NATIONAL
COMPETITION
COUNCIL

Declaration of Services

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

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Executive Director
National Competition Council
GPO Box 250
MELBOURNE VIC 3001
NCC Inquiry Line: 1800 099 470
Fax: (03) 9663 3699
Email: info@ncc.gov.au

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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 1800 099 470.

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 that satisfies the declaration criteria, further explained in this guide.

This Guide is intended to assist interested parties to make or respond to an application for declaration. This version of the Guide has been drafted following the 2017 amendments to Part IIIA and takes account of consequences flowing from those amendments.

Part IIIA was amended in response to a series of judicial decisions and policy reports, namely:

- the High Court decision in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (***Pilbara HCA***),
- the National Access Regime, Productivity Commission Inquiry Report, released in 2013 (**Productivity Commission Report**), and
- further review of the regime in the Australian Government Competition Policy Review (Chair: Professor Ian Harper) 2015 (**Harper Review**).

The Government broadly adopted the views presented in the Productivity Report and this Report's findings form the basis for the changes to Part IIIA.

The legislative amendments have also clarified the operation of the law in light of some recent Court decisions. In particular, the amendments to criterion (b) clarify that the test imposed under this criterion is a natural monopoly test. In addition, the Council's view is that amendments to criterion (a) return the focus of this criterion to considering the impact of a declaration on competition in other markets.

Despite the significant legislative amendments, the *Pilbara HCA* decision continues to have some ramifications for the application of Part IIIA. Of relevance for the purposes of this Guide, the High Court held that:

- 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.

[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).

At the time of writing, an application for special leave to appeal the decision of the Full Federal Court in the case of *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124 (***Port of Newcastle FCAFC*****)** is currently before the High Court of Australia, but remains unresolved. The subject of the application for leave to appeal is the interpretation of criterion (a) of s 44CA of the CCA (as previously worded). In this Guide, the Council has set out its views on the appropriate interpretation of criterion (a) following the recent legislative amendments. It remains possible, however, that the current litigation may have consequences for the future interpretation of criterion (a).

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 1800 099 470.

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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 2009 EM	Explanatory Memorandum, Trade Practices Amendment (Infrastructure Access) Bill 2009
Amendment Act EM	Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017
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
Harper Review	The Australian Government Competition Policy Review (Chair: Professor Ian Harper) 2015
Hilmer Report	Report by the Independent Committee of Inquiry into National Competition Policy (Chair: Prof F G Hilmer) 1993

Abbreviation	Description
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)
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
Port of Newcastle FCAFC	*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124
Productivity Commission Report	National Access Regime, Productivity Commission Inquiry Report 2013.
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

Abbreviation	Description
Virgin Blue decision	Re Virgin Blue Airlines Pty Limited [2005] 195 FLR 242

Version history

Version	Modifications made
December 2017	Major redrafting and update, in particular to accommodate amendments to and restructure of Part IIIA of CCA
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 an application to the Council asking it to declare a service cannot be made if the service is the subject of either a state or territory access regime that has been certified as effective (or an access undertaking that has been accepted by the ACCC (ss 44F(1)(a) and (b) 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.[2] The Council considers and publicly consults on the application before making its recommendation to the designated Minister[3] who decides whether to declare the service.

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[2] 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.

[3] The State Premier or the Chief Minister of the Territory is the designated Minister where the service provider is a state or territory body that has some control over the conditions for

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 Further, the 2017 amendments resulted in the inclusion of a new section 44F(1)), which lists a number of situations in which a service cannot be declared. A designated Minister, or any other person, may apply in writing to the Council asking for a recommendation that a particular service be declared, unless one of the following sets of circumstances apply (s 44F(1)):[4]

- the service is currently subject to an effective access regime; or
- the service is the subject of an access undertaking; or
- a tender process provided as part of an approved competitive tender process; or
- the service is provided by means of a pipeline and there is:
  i. a 15-year no-coverage determination in force under the National Gas Law in respect of the pipeline; or
  ii. a price regulation exemption in force in respect of the pipeline; or
- the designated Minister has decided that the service is ineligible to be a declared service.

1.9 Most of the circumstances set out in s 44F(1) are explained in other NCC guides or legislation.[5] In relation to the final exclusion listed in this new section - services that have been deemed ineligible to be a declared service - the following processes and requirements apply:

- 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.

