NATIONAL
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COUNCIL

Declaration of Services

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

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The National Competition Council

The National Competition Council was established on 6 November 1995 by the *Competition Policy Reform Act 1995 (Cth)* following agreement by the Australian Government and State and Territory governments. It is a federal statutory authority which functions as an independent advisory body for all governments on third party access matters.

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

Foreword

Declaration of a service under Part IIIA of the *Competition and Consumer Act 2010* (Cth)[1] (**CCA**) allows access seekers to negotiate with a service provider and provides recourse to arbitration if negotiation is unsuccessful. The National Competition Council (**Council**) is responsible for considering applications for declaration and making a recommendation to a designated Minister. The Council can recommend declaration of a service provided by a nationally significant facility that cannot be economically duplicated if access would materially promote competition in a dependent market and not be contrary to the public interest.

This Guide is intended to assist interested parties to make or respond to an application for declaration. This version of the Guide takes account of the decision of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (***Pilbara HCA***) and legislative amendments made by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) (**Amendment Act**).

Pilbara HCA decision has significant ramifications for the application of Part IIIA. Of particular relevance for the purposes of this Guide, the High Court held that:

- the test of whether it would be uneconomical for anyone to develop another facility to provide the service (criterion (b)) is one of profitability rather than a test of natural monopoly, net social benefit or economic efficiency
- the test of whether access (or increased access) to the service would not be contrary to the public interest (criterion (f)) encompasses a great breadth of matters
- the designated Minister has no residual discretion not to declare a service if he or she considers that all of the declaration criteria are satisfied, and
- the Tribunal upon review is to re–consider, as opposed to re–hear, the decision of the Minister on the material that was before the Minister, which is likely to principally consist of the Council's recommendation.

This Guide should not be taken as definitive of the Council's final position on any particular matter. It reflects the Council's current approach but the Council's views continue to evolve.

This Guide may be downloaded from the Council's website or a printed copy can be provided on request. Updated versions are published online. Please check the currency of the Guide on the Council's website or by calling the Council on (03) 9981 1600.[2]

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1 The *Competition and Consumer Act 2010* replaced, with effect from 1 January 2011, the *Trade Practices Act 1974 (***TPA***).* Part IIIA was introduced into the TPA in 1995 by the *Competition Policy Reform Act 1995* (Cth).

2 The version and date appear on the front cover and a version history is on p 9.

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Glossary of terms and abbreviations

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
Amendment Act	*Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth)
Amendment Act EM	Explanatory Memorandum, Trade Practices Amendment (Infrastructure Access) Bill 2009
Australian Union of Students decision	Re Australian Union of Students (1997) 140 FLR 167
CCA	*Competition and Consumer Act 2010* (Cth)
clause 6 principles	The principles set out in clause 6 of the Competition Principles Agreement
Commonwealth Minister	Has the meaning given to it in s 44B of the *Competition and Consumer Act 2010* (Cth)
Competition Principles Agreement	Competition Principles Agreement 11 April 1995 (as amended 13 April 2007)
Council	National Competition Council
designated Minister	Has the meaning given to it in s 44D of the *Competition and Consumer Act 2010* (Cth)
Duke EGP decision	Re Duke Eastern Gas Pipeline Pty Ltd (2001) 162 FLR 1
FCA or Federal Court	Federal Court of Australia
FCAFC or Full Court	Full Court of the Federal Court of Australia
Gas Code	National Third Party Access Code for Natural Gas Pipeline Systems
Hamersley Iron decision	Hamersley Iron Pty Ltd v National Competition Council and others (1999) ATPR ¶41–705
HCA or High Court	High Court of Australia
Hilmer Report	Report by the Independent Committee of Inquiry into National Competition Policy (Chair: Prof F G Hilmer) 1993
National Gas Law	Schedule to the *National Gas (South Australia) Act 2008* which is applied as law in the following jurisdictions: *National Gas (New South Wales) Act 2008*, *National Gas (ACT) Act 2008*, *National Gas (Northern Territory) Act 2008*. *National Gas (Tasmania) Act 2008*, *National Gas (Queensland) Act 2008*, *National Gas (Victoria) Act 2008* and *National Gas Access (WA) Bill 2008* (forthcoming).
Part IIIA	Part IIIA of the *Competition and Consumer Act 2010* (Cth)

Abbreviation	Description
Pilbara ACompT 2	Application by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd [2013] ACompT 2
Pilbara FCAFC	Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2011) 193 FCR 57
Pilbara HCA	The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal [2012] HCA 36
Production Process HCA	BHP Billiton Iron Ore Pty Ltd v National Council; BHP Billiton Iron Ore Pty Ltd v National Competition Council (2008) 236 CLR 145
Production Process FCA	BHP Billiton Iron Ore Pty Ltd v The National Competition Council [2007] ATPR 42-141
Production Process FCAFC	BHP Billiton Iron Ore Pty Ltd v National Competition Council (2007) 162 FCR 234
Rail Access Corporation	Rail Access Corp v New South Wales Minerals Council Ltd (1998) 87 FCR 517
Re QCMA	RE QCMA (1976) ATPR 40-012
RTIO v Tribunal FCAFC	*Rio Tinto Limited v The Australian Competition Tribunal* [2008] ATPR 42-214; [2008] FCAFC 6
SACL	Sydney Airport Corporation Limited
Services Sydney decision	Re Services Sydney Pty Limited [2005] 227 ALR 140
SIA	Sydney International Airport
Sydney Airport decision	Re Sydney International Airport (2000) 156 FLR 10
Sydney Airport Appeal decision	Sydney Airport Corporation Limited v Australian Competition Tribunal (2006) 155 FLR 124
TPA	*Trade Practices Act 1974* (Cth)
Tribunal	Australian Competition Tribunal
Virgin Blue decision	Re Virgin Blue Airlines Pty Limited [2005] 195 FLR 242

Version history

Version	Modifications made
February 2013	Updated to take account of decisions of the High Court and Australian Competition Tribunal and to reflect amendments to Part IIIA, including the change in the statute name from TPA to CCA
August 2009	Correction of style/formatting problems
March 2009	Major redrafting and update, in particular to accommodate changes to the TPA and case law developments
December 2002	First edition

1 Overview

1.1 Part IIIA of the CCA provides four 'pathways' to gain access to a service:

- through declaration
- pursuant to a state or territory access regime,
- under a voluntary access undertaking given by a service provider and accepted by the Australian Competition and Consumer Commission (**ACCC**), and
- through a competitive tender process for government owned facilities.

1.2 The pathways are discrete in that a service cannot be declared if it is subject to either a state or territory access regime that has been certified as effective (see criterion (e)) or an access undertaking that has been accepted by the ACCC (ss 44G(1) and 44H(3) of the CCA). The provider of a declared service is not prevented from providing an access undertaking to the ACCC. Where such an undertaking is approved access terms are determined according to that undertaking and only terms not addressed by the undertaking are open to arbitration (see Division 6B).

1.3 If a service is declared, access seekers are able to negotiate access with the service provider. If necessary, access disputes are arbitrated by the ACCC.

1.4 The Council, in making a recommendation on a declaration application must take account of the objects of Part IIIA, which are set out in s 44AA of the CCA (see Box 1).

Box 1 Objects of Part IIIA

The objects of Part IIIA are to:

(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets, and

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

1.5 A party wanting access to a particular service may apply to the Council for a recommendation that the service be declared.[3] The Council considers and publicly consults on the application before making its recommendation to the designated Minister[4] who decides whether to declare the service.

[3] The declaration pathway is not only available to third party access seekers. Infrastructure providers and the designated Minister can also apply for declaration under Part IIIA (refer s 44F(1)). It is however more common for providers to approach access issues by seeking approval of an access undertaking from the ACCC.

[4] The State Premier or the Chief Minister of the Territory is the designated Minister where the service provider is a state or territory body and the state or territory concerned is a party to the Competition Principles Agreement. In all other circumstances, the designated Minister is

Services that can and cannot be declared

1.6 Part IIIA deals with access to services provided by facilities. A declaration is made with respect to a service, as distinct from the facility that provides a service. For example, water transport services would be declared (where the declaration criteria are met) rather than the water pipeline which provides those services. This allows for specific services to be declared where a facility may produce a number of different services, not all of which may warrant declaration.

1.7 The services that may be declared under Part IIIA, and particular exclusions, are defined in s 44B of the CCA. The definition of service in s 44B is discussed in greater detail in section 2 of this Guide.

1.8 In addition to the matters excluded from the definition of service in s 44B, the following services are ineligible for declaration:

(a) services subject to a decision of the designated Minister under s 44LG that the service is ineligible to be a declared service[5]

(b) any service that is the subject of an access undertaking under s 44ZZA of the CCA

(c) any service provided by means of a facility specified under s 44PA(2)(a) of the CCA (this relates to a facility that is owned by the Commonwealth, State or Territory where the ACCC has approved a tender process as a competitive tender process)

(d) any service provided by means of a pipeline which is the subject of either a 15-year no-coverage determination or a price regulation exemption in force under the National Gas Law

(e) any service supplied by Australia Post, as per s 32D of the *Australian Postal Corporation Act 1989* (Cth)

(f) the supply of a telecommunications service by a carrier or under a class licence as defined in s 235A of the *Telecommunications Act 1997* (Cth).

Declaration and arbitration

1.9 Declaration does not provide access seekers with an automatic right to use the service. Rather, there are two 'stages'. The first is the decision to declare the service and the second is the gaining of access either by agreement between the access seeker and service provider or through arbitration by the ACCC (*Sydney Airport decision*, [7]; *Pilbara HCA*, [6]).

1.10 At the 'second stage', the ACCC may–but need not–require the provision of access. If it does require the provision of access, it may specify the terms and conditions,[6]

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the Commonwealth Minister (see s 44D(1) of the CCA).

5 The ineligibility process is explored further in Chapter 10 of this Guide.

6 Sections of the CCA governing the arbitration of access disputes are reproduced in Appendix C of this Guide.

and may deal with any matter relating to access to the service. This includes a requirement that the service provider extend (or expand[7]) a facility to accommodate access seekers. However, the service provider cannot be required to pay the costs of extension (or interconnection). The ACCC must also take into account the matters listed in s 44X(1),[8] including (among other things):

- the objects of Part IIIA
- the legitimate business interests of the provider and users of the service
- the public interest
- the costs of access, and
- the economically efficient operation of the facility.

1.11 The ACCC must not make an access determination that would prevent an existing user from having sufficient capacity to meet its reasonably anticipated requirements or that would result in a transfer of ownership of any part of a facility.

1.12 ACCC determinations are reviewable by the Australian Competition Tribunal (**Tribunal**) (s 44ZP).

Review by the Tribunal

1.13 If the designated Minister decides to declare a service, the service provider may apply to the Tribunal for re-consideration of the Minister's decision (s 44K(1)). Where the designated Minister decides not to declare a service, the declaration applicant may apply for re-consideration of that decision (s 44K(2)). Applications for re-consideration must be made within 21 days after the publication of the declaration decision.

1.14 Section 44K(4) of the CCA provides that:

> The review by the Tribunal is a re-consideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

1.15 The Tribunal is subject to a time limit (a period of 180 days) when undertaking a re-consideration of a declaration decision (s 44ZZOA), although this time limit may be extended at the Tribunal's discretion.

1.16 The High Court in *Pilbara HCA* considered the task of the Tribunal in re-considering a designated Minister's declaration decision. The High Court distinguished between a "re-hearing" and a "re-consideration", explaining that:

> The contrast is best understood as being between a "re-hearing" which requires deciding an issue afresh on whatever material is placed before the new decision

[7] The Tribunal considered that the meaning of 'extend' should not be construed narrowly. The Tribunal was of the opinion that "a capacity expansion falls within the extension power" (*In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [728], [730]).

[8] See Appendix C.

> maker and a "re-consideration" which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44K(6)). (at [60]).

1.17 Further, the High Court found the Tribunal had

> treated its task as being to decide afresh on the new body of evidence and material placed before it whether the services should be declared. That was not its task. Its task was to review the Minister's decisions by reconsidering those decisions on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the NCC in response to a request made under s 44K(6). (at [65]).

1.18 While the High Court's decision also considers what information the Tribunal could consider in undertaking its task, that consideration must be read in light of the amendments to the CCA in 2010.

1.19 The information that the Tribunal may take into account in conducting its re-consideration is now governed by statutory provisions that limit the material before the Tribunal to that which was taken into account by the designated Minister in making a declaration decision[9] or specifically requested by the Tribunal (see ss 44K, 44ZZOAAA and 44ZZOAA). Nevertheless the High Court's consideration of the character of such re-consideration is important. Many of the provisions governing the information that may be obtained and considered by the Tribunal apply across the range of reviews the Tribunal undertakes—encompassing both re-hearings and re-considerations. As the High Court notes, the powers given to the Tribunal to obtain information additional to that before the designated Minister must be for the purposes of the review it is undertaking. The scope of any powers of the Tribunal depends on first identifying the nature of the review task. In re-considering a declaration decision the essence of the Tribunal's task is to re-consider what the Minister decided.