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accessing the facility that is used (or is to be used) to provide the service and the state or territory concerned is a party to the Competition Principles Agreement. In all other circumstances, the designated Minister is the Commonwealth Minister (see ss 44D(1) and (2) of the CCA).

4 See Appendix A.

5 See NCC Publications.

- The period for which a service is ineligible must be at least 20 years (s 44LG(1)(a)(ii)).
- 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.
- 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.

- An application for an ineligibility recommendation must demonstrate that the relevant facility falls within this definition.
- A service is ineligible to be a declared service if the designated Minister is not satisfied of all the declaration criteria for the service (s 44H(4)) (see paragraph 1.24 and Box 2 below).
- 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 declaration criteria for the service (s 44LI(2)(a)); or
  (b) the service provider requests a revocation of the decision (s 44LI(2)(b)).
- Decisions made by the designated Minister (including deemed decisions) are, upon application, reviewable by the Tribunal.

1.10 In addition to the matters excluded from the definition of service in s 44B and s 44F(1) of the CCA, the following services are also ineligible for declaration:

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

(b) 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).

1.11 In light of the new s 44F(1) of the CCA, as well as the other exclusions noted above, the Council will assess the validity of an application as quickly as possible and advise the applicant in writing if it considers the application invalid.

1.12 The consequence of a service being identified at the outset as invalid is that the Council will not run a declaration review process, therefore saving both time and resources.

Declaration and arbitration

1.13 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]).

1.14 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] 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.

1.15 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.

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

Review by the Tribunal

1.17 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

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

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.

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.

1.18 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.

1.19 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.

1.20 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 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]).

1.21 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]).

1.22 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.

1.23 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,

[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.

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.

1.24 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).

1.25 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) 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.

1.26 This decision of the Tribunal and the findings of 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.

1.27 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

1.28 Previously, criteria for recommending and making declarations had been included in multiple places throughout the CCA. However, following amendments to the CCA that commenced in November 2017, the declaration criteria are now set out in one section, that being s44CA(1).

1.29 The Council cannot recommend that the Minister declare a service unless satisfied that all of the declaration criteria set out in ss 44CA(1) are met (s 44G of

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

the CCA). Further, the designated Minister cannot decide to declare a service unless satisfied that these declaration criteria are met (s 44H(4) CCA).

1.30 The declaration criteria are set out in Box 2.

Box 2 The declaration criteria

(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of 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 the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

  (i) over the period for which the service would be declared; and

  (ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility);

(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; and

(d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

1.31 If not satisfied that all criteria are met, the Council must recommend, and the designated Minister must decide, that the service not be declared.

1.32 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).[11] 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 have many similarities to the declaration criteria under Part IIIA of the CCA.[12] The Council also has regard to extrinsic material, including for example, the Productivity Commission Report, the Hilmer Report and the

[11] 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.'

[12] 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.

Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (**the Amendment Act EM**), but does not consider these materials to be conclusive or definitive.

1.33 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

1.34 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]).

1.35 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

1.36 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

Time limits

1.37 If the service is capable of being declared (see section 1 above), the Council must make its recommendation on the 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).