1.20 The High Court in *Pilbara HCA* remitted the Hamersley and Robe declaration decisions back to the Tribunal to be determined according to law. The Tribunal considered the remitted matters in late 2012, delivering its decision in February 2013[10] where it set aside the Minister's decisions to declare both the services provided by the Hamersley railway and the services provided by the Robe railway. In its decision the Tribunal also considered its role in re-considering a Minister's decision and the scope of s 44K(6).

1.21 In terms of s 44K(6) of the CCA, and having regard to the High Court's findings, the President of the Tribunal determined that he was not empowered under s 44K(6)

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[9] Where the Minister does not make a decision and allows the decision period to expire, the material taken into account by the Council in making its declaration recommendation is provided to the Tribunal.

[10] *Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* [2013] ACompT 2

to require the Council to assist the Tribunal by providing further information to the Tribunal by way of sourcing expert reports. The President found that to do so would require the Tribunal to undertake a form of review that the High Court determined was not according to law. The President also considered that were such a power available under s 44K(6), it is a discretionary one. And in this case, he would not exercise any such discretion. Accordingly, in considering the remitted matters the Tribunal did so on the basis of the material that was before the Minister.

1.22 This decision of the Tribunal and the findingsof the High Court about the nature of the Tribunal's task in re-considering a declaration decision, indicate that going forward the review or re-consideration of matters by the Tribunal under s 44K will be undertaken differently from the way in which such matters have proceeded in the past.

1.23 In future reviews, there are likely to be fewer opportunities to place new information before the Tribunal than there has been previously. It is therefore important that applicants, service providers and other interested parties participate fully in the Council's public consultation process.

The declaration criteria

1.24 The Council cannot recommend and the designated Minister cannot decide to declare a service unless satisfied that all of the declaration criteria set out in ss 44G(2) and 44H(4) (respectively) are met. The declaration criteria are set out in Box 2.

Box 2 The declaration criteria

(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) [repealed][11]

(e) that access to the service:

(i) is not already the subject of a regime in relation to which a decision under

[11] Criterion (d) required that the Council and Minister be satisfied that access to the service could be provided without undue risk to human health and safety. It was repealed by the Amendment Act.

> section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or
>
> (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement; and
>
> (f) that access (or increased access) to the service would not be contrary to the public interest.

1.25 If not satisfied that one or more of the criteria are met, the Council must recommend, and the designated Minister must decide, that the service not be declared.

1.26 The Council and the designated Minister must also consider whether it would be economical for anyone to develop another facility that could provide part of the service (ss 44F(4) and 44H(2) of the CCA).

1.27 The Council applies the declaration criteria (and other provisions of Part IIIA) in a way that promotes the purpose and objects of Part IIIA (s 44AA of the CCA) and the objects of the CCA (s 2 of the CCA).[12] The Council is guided by relevant decisions of the Tribunal and the Courts. These include decisions relating to coverage of gas pipelines, as the coverage criteria in s 15 of the Schedule to the National Gas Law are substantially the same as the declaration criteria under Part IIIA of the CCA.[13] The Council also has regard to extrinsic material, including the Hilmer Report, but does not consider these materials to be conclusive or definitive.

1.28 Chapters 2–8 of this Guide outline the Council's approach to the declaration criteria based on its experience in dealing with applications since 1996 and drawing on relevant decisions by the Tribunal and the Courts.

No discretion to not declare

1.29 Where a service for which declaration is sought falls within the scope of Part IIIA and the declaration criteria are satisfied the Council must recommend and the designated Minister must decide to declare the service.

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12 Section 2 provides: '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.'

13 The criteria in the National Gas Law are also similar to those in the Gas Pipelines Access Law and the National Third Party Access Code (Gas Code) for Natural Gas Pipeline Systems that preceded the National Gas Law. Where relevant, the variations between the words of the coverage criteria in s 1.9 of the Gas Code and the declaration criteria in s 44G(2) of the CCA will be discussed in chapters 2–8 of this Guide.

1.30 Until *Pilbara HCA* the prevailing view was that the Council (in making a recommendation) and the designated Minister and Tribunal (in making or reviewing a decision) had a 'residual' discretion not to declare a service even where all declaration criteria were satisfied. However, the High Court has determined that there is no such residual discretion (*Pilbara HCA*, at [119]).

1.31 Where satisfied that all the declaration criteria are met, the Council must recommend a service is declared and the Minister (or the Tribunal on review) must declare a service.

Application not made in good faith

1.32 If the Council considers an application is not made in good faith, although it may not reject such an application, the Council may recommend that a service not be declared (s 44F(3)). The Council has not had cause to apply this provision but anticipates that it would identify and address with an applicant any question as to an applicant's good faith early in the process of considering the application.

Declaration timeline

1.33 The Council must make its recommendation on an application within 180 days from the day it receives the application (s 44GA). The 180-day 'clock' is stopped if:

(a) an agreement is made between the Council, the applicant and the provider of the service to disregard a period as specified, and

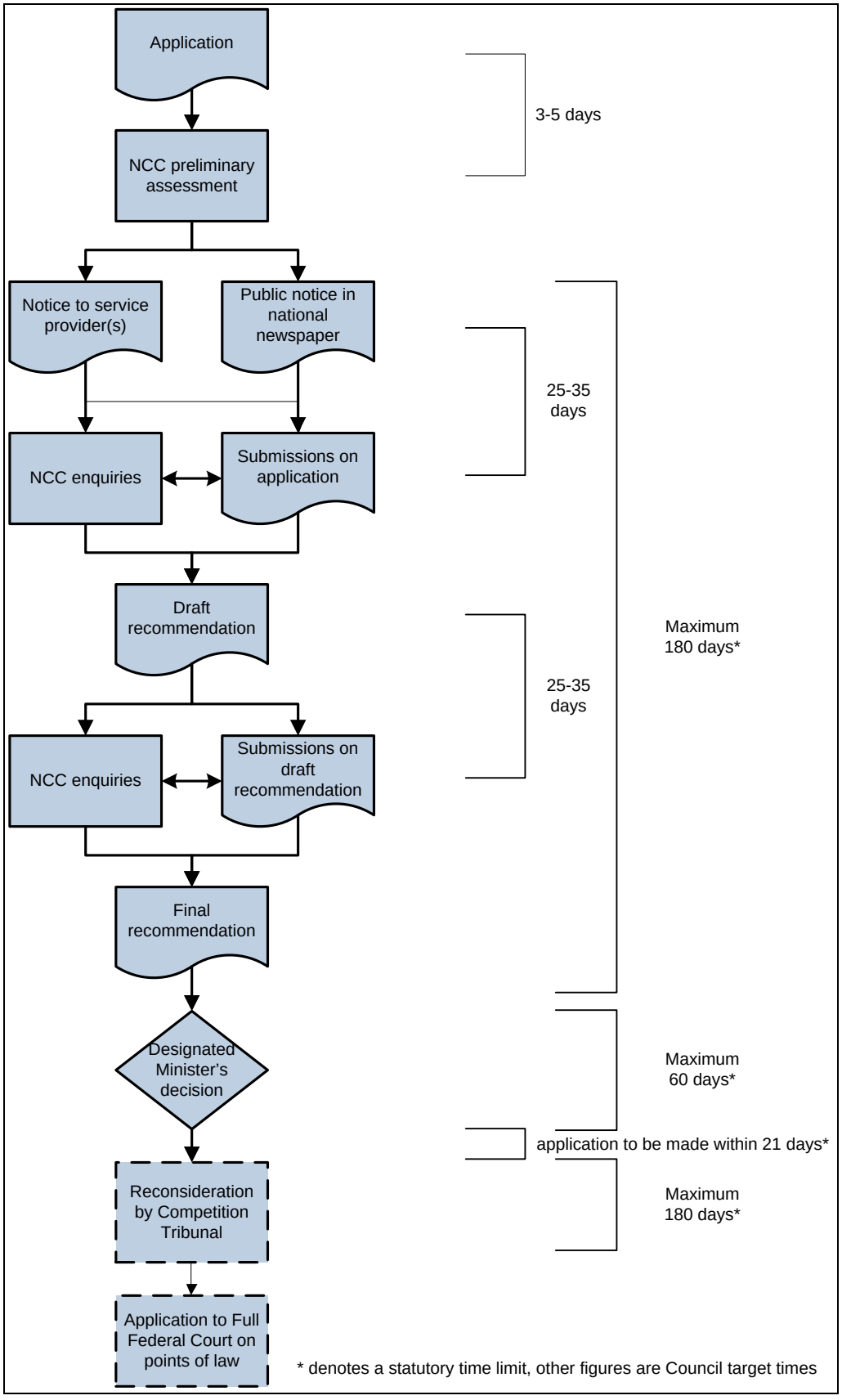
(b) the Council issues a notice requesting information in relation to the application pursuant to s 44FA(1).

1.34 The Council can extend the 180 day period by providing notice to the designated Minister, explaining why the Council has been unable to make its recommendation within the period and advising the new date for its recommendation. The Council must give a copy of any such notice to the applicant and the provider of the service and also publish it in a national newspaper. The Council considers that most applications can and should be dealt with within the 180 days provided for in the CCA and will look to extend or agree to extend this period only in exceptional circumstances.

1.35 The designated Minister has 60 days from receipt of the Council's recommendation within which to make a decision. This period cannot be extended. If the designated Minister does not publish his or her decision on a declaration recommendation within 60 days of receiving the Council's declaration recommendation, he or she is taken to have decided not to declare the service and to have published a decision to that effect (s 44H(9)).

1.36 The process for consideration of declaration applications is summarised in Box 3. This figure also shows the time limits provided for in Part IIIA and the Council's target times for the various stages of the declaration process.

Box 3 The application process



Declaration applications

1.37 There are no particular requirements for standing to make an application for declaration. Any person–including the designated Minister–may apply in writing to the Council for a recommendation that a particular service be declared (s 44F(1)). However, applications are typically made by parties seeking to use the service in question. Less commonly, applications are made by service providers seeking to establish a process for resolving access issues.

1.38 On receipt, the Council will check that an application:

- meets the requirements of regulation 6A of the *Competition and Consumer Regulations 2010* (Cth)
- seeks access to a service within s 44B of the CCA
- adequately defines the service for which the declaration is sought, and
- adequately identifies the facility and provider (or providers) of the service.

1.39 The Council consults publicly on all applications received. Following receipt of an application the Council will set a date by which interested parties may make submissions on the application. The Council expects submission deadlines to be complied with and, depending on the circumstances, may not take account of late submissions.

1.40 After considering submissions, the Council publishes a draft recommendation upon which further submissions may be made before making its final recommendation to the designated Minister.[14]

1.41 The Council informs the applicant and the service provider when it has provided its final recommendation to the designated Minister but does not publish its final recommendation until the day the designated Minister publishes his or her decision, or as soon as practicable afterwards (s 44GC(3)). At that time the Council also provides its final recommendation to the applicant and service provider. The designated Minister must publish by electronic or other means his or her decision and reasons (s 44HA(1)). This is ordinarily done by the Council publishing the decision on its website (in accordance with s 44GC). The designated Minister must also give a copy to the applicant and the service provider (s 44HA(2)).

Applications and submissions

1.42 It is important that an application establish a *prima facie* case for satisfaction of the declaration criteria. Applications should, wherever possible, anticipate and respond to arguments as to why a service might not be declared.

1.43 Any party contemplating making an application for declaration is encouraged to contact the Council's secretariat in advance to discuss its proposed application.

[14] Section 44GB of the CCA provides that the Council provide at least 14 days for submissions to be made.

1.44 Interested parties participating in declaration matters should address all substantive issues in the application (if the applicant) or the submissions in response to the application (if other than an applicant)—rather than waiting to respond to the draft recommendation—as this maximises opportunities for information and arguments to be fully considered. Where a submission made after the draft recommendation raises issues not previously before the Council, the Council's ability to test and consult on those issues may be limited.

1.45 The Council encourages any party contemplating making a submission on an application for declaration or a draft recommendation to read the Council's guidelines for making a submission. The Council has also issued guidelines on the use of confidential information in declaration applications and submissions to which all parties should have regard. Submissions should be made under a completed and signed Submission Cover Sheet. These documents are available on the Council's website (www.ncc.gov.au).

1.46 Parties submitting information to the Council should note that the giving of false or misleading information is a serious offence. In particular s 137.1 of the Commonwealth Criminal Code makes it a criminal offence for a person to supply information to a Commonwealth body knowing that the information is false or misleading in a material particular or omitting any matter or thing without which the information is misleading in a material particular.