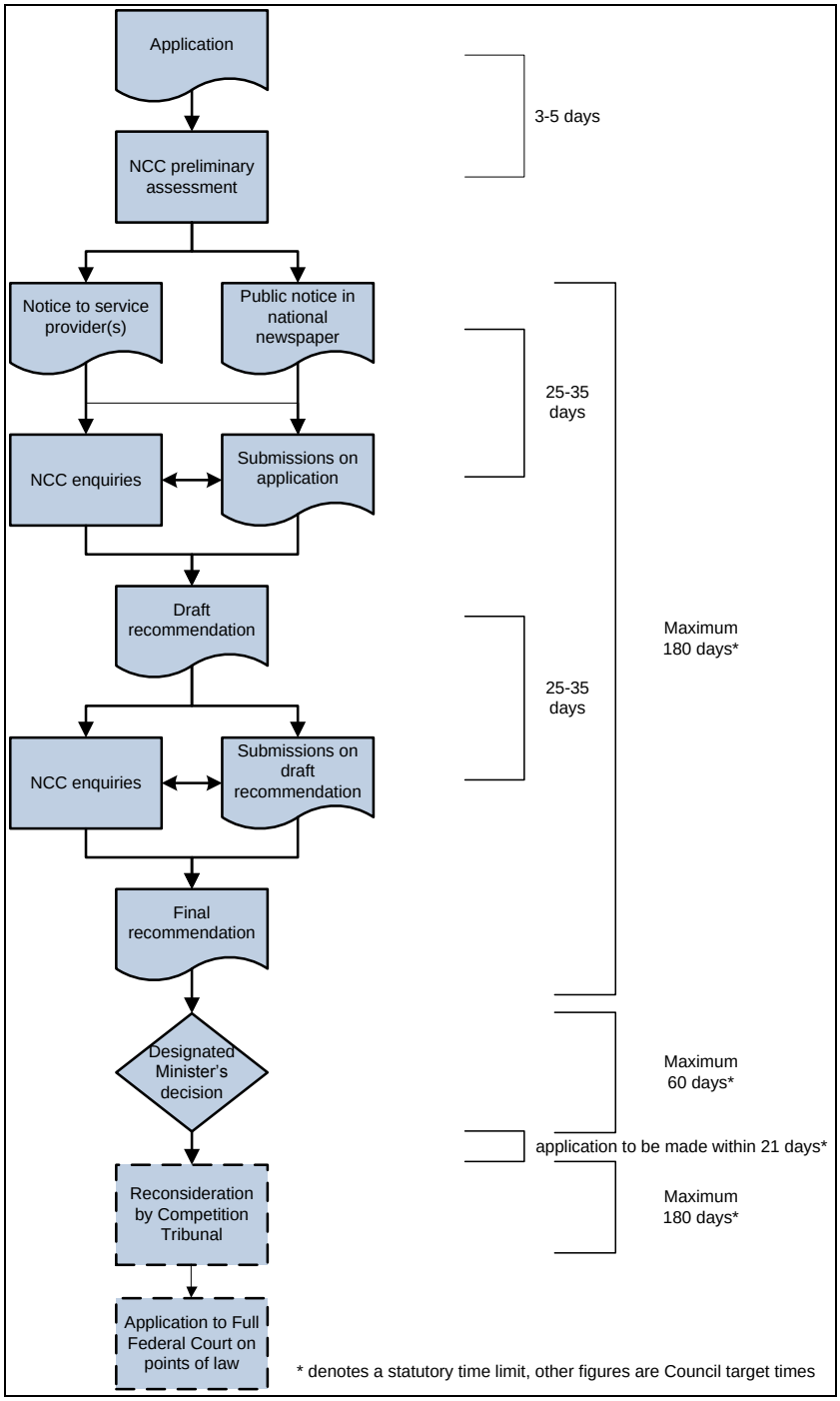
1.38 The Council can extend the 180 day period by providing notice to the designated Minister, explaining why the Council has been unable to make its recommendation within the period and advising the new date for its recommendation. The Council must give a copy of any such notice to the applicant and 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.

1.39 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 made a decision in accordance with the declaration recommendation and to have published a decision to that effect (s 44H(9)).

1.40 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

1.41 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.

1.42 On receipt of an application, the Council will check that the 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
- adequately identifies the facility and provider (or providers) of the service, and
- does not fall within one of the exclusions listed in s 44F(1) of the CCA.The Council consults publicly on all applications received.

1.43 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.

1.44 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.[13]

1.45 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

1.46 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.

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

1.48 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

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

1.49 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).

1.50 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.[14] 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

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

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.[15]

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.

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

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.[16]

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'.[17] 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).

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

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

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 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]) [18]

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 44CA(1) 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]).[19] 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

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[18] 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".'

[19] 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).

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 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 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'.[20] 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.

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

3 Criterion (a)

Introduction

3.1 The Council must consider certain criteria set out in section 44CA of the CCA when deciding whether to recommend that a service be declared. The first criterion, set out in paragraph 44CA(1)(a)) is:

> that access (or increased access) to the service, on reasonable terms and conditions, as a result of the declaration 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.

3.2 The focus of this criterion is on the promotion of competition in other markets. The other markets are commonly referred to as 'dependent markets'. When considering this criterion, the Council has to compare two future scenarios: one in which the service is declared (with access or increased access granted on reasonable terms and conditions) against one in which there is no declaration. In comparing these two scenarios, the Council must be satisfied that a material increase in competition in a dependent market would be promoted as a result of declaration. If not satisfied, the Council will not recommend the declaration.