2 Identifying the service, facility and provider

The service

2.1 The starting point for considering a declaration application is to identify the service to which access is sought. Section 44B of the CCA provides that:

Box 4 Section 44B of the CCA

'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.

2.2 Declaration under Part IIIA provides for access to services provided by a facility. Declaration is not of a facility itself. A service is distinct from a facility; although it may consist merely of the use of a facility. In *Rail Access Corporation*, for example, the use of rail track, rather than the rail track itself, was the subject of a declaration recommendation.[15] The Federal Court said in that case:

> The definition of "service" in s 44B of the Act makes clear that a service is something separate and distinct from a facility. It may, however, consist merely of the use of a facility. The definition of 'service' distinguishes between the *use* of an infrastructure facility, such as a road or railway line, and the *handling* or transporting of things such as goods or people, by the use of a road or railway line.(at [524])

2.3 The Council and the designated Minister (and the Tribunal on review) are to interpret the service described in an application but not so as to 'redefine the scope' of the service for which declaration is sought (*RTIO v Tribunal FCAFC*, [58]). This does not require a 'slavish attachment to the words of the application … provided that the substance and essential nature of the service is not altered' (*RTIO v Tribunal FCAFC*, [59]). Applicants should ensure that the description of the service is sufficiently broad to enable them to undertake their intended business activity and to enable a material promotion of competition in a dependent market, but not so broadly that the service as defined is provided by a facility or facilities which do not satisfy the declaration criteria.[16]

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[15] In this matter the NSW Minerals Council sought declaration of the use of rail track services provided by the Rail Access Corporation.

[16] The Council notes that in some previous matters the nature of the service for which

2.4 In characterising the service provided by means of a facility it may be useful to specify the purpose for which access to the service is sought. It may be useful to incorporate the purpose for which the service is provided, to ensure the right to negotiate access to the service following declaration is suitably limited by a reference to that purpose. Further, incorporating the purpose of the service provision in the delineation of that service may help to determine the relevant dependent markets for the assessment of criterion (a). However, the delineation of service should not be confused with the quite separate analysis that may occur for identifying relevant dependent markets.

2.5 In the *Sydney Airport decision*, for example, the Tribunal found that the service provided by the Sydney Airport Corporation Limited (SACL) was:

> the provision, or making available by SACL, of the use of the freight aprons, hard stands, areas where equipment may be stored and areas where freight can be transferred from loading/unloading equipment to/from trucks at the airport. ... The point can be tested by asking what services are provided by SACL? It provides or makes available the use of freight aprons, hard stands and equipment storage areas and freight transfer areas to a variety of organisations, such as ramp handlers but it does not provide or make available the service of loading and unloading international aircraft and transferring freight at the airport. (at [17])

2.6 In that case, in the assessment of criterion (a), defining the service by referring to the purpose of its provision was necessary to distinguish the dependent markets from the market for the service to which access was sought.

2.7 The purpose for which the service is provided should, however, be distinguished from the process of characterising a service by referring to the identity of particular users or the particular activity an access seeker intends to undertake if it obtains access. A service does not change with the identity of the access seeker or any particular operational ends for which access is sought: a distinct service is not identified by reference to each user or intended use of the service. This is consistent with the intention of Part IIIA that access to a declared service may be sought by any access seeker and not just the initial applicant.[17]

declaration was sought may have been constrained by efforts to delineate a service around the presence of natural monopoly characteristics. One example is the distinction between "below rail" services seen as being provided by natural monopoly elements of a railway system and "above rail" services supplied by locomotives and rolling stock which are unlikely to exhibit natural monopoly characteristics. It may be that such service definitions are no longer necessary following *Pilbara HCA*. Declaration may be available for broadly defined services so long as duplication of the facility (or facilities) providing the services is unprofitable.

[17] See for example, *Services Sydney decision* [17].

Services excluded from the s 44B definition of service

2.8 Paragraphs (d), (e) and (f) of the definition of 'service' in s 44B exclude particular things from the definition of service.

Supply of goods

2.9 Paragraph (d) excludes the supply of goods, except to the extent that such a supply is an integral but subsidiary part of the service for which declaration is sought. Thus access to a supply of gas generally cannot be gained through application of Part IIIA although access to the service of transmission of gas along a pipeline can and this may result in the supply of additional gas to gas users. However, a supply of gas required to fuel pumps used in the transmission process is likely to be a subsidiary supply of a good (the gas) that is integral to the provision of a gas transmission service and open to declaration.

Use of intellectual property

2.10 Paragraph (e) of the definition of "service" in s 44B excludes the use of intellectual property, except to the extent that it is an integral but subsidiary part of the service. Thus, the use of a copyright, design or patent may not be the declared service, but a declaration may extend to services associated with the use of intellectual property without which the access seeker would be unable to make use of the declared service.

Use of a production process

2.11 Paragraph (f) of the definition of "service" in s 44B excludes the use of a production process, except to the extent that it is an integral but subsidiary part of the service. The expression "a production process" in paragraph (f) has its ordinary meaning: 'the creation or manufacture by a series of operations of some marketable commodity'.[18] The High Court held in *Production Process HCA* that the issue

> is whether the use of the service, which engages par (a) of the definition [of service], to meet the needs of the access seeker also answers the description of the use by the access seeker of the [service provider's] production process. (at [41])

2.12 In that case, the Court found that the applicant had sought the use of a facility (each of the Pilbara iron ore railways owned and operated by BHP Billiton) that the service provider uses for the purposes of its production process and that that use does not fall within paragraph (f).

2.13 The relevant service is the service that is the subject of the application for declaration, and that is provided by means of a facility. The relevant production process is the series of operations used by the service provider to create or

[18] *Hamersley Iron decision* at [32]. See also the *Production Process HCA* at [37].

manufacture a marketable commodity. The content of the production process is a matter of fact to be determined having regard to the circumstances of the particular declaration application. After identifying the relevant service and production process, the question is whether the use of the service for which declaration is sought also answers the description of the use by the access seeker of a service provider's production process. If it does, then the service falls within the exception created by paragraph (f) and declaration is not available. In *Production Process FCAFC*, Greenwood J (with whom Sundberg J generally agreed) said that,

> [p]rima facie, if a production process is found on the facts to comprise integers A, B, C, D, E and F and the service sought by the third party is the use of integers B and C, the service sought by the third party is not the use of a production process as found. (at [169]) [19]

2.14 Thus, if an access seeker wants to use 'integers' of the service provider's production process for its own purposes, it does not necessarily mean that a service using those integers will be excluded from the definition of service in s 44B. In the case of the Fortescue applications, for example, BHP Billiton's railway lines were 'integers' of its iron ore production process from mine to port.

The facility

2.15 The declaration criteria in s 44G(2) of the CCA and the definition of service in s 44B refer to the 'facility' that provides a service. The CCA does not define the term 'facility', although the s 44B definition of service cites roads and railway lines as examples.

2.16 In the *Sydney Airport decision*, the Tribunal said that 'a facility for the purposes of the Act is a physical asset (or set of assets) essential for service provision' (at [82]). The relevant facility is therefore comprised of 'the minimum bundle of assets required to provide the relevant services subject to declaration' (at [192]).[20] Identifying the set of physical assets that comprise a facility is a 'key issue' in determining whether criterion (b) is satisfied because, the larger the set of assets, the less likely it is that someone will find it economical to duplicate the facility to provide the service (see *Sydney Airport decision* at [192]).

2.17 In the *Sydney Airport decision*, for example, the Tribunal considered (at [99]) that the relevant facility extended to most (if not the whole) of the airport, including all

[19] See also the *Production Process HCA* (at [43]): 'that the … production process employed by BHPBIO involves the use of integers which the access seeker wishes to utilise for its own purposes does not deny compliance with the definition of "service".'

[20] In the *Australian Union of Students decision*, the Tribunal compared the definition of 'facility' in the Shorter Oxford Dictionary as 'equipment or physical means for doing something' with the Macquarie Dictionary's broader concept of 'something that makes possible the easier performance of any action; advantage; transport facilities; to afford someone every facility for doing something.' (p 14).

the basic airside infrastructure (runways, taxiways and terminals) and related land side facilities, since this was (1) necessary for international aircraft to land at Sydney Airport, load and unload passengers and freight, and depart, and (2) essential to the services to which access was sought. In the *Services Sydney decision* the Tribunal considered that the Northern Suburbs Ocean Outfall Sewer, the Bondi Ocean Outfall Sewer and the South Western Suburbs Ocean Outfall Sewer were three separate facilities because it was conceivable that 'a new entrant could offer sewerage collection services only to customers connected to one of the three reticulation networks' (at [15]).

2.18 While the Tribunal decisions identify a facility as comprising physical assets, and the Tribunal has indicated in obiter that a facility must be a physical asset and that a computer network may not be a facility, the definition of 'service' in s 44B includes 'a communications service or similar service'. Whether or not a non-physical facility–such as a collection of data or information or a set of rights or obligations–may fall within the ambit of Part IIIA is a question appropriately considered in the context of public consultation on an application for declaration. However, the Council would be reluctant to reject an application on such technical grounds if declaration might address the kind of competition issue that Part IIIA is designed to address.

The service provider

2.19 Part IIIA refers to the provider of an infrastructure service in a number of contexts, including:

(a) When an application for declaration is received, the Council must inform the provider

(b) If the designated Minister declares the service, then the provider may apply to the Tribunal for review of the decision, and

(c) The provider is required to negotiate access if a service is declared, and may be bound by an ACCC arbitration of an access dispute.

2.20 Section 44B of the CCA defines 'provider' as meaning 'the entity that is the owner or operator of the facility that is used (or to be used) to provide the service.'

2.21 At law, a person generally cannot assign an interest greater than the one they possess. The provider must therefore be the entity that controls the use of a facility and has the legal power to determine whether—and on what terms—access is provided. A number of the provisions of the CCA such as ss 44S, 44U and 44V cannot operate unless this is the case.

2.22 A partnership or joint venture that consists of two or more corporations can be treated as a single 'provider' under s 44C of the CCA. Further, s 23(b) of the *Acts Interpretation Act 1901* (Cth), provides that 'words in the singular number include

the plural and words in the plural number include the singular'.[21] Thus, the word 'provider' can extend to more than one party including the owner, the operator and any person with control over the provision of the service or the use of the facility.

2.23 Where the owner and the operator of a facility are not the same entity, the identification of the provider depends on an assessment of the entity that controls the use of a facility. The Council's practice is to include as the provider of a service the owner, operator and any other party with control over the use of the facility by which the service is provided.

[21] The same principle arises under the general law of statutory interpretation, see: *Blue Metal Industries v. Dilley* (1969) 117 CLR 651, 656.

3 Promotion of competition (criterion (a))

Introduction

3.1 Section 44G(2)(a) of the CCA (criterion (a)) provides that the Council cannot recommend that a service be declared unless it is satisfied that access (or increased access) to the service would promote a material increase in competition in at least one market other than the market for the service, whether or not that market is in Australia.[22]

3.2 The markets in which competition might be promoted are commonly referred to as 'dependent markets'. The issue is whether access would improve the opportunities and environment for competition in a dependent market such as to promote materially more competitive outcomes.

3.3 The purpose of criterion (a) is to limit declaration to circumstances where access is likely to materially enhance the environment for competition in at least one dependent market.

3.4 In assessing whether criterion (a) is satisfied, the Council:

- identifies dependent (upstream or downstream) markets (see paragraphs 3.5 to 3.14)
- considers whether the dependent markets are separate from the market for the service to which access is sought (paragraphs 3.16 to 3.23), and
- assesses whether access (or increased access) would be likely to promote a materially more competitive environment in any dependent market (paragraphs 3.30 to 3.49).

Identifying dependent markets

3.5 Section 4E of the CCA provides that:

> For the purposes of this Act, unless the contrary intention appears, 'market' means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

[22] In 2006, criterion (a) was amended to introduce the requirement that access (or increased access) to the service promote "a material increase" in competition in at least one dependent market (see s 16 of the Amendment Act).

3.6 Criterion (a) expands the definition of market in s 4E in that the dependent market in which competition is to be promoted need not be in Australia.

3.7 In *Re QCMA* the Trade Practices Tribunal (the predecessor to the Tribunal) described a market as being 'the area of close competition between firms' or 'the field of rivalry between them'[23]. The Tribunal said that within a market there is substitution between products or sources of supply in response to price changes. It said that

> a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. (at [190])[24]

3.8 As is generally the case with consideration of markets in competition law matters, the Council takes a purposive approach to market definition. The particular purposes of market definition in the consideration of applications for declaration are to enable examination of the effect of access or increased access on competition in a dependent market and to ensure that dependent markets are separate from the market for the service for which declaration is sought.