3.3 When assessing whether criterion (a) is satisfied, the Council therefore:

- considers two scenarios: one in which a declaration is made and access (or increased access) to the service is available on reasonable terms and conditions, and the other in which no declaration is made
- identifies the dependent (upstream or downstream) markets (see paragraphs 3.4 –3.14)
- considers whether the dependent markets are separate from the market for the service to which access is sought (paragraphs 3.15 – 3.21), and
- assesses whether the access (or increased access) resulting from the declaration would promote a material increase in competition in any of the dependent markets (paragraphs 3.22 – 3.28).

Identifying dependent markets

3.4 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.

3.5 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.

3.6 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'[21]. 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])[22]

3.7 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.

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

- a product or service dimension
- the geographic area, and (if relevant)
- the functional level.[23]

3.9 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.

3.10 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.

3.11 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

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21 *Re QCMA* [190].

22 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*.

23 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.

the 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 3.15 – 3.21)

3.12 The Council seeks to identify one or more dependent markets where competition appears likely to be materially affected by an improvement in terms and conditions 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.

3.13 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 declaration will have on the conditions for competition in that dependent market.

3.14 Criterion (a) is satisfied if access or increased access on reasonable terms and conditions will materially promote competition in one or more dependent markets as a result of declaration. 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 – vertical integration

3.15 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.

3.16 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.

3.17 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])

3.18 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.

3.19 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])

3.20 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**.**

3.21 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) will not be satisfied.

Assessing effects on competition in dependent markets

3.22 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.

3.23 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.

3.24 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. The subject matter of the criterion (a) assessment involves an assessment of the competitive conditions in a real-life industry.[24]

3.25 Where a dependent market is already workably or effectively competitive, improved 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 therefore unlikely to satisfy criterion (a).

3.26 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])

3.27 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 to 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.

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

3.29 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.

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[24] 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.

3.30 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.[25]

3.31 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 the above paragraph and a declaration is unlikely to promote competition in the dependent market.

3.32 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 considers whether the service provider can engage in any of the types of conduct described above.

Time horizon for assessment

3.33 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.

3.34 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)

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

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 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).

3.35 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 not be satisfied, and
- there is a high probability of these changes occurring in the not too distant future.

3.36 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.

Recent Litigation

3.37 The wording of criterion (a) has been amended since it was first introduced. The current wording came into effect on 6 November 2017.

3.38 Previous wordings of criterion (a) have been the subject of litigation in the High Court of Australia, the Federal Court and the Australian Competition Tribunal. In particular, the Full Federal Court has recently considered its meaning in *Port of Newcastle Pty Ltd v the Australian Competition Tribunal, Glencore Coal Pty Ltd and ors* [2017] FCAFC 124 (***Port of Newcastle FCAFC***). An application for special leave to appeal the decision of the Full Federal Court is currently before the High Court of Australia but remains unresolved. It remains possible that this litigation may have consequences for the future interpretation of criterion (a).

4 Criterion (b)

Introduction

4.1 Section 44CA(1)(b) of the CCA (criterion (b)) requires that the Council be satisfied that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

(i) over the period for which the service would be declared; and

(ii) at the least cost compared to any 2 or more facilities (which could include the first mentioned facility).

4.2 Following the most recent amendments to Part IIIA of the CCA, the Council interprets this criterion to be 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.

4.3 The Amendment Act EM specifically states that '[t]he amendment to this paragraph is intended to refocus the test to a 'natural monopoly' test instead of a 'private profitability' test.'[26] The Council therefore adopts a natural monopoly test. The key characteristics of a natural monopoly relate to the presence of significant economies of scale and/or economies of scope in the production of the service or services the facility provides, the existence of substantial fixed (or capital) costs and relatively low variable (or operating) costs, and large and lumpy investment costs.

Total foreseeable market demand

4.4 Criterion (b) is now worded so as to require 'the market in which the infrastructure service under application is supplied to be defined.'[27] The person making the application must therefore stipulate what market the proposed declaration of the service will impact.

4.5 The presence of the word 'foreseeable' means that the Council may take into account other future uses of the services, provided they are foreseeable.[28]

Over the period for which the service would be declared

4.6 This part of criterion (b) does not restrict the Council and the Minister to consider a certain period referred to in the application for declaration. Rather, the Council recommends the appropriate period for the declaration of the

[26] Amendment Act EM, [12.22].

[27] Amendment Act EM, [12.23].

[28] Amendment Act EM, [12.26].

service. The Minister will then decide whether to declare the service based on this recommendation.