3.9 Conventionally, markets are identified or defined in terms of:

- a product or service dimension
- the geographic area, and (if relevant)
- the functional level.[25]

3.10 The **product/service dimension** of a market delineates the products and/or services that are sufficiently substitutable to be considered to be traded within a single market.

3.11 The **geographic dimension** of a market identifies the area within which substitution in demand or supply is sufficient for the product(s)/service(s) traded at different locations to be considered to be in the same market.

3.12 Where products or services pass through a number of levels in a supply chain, it is also useful to describe the market in terms of the function being considered. The **functional dimension** identifies which of a set of vertically related markets is being considered. Defining the relevant functional market requires distinguishing between the different vertical stages of production and/or distribution and identifying those that comprise the field of competition in a particular case. In the

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23 *Re QCMA* [190].

24 The QCMA description of a market has been frequently approved in the Courts, including by the High Court in Queensland Wire Industries Proprietary Limited v. The Broken Hill Proprietary Company Limited (1989) 167 CLR 177, and adopted by the Tribunal, including in the *Sydney Airport decision* and the *Duke EGP decision*.

25 A temporal or time related element can also be relevant to market definition in some circumstances, although this is less likely in the context of Part IIIA where markets usually involve long lived assets and shorter term market conditions are less likely to be relevant.

context of considering applications for declaration the functional dimension of market definition can be of particular importance and often overlaps with consideration of whether a dependent market is separate from the market for the service for which declaration is sought (see paragraphs 3.16 to 3.23).

3.13 The Council seeks to identify one or more dependent markets where competition appears likely to be materially affected by the availability of access to the service for which declaration is sought. Often these markets will be vertically related to the market for the service for which declaration is sought. That is, they are upstream or downstream of that market in a supply chain.

3.14 Although the Council generally identifies dependent markets in terms of the dimensions set out above, an assessment of criterion (a) may not always require a precise delineation of the boundaries of the market for the service. What must be determined is whether any market in which competition is said to be materially promoted (a dependent market) is distinct from the market for the service and the effect access will have on the conditions for competition in that dependent market.

3.15 Criterion (a) is satisfied if access will materially promote competition in one or more dependent markets. In practice, it may be unnecessary for the Council to examine more than the one or two most likely and significant dependent markets in relation to an application for declaration.

Separate market from the market for the service

3.16 Criterion (a) requires the Council to be satisfied that access (or increased access) would promote a material increase in competition in a market other than the market for the service for which declaration is sought.

3.17 Although it is possible that criterion (a) may be satisfied where the service provider is not vertically integrated into a dependent market(s), criterion (a) will more likely be satisfied where the service provider is vertically integrated into the dependent market(s). The Federal Court stated in *Production Process FCA* that:

> it is the very prevention of a vertically integrated organisation using its control over access to an essential facility to limit effective competition in dependent markets that is a key activity that the access regime seeks to deal. (at [45])

In these circumstances, for an application to proceed, it must be established that the provision of the service provided by the facility and the vertically related activity in the dependent market occur in separate functional markets.

3.18 In the *Sydney Airport decision*, the Tribunal was concerned with the viability of the vertically separate provision of products or services and found that the existence of functionally separate markets depended on whether there were overwhelming economies of joint production or joint consumption that dictated that the vertically related activities must occur within the same entity.

3.19 In the *Services Sydney decision* the Tribunal was also concerned with economic separability and stated:

> One approach to assessing efficiencies of vertical integration is to posit that where the transaction costs of market coordination between vertical stages of supply exceed those of administrative coordination within the firm, there will be no separate market for the service(s). However, a literal interpretation of that test could prevent the very benefits of competition in dependent markets, which Pt IIIA is designed to achieve, from being realised. It is not difficult to imagine a situation where the coordination costs within a vertically integrated firm are less than the costs of market transactions for a particular service; but where there exists a more cost efficient potential entrant to an upstream or downstream dependent stage of the supply chain, who can more than offset the additional transaction costs with their superior efficiency. Entry of such a firm would be pro-competitive and economically efficient, yet a narrow view of the test would have the consequence that no market for the service would be defined and hence there would possibly be no declaration and no entry. The community would be denied the very kind of benefits arising from competition that were envisaged by the report of the Independent Committee of Inquiry into Competition Policy in Australia on National Competition Policy (the Hilmer Report) and which underpin the access regime principles in Pt IIIA.
>
> A broader approach, which asks whether the complementarities of vertical integration are such as to dictate vertical integration, would not preclude declaration and competition in these circumstances. This approach was generally adopted in the NCC's Final Report and is consistent with that adopted by the Tribunal in *Re Sydney International Airport:*
>
> ...
>
> An alternative, more precise, test could involve looking at some combination of both transaction costs and service delivery costs. If there was a demand for the service at a price which covered these combined costs, then a market could be said to exist. (at [116]-[118])

3.20 Economic separability is thus at least a necessary condition for different functional layers to constitute distinct markets and for a dependent market to be separate from a market for a declared service.

3.21 Services may be provided in functionally distinct markets even though there is a one-for-one relationship—ie, perfect supply side and demand side complementarity—between those services. This will be the case where those complementarities do not give rise to economies of joint consumption or joint production that dictate that the services must be performed in the same economic entity. In the *Sydney Airport decision* the Tribunal acknowledged "the strong supply side and demand side complementarity between other airport services and the declared services and the underlying facilities". Nonetheless, the Tribunal found that the one-for-one relationship between airport aprons at Sydney International Airport and ramp handling services did not mean that these two

services were in the same functional market. In so finding, the Tribunal drew a comparison with the example of rail track and train services. The Tribunal stated:

> The Tribunal was struck by the parallels here with the provision of railway track and train services. Though in the past usually vertically integrated, track services and the running of passenger or freight trains can be, and increasingly are, provided separately. As such, they operate in functionally distinct markets, even though there is perfect complementarity between them. To put it another way, these complementarities do not appear to give rise to economies of joint consumption or joint production that dictate the services must be performed within the same economic entity. The evidence presented to the Tribunal suggested similar considerations apply to the services provided by SIA's physical infrastructure and ramp handling and CTO services. In other words, just because there is a one for one relationship between airport aprons and ramp handling services does not mean that the supply of these two types of services are in functionally the same market. (at [97])

3.22 In determining whether the service that is the subject of a declaration application is in the same or a different market(s) from the markets in which competition is said to be promoted, the Council will identify likely dependent markets and assess whether these markets are functionally distinct from the market in which the service is provided**.**

3.23 Where the economies of joint production or consumption between a dependent market and the market for the service for which declaration is sought are such that separate provision or consumption is not economically feasible, the services are not in functionally separate markets (*Sydney Airport decision*, at [97]) and criterion (a) is not satisfied.

Access (or increased access) to the service

3.24 The phrase 'access (or increased access)' was considered by the Full Federal Court in the *Sydney Airport Appeal decision*. The Full Court held that criterion (a) requires

> a comparison of the future state of competition in the dependent market with a right or ability to use [the] service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service. (at [83])

3.25 As the Tribunal noted in the *Sydney Airport decision*:

> The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. (at [107])

3.26 Criterion (a) does not require that access to the service is unavailable at the time a declaration application is made. In the *Sydney Airport decision*, the Tribunal held

that "existing access to a service is no bar to a consideration whether a declaration should be made in respect of that service" (at [229]). This principle was further illustrated by the Tribunal's discussion in the *Duke EGP decision* of the equivalent criterion (a) in the Gas Code. In that case, Duke (the service provider) contended that the question of whether access or increased access to the service would promote competition in other markets does not arise unless, as a matter of fact, access to the Eastern Gas Pipeline was either unavailable or restricted.

3.27 The Tribunal rejected this argument in the following terms:

> The object of the Code, and its structure, make it clear that criterion (a) does not have as its focus a factual question as to whether access to the pipeline services is available or restricted. Put in that way, the question would not take sufficient account of the terms on which access is offered. Rather, the question posed by criterion (a) is whether the creation of the right of access for which the Code provides would promote competition in another market. (at [74])

3.28 No threshold question as to whether access to a service is unavailable or restricted arises in the assessment of criterion (a). The Full Court stated in the *Sydney Airport Appeal decision* that it is not necessary 'to identify and determine the existence and extent of a denial or restriction of access' (at [76]) in order to satisfy criterion (a).

3.29 Further, the Full Court stated in the *Pilbara FCAFC* that "access":

> is access on such reasonable terms and conditions as may be determined in the second stage of the Pt IIIA process.[26] (at [112])[27]

Material promotion of competition

3.30 The notion of competition is central to the CCA. As noted by the Tribunal, competition is a very rich concept, containing within it a number of ideas (see Re QCMA). Competition is valued for serving economic, social and political goals. It is a mechanism for discovering market information and reaching business decisions in light of this information. Competition is a dynamic process, generated by market pressure from alternative sources of supply and the desire to keep ahead. In this sense, competition expresses itself as rivalrous market behaviour.

3.31 The promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

3.32 In the *Sydney Airport decision*, the Tribunal stated:

> The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in

[26] While this interpretation was made in relation to criterion (f), on statutory interpretation principles it is also necessarily applicable to criterion (a).

[27] In the subsequent appeal, the High Court did not examine this issue or comment on the Full Court's finding.

> competition in the sense that competition would be increased. Rather, 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. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration. (at [106])

3.33 The Tribunal went on to say that the removal of barriers to entry in any dependent market(s) can be expected to promote competition:

> We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial. (at [107])

3.34 The Tribunal also adopted this approach in the *Duke EGP decision*, stating that 'the question for the Tribunal is whether the opportunities and environment for competition in market(s) upstream or downstream of the EGP would be enhanced if the EGP were to be covered in terms of the Code, than if it were not.' (at [83]). This question is assessed by a comparison of the future conditions and environment for competition with and without access.

3.35 Similarly, in the *Services Sydney decision* the Tribunal emphasised that even though access will not remove all barriers to entry and that actual entry may still be difficult with access, criterion (a) can still be satisfied if access would remove a significant barrier to entry and thereby promote competition. The Tribunal stated:

> Before turning to the specific arguments raised in this matter, we must address the question of what is meant by the term "promote competition" in s 44H(4)(a) of the Act. The Tribunal has expressed a view in the past that the promotion of competition test does not require it to be satisfied that there would necessarily or immediately be a measurable increase in competition. Rather, consistent with the purpose of Pt IIIA being to unlock bottlenecks in the supply chain, declaration is concerned with improving the conditions for competition, by removing or reducing a significant barrier to entry. Other barriers to entry may remain and actual entry may still be difficult and take some time to occur, but as long as the Tribunal can be satisfied that declaration would remove a significant barrier to entry into at least one dependent market and that the probability of entry is thereby increased, competition will be promoted. (at [131])

3.36 As provided in the objects of Part IIIA (s 44AA of the CCA), the reference to 'competition' in criterion (a) is a reference to workable or effective competition,

rather than any theoretical concept of perfect competition. 'Workable or effective competition' refers to the degree of competition required for prices to be driven towards economic costs and for resources to be allocated efficiently at least in the long term. In a workable or effective competitive environment no one seller or group of sellers has significant market power. It is unlikely that the reference to 'competition' in criterion (a) is intended to refer to the theoretical concept of perfect competition, not only given the Hilmer Report's stated objective of access regulation to promote workable or effective competition, but also because the subject matter of the criterion (a) assessment involves an assessment of the competitive conditions in a real-life industry.[28]

3.37 Where a dependent market is already workably or effectively competitive, access is unlikely to promote a material increase in competition and an application for declaration of a service that seeks to add to competition in such a dependent market is unlikely to satisfy criterion (a).

3.38 In the *Duke EGP decision*, the Tribunal concluded that whether access will promote competition critically depends on whether the access provider has market power that could be used to adversely affect competition in the dependent market(s). The Tribunal said:

> Whether competition will be promoted by coverage is critically dependent on whether EGP has power in the market for gas transmission which could be used to adversely affect competition in the upstream or downstream markets. There is no simple formula or mechanism for determining whether a market participant will have sufficient power to hinder competition. What is required is consideration of industry and market structure followed by a judgment on their effects on the promotion of competition. (at [116])

3.39 The Tribunal went on in the *Duke EGP decision* (at [116]-[124]), to consider a range of factors in assessing whether Duke EGP could exercise market power t*o* hinder competition in the relevant dependent markets, including:

- the commercial imperatives on Duke to increase throughput, given the combination of high capital costs, low operating costs and spare capacity
- the countervailing market power of other participants in the dependent markets
- the existence of spare pipeline capacity, and
- competition faced by Duke from alternatives to the use of the Eastern Gas Pipeline in the dependent markets.