4.7 The Amendment Act EM notes that:

> The time period for declaration will be relevant to considerations of foreseeability. If the declaration period being contemplated is only 10 years, it is not necessary to consider demand for the service far beyond that period. While it may be possible to foresee increased demand for the service in 30 years as a result of a long-term development, it is unlikely this demand would affect the natural monopoly status of the service within the declaration period. The Council and the Minister may need to consider multiple potential declaration periods in determining whether there is an appropriate declaration period over which criterion (b) would be met.[29]

Least cost compared to 2 or more facilities

4.8 In considering whether the facility that is used to provide the service could meet the total foreseeable demand in the market at the least cost compared to any 2 or more facilities, the Council will look at whether the facility could support an expected maximum demand.[30] This aspect of criterion (b) is a 'question of judgment informed by facts.'[31]

4.9 The Council will compare the scenario where the facility in question meets the total foreseeable market demand against the scenario where the least costly alternative arrangement is in place.[32]

4.10 There is some guidance as to how criterion (b) should be applied set out in s.44CA(2) of the CCA. This guidance relates to:

- facilities that can be extended or expanded, and
- how to take account of costs.

4.11 Paragraph 44CA(2)(a) contemplates that a facility at capacity can be declared if it is reasonably possible for it to be extended or expanded. However, it is not necessary for the Council and the Minister to have regard to a facility at capacity as if it had expanded capacity, if it is not reasonably possible for that facility to be expanded or extended.

4.12 The costs referred to in s 44CA(1)(a)(ii) are not defined. However, s 44CA(2)(b) requires that the costs referred to in 44CA(1)(a)(ii) specifically includes 'all costs associated with having multiple users of the facility (including such costs that would be incurred if the service is declared)'. According to the Amendment Act EM,

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29 Amendment Act EM, [12.27].

30 Amendment Act EM, [12.24].

31 Amendment Act EM, [12.28].

32 Amendment Act EM, [12.28].

> [t]hese co-ordination costs could include the costs of lost production or of being allocated less of the service's capacity as a result of the facility becoming a multi-user facility.[33]

4.13 The Council will not take into account the costs of application for declaration, as these costs are not relevant to whether the facility is functioning as a natural monopoly.[34]

4.14 The administrative and compliance costs that may be incurred by the service provider as a result of the declaration would be considered in criterion (d), as they would not be incurred if access was provided without the declaration. The relevance of these costs is discussed in more detail in Section 6 below.

[33] Amendment Act EM, [12.31].

[34] Amendment Act EM, [12.32].

5 Criterion (c)

Introduction

5.1 Section 44CA(1)(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 (d). 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 Criterion (d)

Introduction

6.1 Section 44CA(1)(d) of the CCA (criterion (d)) requires that the Council be satisfied 'that access (or increased access) to the service, on reasonable conditions, as a result of a declaration of the service, would promote public interest'. The previous version of this criterion (criterion (f) 44G of the CCA) was formulated as a negative obligation, i.e. the Council had to be satisfied that access (or increased access) to the service *would not* be contrary to the public interest.

6.2 The central question associated with this criterion is whether the declaration is likely to generate overall gains to the community.[35]

6.3 The Amendment Act EM clarifies that

> criterion (d) does not call into question the results of subsections 44CA(1)(a), (b) and (c). It accepts the results derived from the application of those subsections, but it enquires whether, on balance, declaration of the service would promote the public interest. It provides for the Minister to consider any other matters that are relevant to the public interest.[36]

Meaning of public interest

6.4 The term 'public interest' is not exhaustively defined in the CCA.

6.5 Subsections 44CA(3)(a) and (3)(b) set out some matters that the Council must consider when determining whether access as a result of a declaration of the service would promote public interest. These mandatory considerations are:

(a) the effect that declaring the service would have on investment in:

(i) infrastructure services; and

(ii) markets that depend on access to the service; and

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

However, recent High Court authority indicates that the assessment of the public interest can encompass a very wide range of matters (see Pilbara HCA, at [42]).

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

6.7 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.

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35 Amendment Act EM, [12.37].

36 Amendment Act EM, [12.40].

The list in clause 1(3) of the Competition Principles Agreement provides some guidance of the matters potentially relevant for the purposes of criterion (d). 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. Those matters 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.

The mandatory public interest considerations

6.8 In addition to any other public interest considerations which might be relevant, under s 44CA(3) of the CCA, the Council must have regard to:

(a) the effect that declaring the service would have on investment in:

(i) infrastructure services; and

(ii) markets that depend on access to the service; and

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

Investment effects

6.9 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)

6.10 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). The centrality of the effect of declaring a service on investment has been reaffirmed in s 44CA(3)(a). This section makes the effect of declaration on

investment a compulsory consideration for the Council when considering the promotion of public interest under s 4CA(1)(d) of the CCA.