[28] See, for example, the discussion of perfect competition, workable competition and the interpretation of competitive market in the introduction to, and s 8.1(b) of, the Gas Code in *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at paragraphs 124 and 125 in particular.

3.40 Following its consideration of these factors, the Tribunal concluded that Duke did not have sufficient market power to hinder competition in the dependent markets.

3.41 If a service provider is unable to exercise market power in the dependent market, then declaring the service so as to provide an enforceable mechanism to determine the terms and conditions of access to the service would not promote competition or efficiency in that market.

3.42 Barriers to entry are a primary determinant of the existence of market power. Only in the presence of significant barriers to entry can a firm sustainably raise prices above economic costs without new entry taking away customers in due course.

3.43 The ability and incentive for a service provider to exercise market power to adversely affect competition in a dependent market is a necessary (although not sufficient) condition for access to promote competition. Prima facie, regulation of the terms and conditions of the provision of the service by the service provider in these circumstances is likely to promote competition.

3.44 In addition, a finding that the service provider has the ability and incentive to exercise market power to adversely affect competition in a dependent market is likely to mean that the barriers to entry in that market result from the characteristics of the facility and its bottleneck position. In the usual case, this finding would mean that access would reduce barriers to entry and promote competition in that dependent market.

3.45 By contrast, the service provider may not have the ability or incentive to exercise market power to adversely affect competition in the dependent market(s) where:

- the facility does not occupy a bottleneck position in the supply chain for the service
- the service provider is constrained from exercising market power in the dependent market(s), perhaps by competitive conditions in the dependent market(s) and/or the market power of other participants in the market(s), or
- the incentives faced by the service provider are such that its optimal strategy is to maximise competition in the dependent market(s). It may be profit maximising, for example, for a service provider to promote increased competition in the dependent market(s) and maximise demand for the services provided by its facility.

3.46 Access is unlikely to materially promote competition in the dependent market(s) if the service provider cannot exercise market power to adversely affect competition in the dependent market(s).

3.47 There are a number of ways the use of market power in the provision of the service for which declaration is sought by a service provider may adversely affect competition in a dependent market. For example:

- a service provider with a vertically related affiliate may engage in behaviour designed to leverage its market power into a dependent market to advantage the competitive position of its affiliate
- where a service provider charges monopoly prices for the provision of the service, those monopoly prices may suppress demand or restrict entry or participation in a dependent market, and/or
- explicit or implicit price collusion in a dependent market may be facilitated by the use of a service provider's market power. For example a service provider's actions may prevent new market entry that would lead to the breakdown of a collusive arrangement or understanding or a service provider's market power might be used to 'discipline' a market participant that sought to operate independently.[29]

3.48 Where competition in a dependent market(s) is not workable or effective, a service provider may still lack the incentive to exercise market power to adversely affect competition in a dependent market. In some situations, a service provider may have an incentive to engage in strategies designed to increase competition in a dependent market(s). If, for example, a service provider has no vertical interests in a dependent market(s), and its facility has excess capacity, then it may be profit maximising for the service provider to promote competition in the dependent market(s), reduce margins and prices in the dependent market(s), and increase incremental demand for the services provided by the facility. In these circumstances, the service provider would not have an incentive to engage in the conduct described in paragraph 3.47 and access is unlikely to promote competition in a dependent market.

3.49 Accordingly, in assessing whether a service provider has the ability and incentive to use its market power to adversely affect competition in a dependent market, the Council asks whether the service provider can engage in any of the types of conduct described in paragraph 3.47.

Time horizon for assessment

3.50 A consideration of whether access would promote a material increase in competition in a dependent market must be considered in association with a time horizon. The Council recognises that a conclusion as to whether access would improve the environment for competition in a dependent market may change over time due to changes in technology or market evolution.

3.51 Changes in market conditions may also have implications for the competitive conditions in the dependent market and thus have an impact on the criterion (a) assessment. Planned new entry or capital investment in expanded capacity, for example, may increase the alternatives to the use of the service in a dependent

[29] Explicit or implicit price collusion in the market for the service may also be dealt with under Part IV of the CCA.

market and thus change conditions for competition in that market. These changes may have an impact on the ability of, and incentive for, the service provider to exercise market power to adversely affect competition in the market. Short lived or transitory changes are, however, unlikely to have a material effect and change the appropriate assessment of criterion (a).

3.52 The time horizon adopted by the Council for the criterion (a) assessment will vary from case to case. In its assessment, the Council accounts for foreseeable changes in technology and/or market conditions, having regard to the timing and probability of those changes. The Council is less likely to conclude that criterion (a) is satisfied where:

- there are foreseeable changes in conditions such that criterion (a) would no longer be satisfied, and
- there is a high probability of these changes occurring in the not too distant future.

3.53 While there is a time horizon to the assessment of both criteria (a) and (b), the time horizon over which the Council accounts for relevant changes for the two assessments may not necessarily be the same.

4 Uneconomical to develop another facility (criterion (b))

4.1 Section 44G(2)(b) of the CCA (criterion (b)) requires that the Council be satisfied that 'it would be uneconomical for anyone to develop another facility to provide the service' sought to be declared.

4.2 Prior to *Pilbara HCA*, the Council (and the Tribunal and a number of court decisions) had interpreted this criterion in a way that was concerned with the waste of Australian society's resources associated with duplication of facilities that exhibit natural monopoly characteristics, ie where a single facility could meet all likely demand for a service at lesser cost than two or more facilities. However, in *Pilbara HCA* the High Court determined that the test is one of profitability. It said that criterion (b)

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

4.3 The Court said that

> the central assumption informing and underpinning this construction of criterion (b) is that no one will develop an alternative service unless there is sufficient prospect of a sufficient return on funds employed to warrant the investment. And criterion (b) is read as directing attention to whether there is "anyone" for whom it would be economical (in the sense of profitable, or economically feasible) to develop another facility to provide the service. (at [82])

4.4 The High Court also made a number of observations about the nature of the criterion (b) inquiry and the factors relevant for consideration:

- The meaning previously given to the word "anyone" in criterion (b) as excluding the incumbent owner or operator of the facility 'proceeded from an incorrect construction of criterion (b)'. The High Court said that "anyone" in criterion (b) 'includes existing and possible future market participants.' (at [105])
- Whether it would not be profitable for someone to develop another facility to provide the service requires that 'the person could reasonably expect to obtain a sufficient return on capital that would be employed in developing that facility' (at [104]). If someone could profitably develop an alternative facility as part of a larger project, it would be

  > necessary to consider the *whole* project in deciding whether the development of the alternative facility, as part of that larger project, would provide a sufficient rate of return.' (at [104])

- Asking whether it would be unprofitable for anyone to develop an alternative facility is not asking a question 'to which no answer can be given with any sufficient certainty'. The High Court stated

> it is a question that would require the making of forecasts and the application of judgment. But the converse question – whether it would be economically feasible to develop an alternative facility – is a question that bankers and investors must ask and answer in relation to any investment in infrastructure. Indeed, it may properly be described as the question that lies at the heart of every decision to invest in infrastructure, whether that decision is to be made by the entrepreneur or a financier of the venture. (at [106])

- The High Court observed that a private profitability test may result in the duplication of a natural monopoly but said that

> duplication would occur only if it were profitable for another to develop an alternative facility to provide the service (despite the fact that total market output could be supplied at lowest cost by one facility). It *would* be profitable for another to develop an alternative facility if the new facility is more efficient than the existing facility… . And if the new facility is *not* more efficient than the existing facility, it is to be doubted that development of the new facility in competition with a natural monopoly would be profitable. Especially would that be so where, as here, the capital costs of establishing the new facility would necessarily be very large. (at [102])

4.5 Since *Pilbara HCA,* the Council has not considered criterion (b) in a declaration matter.[30] Nevertheless the Council considers it can offer some initial guidance as to its approach to the application of criterion (b) in light of the High Court's judgment. In the Council's view:

(a) A declaration applicant needs to be able to demonstrate the basis on which it is unprofitable for it or anyone else to develop a new facility to provide the service.

(b) The assessment of profitability should provide information about:

(i) expected capital and operating costs of developing and operating a new facility

(ii) projected use of the facility and revenues

(iii) the required rates of return on the debt and equity necessary to finance the development of the facility and

(iv) the basis for such estimates and the assumptions underlying them.

[30] The High Court in *Pilbara HCA* remitted the Hamersley and Robe service declarations back to the Tribunal to be re-considered according to law. On remittal, the Tribunal focused on the private profitability test for criterion (b). The Tribunal considered on the basis of the information before the Minister (being the information now before the Tribunal to re-consider) it could not be satisfied that criterion (b) was met on the test of private profitability due to the lack of relevant evidence. This judgement did not involve any substantive consideration of the application of the private profitability test and therefore does not provide additional guidance for future declaration applications. (See *Pilbara ACompT2).*

(c) The assessment of profitability should relate at least to the period for which declaration is sought but may be referrable to another time period, for example the timeframe an investor or financier utilises in making their investment decision or the likely operating life of a new facility.

(d) Profitability should be assessed having regard to the return on capital employed in developing a new facility and the cost of that capital.

(e) The consideration of profitability of a new facility may seek to address the profitability of such a project relative to other uses of financial and other resources.

(f) The consideration of profitability of a new facility involves, at least in part, an assessment of the ability of such a facility to successfully compete to supply the service for which declaration is sought and thus attract sufficient revenue to be profitable.

(g) The estimation of the profitability of anyone developing a new facility to provide a service will involve assumptions regarding, among other things, the capital and operating costs of such a facility, likely levels of use and revenues and the risks associated with such assumptions. The Council is unlikely to rely on estimates that do not disclose, in a form that can be tested through the public consultation process, the underpinning assumptions and the sensitivity of the estimates to variations in critical assumptions. Where issues of confidentiality arise, the Council anticipates that it should be possible to still examine the material via the public consultation process by disclosing a range of figures.

(h) Where it appears that the only party likely to be in a position to develop a new facility is the existing service provider/incumbent, the assessment of the profitability of the new facility should:

  (i) be based upon the development of a separate, new facility, and

  (ii) examine why an existing service provider would develop an alternative facility where there is the prospect that additional capacity could be provided at a lesser cost through augmentation of the service provider's existing facility.

(i) Where development of a new facility may involve duplication of a natural monopoly, consideration will be given to whether the new facility is more efficient than the existing facility due to a cost or technological advantage.

(j) Where development of a new facility is unprofitable on a standalone basis but thought to be profitable as an integrated part of a larger project, the assessment of profitability should include consideration of the impact of the cost of developing the new facility on overall project profitability.

4.6 These matters should be addressed in detail in applications for declaration and in submissions in relation to such applications. The Council accepts that parties concerned with future applications for declaration may have different views on these issues and may contend that there are other matters which the Council

should consider. The matters set out in this guide are the Council's preliminary views designed to assist interested parties and do not reflect any concluded view on the matters which may be relevant to this criterion. In the early stages of consideration of criterion (b) in the wake of *Pilbara HCA* the Council expects to seek and consider a wide range of views.

5 National significance (criterion (c))

Introduction

5.1 Section 44G(2)(c) of the CCA (criterion (c)) requires that the Council be satisfied that the facility providing the service for which declaration is sought is nationally significant. Criterion (c) is designed to ensure that only those facilities that play a significant role in the national economy fall within the scope of Part IIIA.

5.2 Criterion (c) is an assessment of the national significance of the facility providing the service, as opposed to the service itself. National significance is to be determined 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.

5.3 A facility need satisfy only one of these three benchmarks although there is some overlap since a facility that is important to constitutional trade and commerce is also likely to be important to the national economy.

5.4 In *Pilbara HCA*, the High Court contrasted criteria (a) and (b) on the one hand, which it saw as of a technical kind with criteria (c) and (f). Criterion (c), the Court said, 'may also [like criterion (f)] direct attention to matters of broad judgment of a generally political kind' (at [43]). This recognises that the assessment of national significance is a matter of judgment that does not lend itself to determination by precise calculation.

Size

5.5 The physical dimensions of a facility may provide guidance on whether it is of national significance. Relevant indicators of size include physical capacity and the throughput of goods and services using the facility. In a case involving a computer network, for instance, the Tribunal referred to the quantity of information stored on the network as perhaps being the appropriate basis for determining whether a computer network is sizeable (*Australian Union of Students decision*).

5.6 The only recommendation in which the size of a facility may have been a critical factor in determining national significance was the Herbert River final recommendation (NCC 2010). In other cases, criterion (c) has rested on the importance of the relevant facility to constitutional trade and commerce or the national economy. In the Herbert River final recommendation, the Council said that the physical size of a facility is not determinative but is something to have regard to in assessing national significance (NCC 2010, [7.14]). It said that determining the limits of national significance 'is a matter of judgment' (NCC 2010, [7.17]). In coming to the view that the Herbert River cane railway was not nationally significant on the basis of its size, the Council took account of the number of growers and size of the area serviced by the railway and the population

of the shire in which the railway is located as well as the actual length of track and area covered by the railway.

Constitutional trade or commerce

5.7 Section 44B of the CCA defines 'constitutional trade or commerce' to mean trade or commerce:

(a) among the States

(b) between Australia and places outside Australia, or

(c) between a State and a Territory or between two Territories.

5.8 The importance of the facility to constitutional trade or commerce may be indicated by the monetary value of trade that depends on the facility.

5.9 In considering whether the facility comprised of Sydney International Airport was of national significance in the *Sydney Airport decision*, the Tribunal observed (at [208]) that in-bound and out-bound freight worth more than $21 billion was cleared at Sydney International Airport in 1997. Similarly, the Tribunal in the *Australian Union of Students decision* found that whilst the receipt of an Austudy allowance was important to students it had no significant impact on trade or commerce and that even if every Austudy recipient in Australia were a member of a student union, access would still only result in $1.5 million in payments to the union annually, which was considered a very small sum when compared to the Australian economy.

Importance to the national economy

5.10 In assessing the importance of a facility to the national economy, the Council focuses on the market(s) in which access would materially promote competition. The Council generally considers national significance to be established if the dependent market(s) provide substantial annual sales revenue to participating businesses. In the *Sydney Airport decision*, the Tribunal emphasised (at [208]) the importance of Sydney Airport to 'Australia's commercial links with the rest of the world', noting that 50 per cent of air freight enters and leaves the nation through Sydney International Airport.

Box 5 Examples of national significance assessment

Herbert River cane railway

While the Council acknowledged that the railway network was big in terms of overall track length (approximately 500 kilometres), being a radial network, the actual maximum haulage distance on the largest stretch of track was less than 60 kilometres. The Council noted that the cane railway network serviced an area of approximately 55 000 hectares, was used by 575 growers and lay within the Hinchinbrook Shire with a then population of 12 513. On these findings, the Council considered that the cane railway was not nationally significant.

Sydney and Melbourne International Airports

The Council considered national significance in terms of:

- the volume and value of international trade that depends on the facility
- the airports' strategic importance in the international air freight chain, and
- the implications for the performance of industries that rely on international air freight

The Council also considered that an assessment of national significance should account for the location of a facility. It found, therefore, that the relevant facilities acquired greater significance as a result of their co-location with other facilities of the Sydney and Melbourne international airports. The Tribunal confirmed this view with respect to Sydney International Airport, finding that the role of Sydney International Airport (**SIA**) in Australia's commercial links with the rest of the world is 'predominant and pervasive' in light of evidence that the value of freight movements for the airport in 1997 exceeded $21 billion and '50% of airfreight into and out of Australia goes through SIA and approximately 80% of the airfreight which goes through SIA is carried by passenger aircraft.' (at [208])

Virgin Blue decision

The Tribunal in the *Virgin Blue decision* said that

> approximately 50% of all international passengers arriving in Australia pass through Sydney Airport, as do approximately 30% of all domestic passengers in Australia. It is thus a major gateway for Australia's tourism industry, and also makes a substantial and significant contribution to trade in Australia. Accordingly, we are satisfied of the matter set out in s 44H(4)(c). (at [78])

Services Sydney decision

The Tribunal was satisfied that three urban Sydney sewerage systems were each of national significance on the basis that each was important to constitutional trade or commerce (on the basis that the services were an essential input to industries connected to the sewerage networks which are involved in constitutional trade and commerce) and were important to the national economy (on the basis of the pervasive use of sewerage services by households, businesses and industry connected to the three networks).

Australian Union of Students decision

The Tribunal held that the Department of Education, Employment, Training and Youth Affair's computer network was not a facility of significance to the Australian economy or to constitutional trade or commerce and that $1.5 million was a small amount of money in the context of the Australian economy.

6 Certified access regime (criterion (e))

Introduction

6.1 Under s 44G(2)(e) of the CCA (criterion (e)), the Council may not recommend declaration unless satisfied that access to the service is not subject to an access regime that is currently certified under s 44N of the CCA[31] or if certified, there have been substantial modifications of the access regime or of the relevant principles in the Competition Principles Agreement (**clause 6 principles**). Criterion (e) recognises that State or Territory governments may develop industry specific access regimes that, certified as effective, apply to the exclusion of declaration or an access undertaking under Part IIIA.

6.2 Further information on the certification process, the clause 6 principles and the Council's approach to their interpretation is set out in the Council's Guide to Certification available on the Council's website.

Uncertified State or Territory access regimes

6.3 Prior to the enactment of the Amendment Act, the Council had to consider whether any access regime that may have applied to the service may have constituted an effective access regime. This is no longer the case. For a State or Territory access regime to preclude declaration it must be currently certified. However, an uncertified State or Territory access regime may have implications for the assessment of criteria (a) and/or (f) because the regime 'may have already facilitated a competitive environment in upstream or downstream markets, so that declaration of the service would not promote competition' and/or 'it may not be in the public interest to have both national and state or territory access regimes applying to the service' (Explanatory Memorandum, Trade Practices Amendment (Infrastructure Access) Bill 2009 (**Amendment Act EM**), [5.27]).

6.4 Thus a State or Territory access regime under development at the time a declaration application is being assessed will not preclude a recommendation to declare by operation of criterion (e) but may be taken into account by the Council when assessing criteria (a) and (f), as well as when considering the appropriate duration of any declaration.

Commonwealth and private access regimes

6.5 Criterion (e) is only concerned with an effective access regime implemented by a State or Territory government that has been certified under Part IIIA.

6.6 As services subject to a Commonwealth access regime may be the subject of an application for declaration under Part IIIA, the Council anticipates that the interaction of a Commonwealth access regime with Part IIIA will generally be considered at its inception. As Commonwealth regimes are likely to be based in

[31] Or s 44NB of the CCA, if a certification has been extended.

statute, any such regime would be likely to include a statutory exclusion from the operation of Part IIIA.

6.7 Criterion (e) would not preclude a recommendation to declare a service subject to a private access regime. However that private access regime may have an impact upon the competition considerations required by criterion (a). Furthermore, services subject to a private access regime in the form of an access undertaking approved by the ACCC cannot be declared (ss 44G(1) and 44H(3) of the CCA).

Access regime for a substitute service

6.8 Section 44G(2)(e) of the CCA expressly requires the certified access regime to be for the service the subject of the application for declaration. Criterion (e) therefore requires an examination of whether there is a certified access regime for the specific service to which access is sought.

6.9 If there exists an access regime for a service which is or could be a substitute for the service the subject of an application for declaration, then the Council may consider whether the service the subject of that access regime is truly a substitute for the service the subject of the application for declaration and the implications of this in its consideration of criteria (a) and (f) as appropriate. In this situation, whether or not the particular regime is certified will be of little relevance as the enquiry addresses criteria other than criterion (e).

7 Not contrary to the public interest (criterion (f))

Introduction

7.1 Section 44G(2)(f) of the CCA (criterion (f)) provides that the Council cannot recommend that a service be declared unless it is satisfied 'that access (or increased access) to the service would not be contrary to the public interest'.

7.2 The term 'public interest' is not defined in the CCA. In the Council's experience, the key issues raised in the context of assessing the public interest in declaration matters have most often been economic in nature: economic efficiency (see paragraphs 7.11–7.14 below), regulatory costs (see paragraphs 7.15–7.17 below), disruption costs (see paragraphs 7.18–7.19 below) and investment effects (see paragraphs 7.20–7.25 below). However, recent High Court authority indicates that the assessment of the public interest encompasses a very wide range of matters (see *Pilbara HCA*, at [42]).

7.3 In light of *Pilbara HCA*, the Council and the designated Minister may consider under criterion (f) any matter that is not extraneous to the scope and object of the function bestowed by the Parliament.

7.4 It is impracticable to exhaustively list all matters that are potentially relevant, particularly given each application presents unique factual circumstances and public interest issues may well be unique to a particular declaration application. However, the list in clause 1(3) of the Competition Principles Agreement provides some guidance of the matters potentially relevant for the purposes of criterion (f). Through the Competition Principles Agreement in 1995, the Council of Australian Governments agreed to the implementation by the Commonwealth of what became Part IIIA. Clause 1(3) reflects the matters that were considered relevant to the analysis of the public interest at that time. The matters to be taken into account under clause 1(3) include:

(a) ecologically sustainable development

(b) social welfare and equity considerations, including community service obligations

(c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity

(d) economic and regional development, including employment and investment growth

(e) the interests of consumers generally or of a class of consumers

(f) the competitiveness of Australian businesses, and

(g) the efficient allocation of resources.

7.5 Where, as in the case of criterion (f), there are no positive statutory indications of the considerations upon which the public interest is to be assessed, assessment of the public interest 'imports a discretionary value judgment to be made by

reference to undefined factual matters' (see: *Pilbara HCA*, at [42] and *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, at 505 (Dixon J)). The High Court also said in *Pilbara HCA* that

> conferring the power to *decide* on the Minister (as distinct from giving the NCC a power to *recommend*) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office. (at [42])

7.6 A decision to declare or not declare a service goes to the scope of regulation. Declaration decisions are akin to decisions taken by the Parliament or the Government to regulate specific industries, and hinge on an assessment of whether declaration/coverage is in the public interest and whether the benefits from regulated access outweigh the costs. They require the decision maker to balance the potentially conflicting goals of promoting competition in related markets and ensuring appropriate investment incentives, and to consider the likely effectiveness of regulation and its costs. The Hilmer Committee recognised that the power to make such a decision appropriately rests with a politically accountable minister acting on (but not bound to follow) independent expert advice. It said that,

> [a]s 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. (Hilmer Report, p 250).

7.7 Once a service is declared, however, the designated Minister ceases to play an active role in the access process. If the parties cannot agree terms, the access dispute may be resolved through arbitration by the ACCC. In the course of making an arbitration determination, the ACCC may be called upon to determine an access price or require the service provider to extend the facility. These determinations do not import questions of the broader public interest (except insofar as their accurate determination affects the public interest in the proper functioning of the National Access Regime).

7.8 The phrase 'access (or increased access)' in criterion (f) is taken to have the same meaning as in criterion (a): ie, that access means access on reasonable terms and conditions. In making a declaration recommendation or decision, the Council and Minister do not enquire into the likely terms of access but should assume that the arrangements for negotiation/arbitration of the terms and conditions of any access request will function as intended and strike a balance between the interests of access seekers and service providers. These arrangements are principally embodied in a number of provisions in Part IIIA that seek to protect service providers in the arbitration of an access dispute, which are summarised in Box 6 below.

Box 6 Part IIIA arbitration protections for service providers

When making a determination on an access arbitration regarding a declared service, the ACCC:

- does not have to allow access (s 44V(3))
- cannot prevent an existing user from obtaining a sufficient amount of the service to meet its current and reasonably anticipated future requirements, which is to be measured at the time of the arbitration (s 44W(1)(a))
- must have regard to the service provider's legitimate business interests (s 44X(1)(a)
- cannot make the service provider pay for extensions or interconnections to the facility (ss 44W(1)(e) and (f))
- must, in setting any access price, take into account the need to give a return on investment commensurate with relevant regulatory and commercial risks and must take into account the direct costs of providing access and the economically efficient operation of the facility (s 44ZZCA)
- may make a determination dealing with any matter relating to the dispute (s 44V(2) and may take into account any matter it thinks is relevant (s 44X(2)
- may require the access seeker to accept and pay for access to the service (s 44V(2)(b)
- must make its determination within six months of receiving an application (s 44XA(1)
- can accept as a party any person with a sufficient interest in the dispute (s 44U).

The ACCC may also terminate arbitration of a dispute that that is vexatious, trivial, misconceived, lacking in substance, raised in bad faith or where access should continue to be governed by existing contractual arrangements (s 44Y(1)).

7.9 In considering any adverse effects access may have on a service provider's interests, the Council may examine how the provisions governing arbitration of access disputes would be likely to apply and whether these prevent or limit any potentially adverse public interest consequences. Costs to a service provider that can be compensated for through access charges are unlikely to be relevant to the assessment of the public interest

7.10 Criterion (f) does not require that access be in the public interest. Rather, the Council (and the designated Minister) must be satisfied that the costs and other effects from access are such that access would be contrary to the public interest. The benefits of access principally arise from the promotion of competition considered under criterion (a) and the resultant positive effects on economic efficiency, which are considered under criterion (f).

Economic efficiency

7.11 The promotion of economic efficiency and the promotion of competition form the twin elements of the first of the objects of Part IIIA (in s 44AA(a)). The promotion

of competition is assessed in the context of criterion (a) and, following *Pilbara HCA*, economic efficiency is not tested by criterion (b) but falls for consideration in respect of the public interest.