6.11 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.

6.12 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.

Administrative and Compliance costs

6.13 The administrative and compliance 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 impact on the public interest, interested parties are encouraged to provide such information as is available to enable a meaningful assessment of these costs.

6.14 Costs that are taken into account under criterion (d) 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.

6.15 The level of compliance 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.

6.16 The provision of access to a facility may also 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.

6.17 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. The protections provided by arbitration are set out 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, make or maintain extensions (including expanding the capacity of the facility and expanding the geographical reach of the facility) or interconnections to the facility (ss 44W(1)(e),(ea) 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)).

6.18 Any service provider opposing an application for declaration of a service should provide clear evidence why the protections under the CCA would not adequately deal with the issues addressed by the CCA. This would include, for example, explaining why potential costs, either generally or in the context of the particular service to which access is sought, would not be taken into account by the ACCC in setting prices in an arbitration.

Economic efficiency and competition and the public interest

6.19 The Council considers issues of economic efficiency and competition to be important in the context of promoting the public interest.

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

6.21 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 (d). 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 6.9 – 6.12).

7 Duration of declaration

7.1 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.

7.2 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.

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

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

7.5 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

7.6 Section 44J of the CCA provides that the Council may recommend that a declaration be revoked.

7.7 The Council cannot recommend revocation of a declaration unless it is satisfied that, at the time the Council makes that recommendation,

- it would have been prevented from recommending the service concerned be declared; or
- the service could not have been declared.

7.8 In essence, in order to recommend revocation, the Council must reach the view that if an application for declaration were being brought today, it would not meet one or more of the declaration criteria. The wording of s44J was changed slightly by the 2017 amendments. The reformulated provision ensures that the Council is able to consider whether the service is (or has become) the subject of a certified access regime when recommending the revocation of a declaration.

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Appendix A Sections 44F, 44G and 44CA 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 apply in writing to the Council asking the Council to recommend that a particular service be declared unless:

(a) the service is the subject of a regime for 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

(b) the service is the subject of an access undertaking in operation under Division 6; or

(c) if a decision is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process—the service was specified, in the application for that decision, as a service proposed to be provided by means of the facility; or

(d) if the service is provided by means of a pipeline (within the meaning of a National Gas Law)—there is:

(i) a 15-year no-coverage determination in force under the National Gas Law in respect of the pipeline; or

(ii) a price regulation exemption in force under the National Gas Law in respect of the pipeline; or

(e) there is a decision of the designated Minister in force under section 44LG that the service is ineligible to be a declared service.

Note: This means an application can only be made or dealt with under this Subdivision if none of paragraphs (a) to (e) apply.

44F(2) [Council must act] After receiving an application under subsection (1), 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(5) [Withdrawal of applications] The applicant may withdraw the application at any time before the Council makes a recommendation relating to it.

Section 44G: Criteria for the Council recommending declaration of a service

The Council cannot recommend that a service be declared unless it is satisfied of all of the declaration criteria for the service.

Section 44CA: Meaning of *declaration criteria*

44CA(1) The declaration criteria for service are:

(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of 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 the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

(i) over the period for which the service would be declared; and

(ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility);

(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; and

(d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

44CA(2) For the purposes of paragraph (1)(b):

(a) if the facility is currently at capacity, and it is reasonably possible to expand that capacity, have regard to the facility as if it had that expanded capacity; and

(b) without limiting paragraph (1)(b), the cost referred to in that paragraph includes all costs associated with having multiple users of the facility (including such costs that would be incurred if the service is declared).

44CA(3) Without limiting the matters to which the Council may have regard for the purposes of section 44G, or the designated Minister may have regard for the purposes of section 44H, in considering whether paragraph (1)(d) of this section applies the Council or designated Minister must have regard to:

(a) the effect that declaring the service would have on investment in:

(i) infrastructure services; and
(ii) markets that depend on access to the service; and

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

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 (including expansions of the capacity of the facility and expansions of the geographical reach 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 (including expanding the capacity of the facility and expanding the geographical reach of the facility);

(ea) requiring the provider to bear some or all of the costs of maintaining extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach 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 (including expansions of capacity and expansions of geographical reach) 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

Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
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.