7.12 The operation of, use of and investment in infrastructure will be economically efficient where, from society's perspective, it:

- enables goods and services to be produced at least cost—ie, it is productively or technically efficient
- ensures that services are provided to those who value them most highly—ie, it is allocatively efficient, and
- preserves incentives for innovation and investment—ie, it is dynamically efficient.[32]

7.13 The promotion of workable or effective competition is generally consistent with the encouragement of economic efficiency. Where access promotes workable or effective competition, it is also likely to result in efficiency gains for reasons including that:

- in the short term, the entry or threat of entry of new firms in downstream markets may encourage lower production costs for services (the promotion of productive efficiency)
- in the longer term, competitive pressures may stimulate innovation designed to reduce costs and develop new products (the promotion of dynamic efficiency), and
- if the terms and conditions of access are appropriate, then all customers who value the service more than its cost of supply will be supplied (the promotion of allocative efficiency).

7.14 Thus, it is likely that a promotion of competition in relevant dependent markets from access that is necessary to satisfy criterion (a) will also give rise to efficiency gains. However, access may also lead to efficiency losses, particularly in the provision of the service subject to declaration, which also need to be considered. These losses may be considered under criterion (f). Potential efficiency losses from access could include:

- in the short term, a reduction in allocative efficiency through the distortion of price signals
- in the longer term, a reduction of dynamic efficiency by dampening incentives for innovation, and
- in the longer term, a reduction of productive efficiency through the deterrence of investment (discussed further at paragraphs 7.20–7.25).

[32] The Tribunal considered the meaning of the term 'economic efficiency' in *Re 7-Eleven Stores Pty Ltd* (1994) ATPR ¶41–357. See also, *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at paras 90–91 and 115–116.

Regulatory costs

7.15 The regulatory costs of access include the costs of negotiating access and arbitrating access disputes. To assist the Council and the designated Minister to determine whether these and similar costs are such that declaration would be contrary to the public interest, interested parties are encouraged to provide such information as is available to enable a meaningful assessment of the costs of access.

7.16 The regulatory costs that are taken into account under criterion (f) do not include costs associated with an application for declaration. Such costs are incurred irrespective of whether any declaration is made and thus are not costs resulting from access or increased access.

7.17 The level of regulatory costs might be expected to differ depending on factors such as the likely number of access disputes that may arise in relation to a declared service, the number of parties to these disputes and the complexity of the issues likely to arise.

Disruption costs

7.18 The provision of access to a facility may involve some disruption to the operations of the service provider and potentially other parties (such as existing third party users). However, many disruption costs should be recoverable by the service provider through access charges or ameliorated through other access terms and conditions and are appropriately dealt with at the negotiation/arbitration stage of the access process rather than at the time that a decision to declare is made.

7.19 Any service provider opposing an application for declaration of a service on the basis of disruption costs should provide clear evidence as to why the protections in the CCA (see Box 6 above) do not adequately deal with those costs either generally or in the context of the particular service to which access is sought. In the absence of specific reasons why these safeguards are ineffective in a particular case, the Council must accept that the CCA will operate as intended.

Investment effects

7.20 The importance of investment in infrastructure to Australia's economy and the need to protect investment incentives have been central considerations since the genesis of Part IIIA. According to the Hilmer Report,

> when considering the declaration of an access right to facilities, any assessments of the public interest would need to place special emphasis on the need to ensure access rights did not undermine the viability of long-term investment decisions, and hence risk deterring future investment in important infrastructure projects. (p 251)

7.21 The importance of incentives for infrastructure investment was confirmed in 2006 with the introduction of the objects clause of Part IIIA (s 44AA(a) of the CCA).

7.22 The prospect of declaration under Part IIIA creates some additional risk for investors in that they may not receive the level of return on their investment that they may have received in the absence of declaration and the provision of access. While this 'regulatory risk' is attendant on the establishment of the Part IIIA regime, some degree of similar risk would likely have followed from any form of intervention or regulation aimed at addressing the policy issues underlying Part IIIA. It is reasonable to assume that the Parliament considered that these costs are outweighed by the benefits to Australia from effective regulation of access in the circumstances allowed for under Part IIIA.

7.23 Part IIIA, in the protections outlined in Box 6 above, provides for service providers/facility owners to receive a return on their investment in the infrastructure providing a declared service that recognises the risks associated with their investment. These protections form the background to access negotiations and encourage the parties to reach a negotiated access arrangement that allows the service provider an appropriate return on investment.

7.24 Part IIIA does not seek to compensate an investor in declared infrastructure for the loss of any monopoly profits arising from its power in a dependent market.

7.25 Access under Part IIIA is designed to eliminate such monopoly profits. If the application of Part IIIA discourages investment that is predicated on such profits, this is not a cost because the investment that has been discouraged would not have been efficient. To quote the Hilmer Report:

> If there are indeed profit implications associated with the application of an access regime, the revenues in question will have been obtained at the expense not only of consumers but of a more efficient economy generally. (p 263)

Box 7 Examples of public interest assessment

Sydney Airport decision

The Tribunal approached the assessment of criterion (f) by first affirming, in effect, the presumption that declaration is in the public interest where criteria (a)–(e) are satisfied. The Tribunal said it

> is satisfied that declaration of the services will promote competition in the ramp handling market. The Tribunal is of the view that it is in the public interest that competition be promoted in this market for the reasons to which we have already referred. (at [219])

The Tribunal went on to consider SACL's arguments in support of the proposition that declaration would be contrary to the public interest. In particular, the Tribunal categorically rejected an argument that declaration would not be in the public interest because it would allow the ACCC to perform the role of SACL in 'the difficult balancing of all the functions involved of managing the airport, balancing the competing demands for the scarce space and balancing the critical functioning of ensuring safety and efficiency with respect to all operations at the airport'.

Services Sydney decision

The Tribunal considered whether 'declaration would be against the public interest because of the impending introduction of a comprehensive State based access regime'. Having examined the evidence, the Tribunal said that:

> at this stage there is nothing to guarantee that an effective access regime will be introduced in the future, or to indicate when it might be introduced. In the event that an effective state based access regime is introduced, it would be appropriate to seek a revocation of any declaration that exists. (at [194])

8 Develop a facility for part of the service

8.1 In deciding whether or not to recommend that a service be declared the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service (s 44F(4)). This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared. The designated Minister must also consider this issue in deciding whether or not to declare a service (s 44H(1)).

8.2 In respect of the operation of s 44F(4) the relevant Explanatory Memorandum states:

> [i]f the Council decides that it would be economical for someone to develop a facility that could provide part of the service, it could decline to recommend declaration of the service as defined by the applicant. The applicant could then seek declaration of the service redefined to exclude that part that is economical for someone to provide. (Competition Policy Reform Bill 1995, Explanatory Memorandum at 180)

8.3 While this identifies one course of action open to the Council it is clear from the words used in the Explanatory Memorandum, and the second sentence of s 44F(4), that the Council is not obliged to follow that particular course. The wording of s 44F(4) makes it clear that even if the Council forms the view that part of the service is economical to duplicate, the Council is not precluded from recommending declaration. In considering s 44F(4) the Council takes into account the objects of Part IIIA.

9 Duration of declaration

9.1 Section 44H(8) of the CCA requires that every declaration include an expiry date. This can be a specified future date or involve an event that may occur in the future or a combination of these. The duration of declaration will vary according to the circumstances of each application.

9.2 In considering the appropriate duration of a declaration, the Council has regard to:

- the importance of long term certainty for businesses. Given the nature of facilities subject to declaration, some access seekers may require declaration as a condition to embark on significant investment, substantial developments or long term contractual commitments
- the need for declaration to apply for a sufficient period to be able to influence the pattern of competition in relevant dependent market(s), and
- the desirability of periodic review of access regulation governing services, including the need for declaration itself. On the expiry of a declaration, the need for ongoing regulation can be reviewed.

9.3 To date declarations have been for periods of longer than five and up to 50 years.

9.4 The Council notes that declaration does not constrain the parties from negotiating access rights that continue beyond the period of the declaration.

9.5 Following *Pilbara HCA* the Council's preliminary view is that it may be appropriate to link the duration of a declaration to the period for which the Council concludes (in its consideration of criterion (b)) that developing an alternative facility to provide the service is unprofitable.

Revocation

9.6 Section 44J of the CCA provides that the Council may recommend that a declaration be revoked. At the time the Council recommends revocation, it must be satisfied that the declaration criteria would no longer be satisfied in relation to the declared services for which revocation is sought. The following are examples of changes in circumstances such that the declaration criterion may no longer be satisfied:

- market developments may mean that a facility becomes profitable to duplicate, thereby precluding satisfaction of criterion (b)
- changes in technology and market conditions may have implications for the satisfaction of criterion (a) such that the service provider would no longer have the ability and/or incentive to use market power to adversely affect competition in the dependent market(s) and thus declaration would no longer promote a material increase in competition in the market(s), and

- reform initiatives at a state or territory level may lead to the introduction and certification of an access regime that applies to a declared service meaning that criterion (e) would no longer be satisfied.

10 Services ineligible to be declared

Changes to Part IIIA–new Division 2AA

10.1 The Amendment Act inserted a new division, Division 2AA into Part IIIA of the CCA. Division 2AA allows a person with a material interest in a proposed new infrastructure facility to apply for a decision that a service to be provided by that facility is ineligible to be a declared service. The period for which a service is ineligible must be at least 20 years (s 44LG(1)(a)(ii)).

10.2 This amendment follows the 2001 review of the National Access Regime undertaken by the Productivity Commission which recommended that the Australian Government examine in detail, a mechanism for the proponent of a proposed investment in an essential infrastructure facility to seek a binding ruling on whether the services provided by that facility would meet the declaration criteria.[33]

10.3 The Productivity Commission's recommendation was incorporated into the National Gas Law (in 2008) with provision for greenfield pipeline projects to seek 'no-coverage determinations' and price regulation exemptions which if obtained apply for 15 years.[34]

Summary of the law concerning services ineligible to be a declared service

10.4 As with declaration, an ineligibility application involves a two-step process. The Council assesses an application before making a recommendation to the designated Minister. On receipt of a recommendation from the Council the designated Minister may decide that the service be ineligible to be a declared service.

10.5 To be eligible for an ineligibility recommendation a service must be provided by a proposed facility. The term proposed facility is defined in s 44B as meaning:

> a facility that is proposed to be constructed (but the construction of which has not started) that will be:
>
> (a) structurally separate from any existing facility; or
>
> (b) a major extension of an existing facility.

10.6 An application for an ineligibility recommendation must demonstrate that the relevant facility falls within this definition. The Amendment Act EM, at [2.12], gives as examples a new railway line, or, potentially, a major spur line from an existing rail line. These examples are not exhaustive and it is clear that the concept of a proposed facility captures a broad range of new infrastructure investment.

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33 PC 2001, Recommendation 11.1 at p. 315.

34 Chapter 5, Part 2 of the Schedule to the *National Gas Law (South Australia) Act 2008*.

10.7 A service is ineligible to be a declared service if the designated Minister is not satisfied of at least one of the matters for declaration in s 44H(4) of the CCA—ie one or more of the declaration criteria (see paragraph 1.21 and Box 2 above).

10.8 A decision that a service is ineligible to be a declared service cannot be revoked unless:

(a) the new infrastructure facility is materially different, when built, to what was proposed so that it would now meet all of the criteria for declaration in subsection 44H(4) of the CCA, (s 44LI(2)(a)) or

(b) the service provider requests a revocation of the decision (s 44LI(2)(b)).

Services that are ineligible to be declared

10.9 Constitutional limits apply to the operation of Division 2AA which effect when a designated Minister may make a decision that a service is ineligible to be a declared service. A decision may only be made where:

(a) the person who is, or expects to be, the provider of the service is a corporation (or a partnership or joint venture consisting wholly of corporations), or

(b) access to the service is (or would be) in the course of, or for the purposes of, constitutional trade or commerce, (s 44LA).

10.10 The definition of "service" is defined in s 44B of the CCA and is considered in paragraphs 2.1–2.14 of this Guide. Services that do not fall within this definition cannot be subject to an ineligibility decision.

The application

10.11 A person with a material interest in a particular service proposed to be provided by means of a proposed facility may make a written application to the Council asking the Council to recommend that the designated Minister decide that the service is ineligible to be a declared service. An application must be made before construction of the facility starts.

10.12 As the applicant is a person "with a material interest" in a service, the identity of an applicant is not limited to the intending owner or owners of the proposed facility. A person with a material interest may extend to a person who will rent the facility upon completion or a third party that has been contracted to provide the service in due course (Amendment Act EM, [2.13]). The opportunity to make an application for a service to be ineligible for declaration is also available for the Commonwealth, states or territories to use in relation to services to be provided by proposed facilities of Commonwealth, state or territory bodies (Amendment Act EM [2.14]).[35]

[35] Note that the operation of Division 2AA of the CCA is subject to constitutional limits: s 44LA of the CCA.

10.13 Any party contemplating making an application for an ineligibility recommendation should have regard to the chapters in this Guide concerning the declaration criteria. Applicants for an ineligibility recommendation must of course seek to establish that one or more of the declaration criteria cannot be satisfied during the 20 year minimum period that an ineligibility decision would be in force.

10.14 In order to make a recommendation to the designated Minister that a service is ineligible to be a declared service, having regard to the objects of Part IIIA in s 44AA the Council needs to be satisfied that at least one of the matters in s 44G(2) of the CCA—ie. one or more of the declaration criteria—is not met and is unlikely to be met during the 20 year minimum period that an ineligibility decision would be in force.

10.15 A decision that a service is not ineligible to be a declared service is not an automatic trigger for the declaration of that service. A separate application for declaration under s 44F would need to be made once construction of the facility providing that service is complete. At such a time, the Council considers the matter afresh to determine whether the five criteria for declaration are satisfied before making a recommendation to the designated Minister.

10.16 As with an application for declaration, an application for an ineligible service recommendation must be made in good faith (s 44LB(4)). Provided the applicant is a person other than the designated Minister, the Council may recommend that the service is not ineligible to be a declared service if the Council thinks that the application was not made in good faith.

10.17 In making a recommendation in favour of the designated Minister deciding that the service is ineligible to be declared, the Council must recommend how long that decision should be in force. The law prescribes that such a period must be for at least 20 years (s 44LB(2)(a)(ii)).

Timing

10.18 As with an application for declaration, the Council must make its recommendation on an application for an ineligible service recommendation within 180 days of the day it receives the application (s 44LD(2)). Section 44LD(3) provides that in the following instances the clock is stopped and the time elapsed does not count toward the 180 days:

(a) an agreement is made between the Council and the applicant to disregard a period as specified, and

(b) the Council issues a notice requesting information in relation to the application pursuant to s 44LC(1).

10.19 The Council can also extend the 180 day period by providing notice to the designated Minister of the extension, explaining why the Council has been unable to make its recommendation within the period and advising when the Council must now make its recommendation. The Council must give a copy of any such notice to the applicant

and if the applicant is not the expected provider of the service, then that party also. The Council must also publish it in a national newspaper (s 44LD).

10.20 As with its practice for other applications made to it the Council will consult on an application for an ineligible service recommendation. Following receipt of an application the Council will set a timeframe for receipt of submissions and will have regard to those submissions in developing its recommendation. It will also publish a draft recommendation and provide a further opportunity for submissions on the draft recommendation. It is usual practice for the Council to allow 30 days for the preparation of written submissions in response to a draft recommendation.

Process

10.21 In this process, it is desirable for applicants, and parties making submissions in response to an application, to raise all relevant issues in the application or the submissions in response to the application as this maximises opportunities for information and arguments to be considered in an informed and transparent way.

10.22 The Council expects interested parties to comply with submission deadlines. Late submissions may not be able to be taken into account, especially where they canvass a broad range of issues or contain new factual material. In particular where a submission raises novel issues that were not raised with the Council prior to it issuing the draft recommendation, the Council will have limited opportunity to test relevant assertions or information. In finalising its recommendation the Council may have to give the information less weight or extend its process to allow for the matters to be exposed for comment by other interested parties.

10.23 The Council informs the applicant (and the expected service provider, if not the applicant) when it has provided its final recommendation to the designated Minister. As soon as practicable after the designated Minister makes his or her decision the Council publishes its final recommendation on the Council's website (www.ncc.gov.au) and provides a hardcopy of the final recommendation to the applicant (and the service provider, if not the applicant) (s 44LF).

10.24 The designated Minister must not decide that a service is ineligible to be a declared service unless he or she is satisfied that:

(a) The service is to be provided by the proposed facility; and

(b) The service would not satisfy at least one of the matters for declaration in s 44H(4) (s 44LG(5)).

10.25 The designated Minister must publish by electronic or other means his or her decision on an ineligibility recommendation and his or her reasons for the decision (s 44LH(1)). The designated Minister must also give a copy to the applicant (s 44LH(2)). If the designated Minister does not publish his or her decision on a ineligibility recommendation within 60 days of receiving the Council's ineligibility recommendation, the designated Minister is taken to have made a decision in accord with the Council's ineligibility recommendation and to have published that decision

(s 44LG(6)(a)). In such a case, the period that the decision is in force is deemed to be the period specified in the Council's ineligibility recommendation (s 44LG(6)(b)).

10.26 If the designated Minister decides that a service is ineligible to be a declared the service (or the decision is deemed as such in accord with the Council's ineligibility recommendation), the service cannot be declared for the period the decision is in force (ss 44G(7) and 44H(6C)).

Revocation

10.27 The Council may recommend to the designated Minister that the designated Minister revoke an ineligibility decision for a particular service (s 44LI). The Council may not do so unless:

(a) it is satisfied at the time of making such a revocation recommendation that the facility that is (or will be) used to provide the service concerned is so materially different from the proposed facility described in the application made under s 44LB that the Council is satisfied of all of the matters in s 44G(2)—ie. the declaration criteria—in relation to the service; or

(b) the person who is, or expects to be, the provider of the service requests that it be revoked.

10.28 The designated Minister must publish his or her decision to revoke or not to revoke an ineligibility decision (s 44LI(5)). If the designated Minister decides not to revoke the ineligibility decision, he or she must give reasons for the decision to the person who is, or expects to be, the provider of the service (s 44LI(6)). If the designated Minister does not publish his or her decision on a revocation recommendation within 60 days of receiving that recommendation, the designated Minister is taken to have made a decision that the ineligibility recommendation is revoked and to have published that decision (s 44LI(7)).

Review

10.29 Decisions made by the designated Minister (including deemed decisions) are, upon application, reviewable by the Tribunal.[36] An application for review must be made within 21 days after publication of the designated Minister's decision (s 44LJ(2)).

[36] The review by the Tribunal is a re–consideration of the matter based on the information, reports and things referred to in s 44ZZOAA.

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Appendix A Sections 44F and 44G of Part IIIA of the *Competition and Consumer Act 2010* (Cth)

Section 44F: Person may request recommendation

44F(1) [Written application to Council] The designated minister, or any other person, may make a written application to the Council asking the Council to recommend under section 44G that a particular service be declared.

44F(2) [Council must act] After receiving the application, the Council:

(a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and

(b) must recommend to the designated Minister:

(i) that the service be declared; or

(ii) that the service not be declared.

44F(3) [Application not in good faith] If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.

44F(4) [Consideration of alternative facilities] In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.

44F(5) [Withdrawal of applications] The applicant may withdraw the application at any time before the Council makes a recommendation relating to it.

Section 44G: Limits on the Council recommending declaration of a service

44G(1) [Access undertakings] The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under section 44ZZA.

44G(2) [Council to be satisfied of matters] The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:

(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) [repealed]

(e) that access to the service:

(i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or

(ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that, since the Commonwealth Minister's decision was published there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement; and

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

Appendix B Competition and Consumer Regulations 2010 (Cth), Regulation 6A

Application to Council for declaration recommendation

An application to the Council under subsection 44F(1) of the Act for a declaration recommendation in respect of a particular service must include the following information:

(a) the applicant's name and, if the applicant is the designated Minister or an organisation, the name and contact details of a contact officer for the Minister or organisation;

(b) the applicant's address for the delivery of documents, including the notification of any decision of the designated Minister or the Council, relating to the application or the declaration recommendation;

(c) a description of the service and of the facility used to provide the service;

(d) the name of the provider, or of each provider, of the service and, if a provider does not own the facility, the name of the owner, or of each owner, of the facility, as the case requires;

(e) the reason for seeking access (or increased access) to the service;

(f) a brief description:

  (i) of how access (or increased access) would promote competition in at least one market (whether or not in Australia), other than the market for the service; and

  (ii) of the market, or of each of the markets, in which competition would be so promoted;

(g) the reason why the applicant believes that it would be uneconomical for anyone to develop another facility to provide the service;

(h) the reason why the facility is of national significance, having regard to the matters set out in paragraph 44G(2)(c) of the Act;

(i) a description of one or more methods by which access to the service can be provided and details of any risk to human health or safety caused by that method or those methods;

(j) if the service is already the subject of a regime for access to the service (including an access undertaking):

  (i) particulars of the regime including details, if any, about when the regime is to end; and

  (ii) reasons why the regime is not an effective access regime;

(k) a description of efforts, if any, that have been made to negotiate access to the service

Appendix C Sections 44W, 44X, 44XA and 44ZZCA of Part IIIA of the *Competition and Consumer Act 2010* (Cth)

Section 44W: Restrictions on access determinations

44W(1) The Commission must not 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.

44W(2) Paragraphs (1)(a) and (b) do not apply in relation to the requirements and rights of the third party and the provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the third party and the provider.

44W(3) A determination is of no effect if it is made in contravention of subsection (1).

44W(4) If the Commission makes a determination that has the effect of depriving a person (the ***second person***) of a pre-notification right to require the provider to supply the service to the second person, the determination must also require the third party:

(a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and

(b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the second party as compensation for the deprivation.

Note: Without infringing paragraph (1)(b), a determination may deprive a second person of the right to be supplied with an amount of service equal to the difference between the total amount of service the person was entitled to

under a pre-notification right and the amount that the person actually needs to meet his or her actual requirements.

44W(5) In this section:

"existing user" means a person (including the provider) who was using the service at the time when the dispute was notified.

"pre-notification right" means a right under a contract, or under a determination, that was in force at the time when the dispute was notified.

"protected contractual right" means a right under a contract that was in force at the beginning of 30 March 1995.

Section 44X: Matters that the Commission must take into account

Final determinations

44X(1) The Commission must take the following matters into account in making a final determination:

(aa) the objects of this Part;

(a) the legitimate business interests of the provider, and the provider's investment in the facility;

(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;

(h) the pricing principles specified in section 44ZZCA.

44X(2) The Commission may take into account any other matters that it thinks are relevant.

Interim determinations

44X(3) The Commission may take the following matters into account in making an interim determination:

(a) a matter referred to in subsection (1);

(b) any other matter it considers relevant.

44X(4) In making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in subsection (1).

Section 44XA: Time limits for Commission's final determination

Commission to make final determination within 180 days

44XA(1) The Commission must make a final determination within the period of 180 days (the expected period) starting at the start of the day the application is received.

Stopping the clock

44XA(2) In working out the expected period in relation to a final determination, in a situation referred to in column 1 of an item of the following table, disregard any day in a period:

(a) starting on the day referred to in column 2 of the item; and

(b) ending on the day referred to in column 3 of the item.

Stopping the clock

Item	Column 1 Situation	Column 2 Start day	Column 3 End day
1	An agreement is made in relation to the arbitration under subsection (4)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A direction is given under subsection 44ZG(1) to give information or make a submission within a specified period	The first day of the period specified for the giving of the information or the making of the submission	The last day of the period specified for the giving of the information or the making of the submission
3	A decision is published under subsection 44ZZCB(4) deferring consideration of the dispute while the Commission considers an access undertaking	The day on which the decision is published	The day on which the Commission makes its decision on the access undertaking under subsection 44ZZA(3)
4	The Commission, under subsection 44ZZCBA(1) or (2), defers arbitrating the dispute while a declaration is under review by the Tribunal	The day on which the Commission gives the notice to defer arbitrating the dispute	The day the Tribunal makes its decision under section 44K on the review

44XA(3) Despite subsection (2), do not disregard any day more than once.

Stopping the clock by agreement

44XA(4) The Commission and the parties to the access dispute may agree in writing that a specified period is to be disregarded in working out the expected period.

44XA(5) The Commission must publish, by electronic or other means, the agreement.

Deemed final determination

44XA(6) If the Commission does not publish under section 44ZNB a written report about a final determination within the expected period, it is taken, immediately after the end of the expected period, to have:

(a) made a final determination that does not impose any obligations on the parties or alter any obligations (if any) that exist at that time between the parties; and

(b) published a written report about the final determination under section 44ZNB.

Section 44ZZCA: Pricing principles for access disputes and access undertakings or codes

44ZZCA The pricing principles relating to the price of access to a service are:

(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:

(iii) allow multi-part pricing and price discrimination when it aids efficiency; and

(iv) 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.

Note: The Commission must have regard to the principles in making a final determination under Division 3 and in deciding whether or not to accept an access undertaking or access code under Division 6.