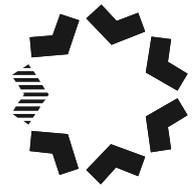


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Third Party Access to infrastructure – Why, when and how?

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1 Introduction¹

As for most transactions relating to the provision of goods and services, a competitive market is the preferred means of determining the prices and other terms of access to the services provided by infrastructure facilities. Where markets for services provided by infrastructure facilities are effectively competitive, the operation of those markets is likely to ensure access is provided efficiently and at appropriate prices. In such circumstances there will also be little incentive for facility owners, acting independently, to deny access on reasonable terms, as access seekers will simply go elsewhere to obtain substitutable services.

However, while many infrastructure services are provided in competitive markets, others are not and access seekers will need to develop new facilities unless they can negotiate access to existing infrastructure. An access seeker and the infrastructure owner must reach a commercial arrangement, or new facilities must be developed.

In a limited number of cases, however, the underlying economics associated with the provision of specific infrastructure is such that one facility can service all current and anticipated demand at a lower cost to the nation than two or more facilities. In such circumstances duplication is wasteful and undesirable.

Where such a situation occurs, the development of competition in related markets may also be dependent on being able to use the facility and the parties which own the facility in effect control the dependent markets. Where these owners are vertically integrated businesses and also participate in the related markets, they have strong incentives to limit the competition they face from other parties, or to prevent it entirely by denying others access at any price.

Where participation in what would otherwise be competitive markets is dependent on access to bottleneck infrastructure effective and efficient mechanisms to allow third party access on appropriate terms are essential to safeguard the national interest in promoting competitive markets and avoiding unnecessary and wasteful duplication of infrastructure investments. Without such mechanisms, competition is likely to be stifled with consequent losses in efficiency and innovation. Alternatively the economy would be burdened with inefficient and unnecessary duplication of costly facilities.

It is in Australia's national interest that natural monopoly infrastructure be shared on terms that provide the infrastructure owner an appropriate commercial return on the investment, including consideration of the risks of that investment. Under such an approach infrastructure owners are no worse off from being required to allow access and appropriate

¹ This paper is based on a paper prepared for the ACCC 2007 Regulatory Conference, 26-27 July 2007. The views expressed in this paper are those of the author.

incentives and rewards for infrastructure investment are retained, however infrastructure owners are prevented from exploiting their power over dependent markets.

While these bottleneck situations are relatively rare, where they do occur they are often significant in terms of the level of restriction on competition that results and the size and value of assets involved. Energy and telecommunication networks are common examples of natural monopolies. For these networks regulated access is the norm and in many cases additional restrictions to prevent the network owners from operating in dependent markets are also imposed.

Other facilities that can exhibit the natural monopoly characteristics that lead to bottlenecks include railways, ports, large scale dedicated loading and unloading facilities (for example for loading grains), water and waste water transport facilities, and a range of other infrastructure facilities.

Internationally there are a range of approaches to the bottleneck access issue. Some countries seek to rely on specific legal rules for each infrastructure sector – generally addressing the access issue as part of a broad ranging approach to regulation of a sector of economic activity. Other countries seek to address the issue through ongoing public ownership of bottleneck infrastructure - retaining political or administrative control over who gains access and on what terms. Still other countries seek to rely on general competition or antitrust laws governing misuse of market power or ‘monopolization’ and public enforcement and private litigation to address refusals to allow access.

In Australia, the National Access Regime established under Part IIIA of the Trade Practices Act 1974 (Cth)(TPA) provides a generally applicable regulatory scheme for third party access to natural monopoly bottlenecks. In addition there are other specific regimes for telecommunications and a range of state based regimes that govern access to gas pipelines, some ports and other specific bottleneck facilities. These other regimes essentially mirror the TPA scheme.

The National Access Regime provides for particular services provided by monopoly infrastructure facilities to be ‘declared’. Where a service is declared access disputes can be taken to the Australian Competition and Consumer Commission (ACCC) which then undertakes an arbitration process to set access terms.

This paper focuses on the scope of regulation under the National Access Regime rather than the operation of the regime as it affects regulated businesses. Thus it is primarily concerned with the first steps in the regulatory process under that regime and in particular the process by which services provided by bottleneck infrastructure are declared.

This paper outlines the development of the National Access Regime and its application over the twelve or so years it has operated. From this some general observations are drawn. The paper then examines recent developments and changes to the regime and their likely impact. Finally the scope for further changes to ensure the regime better meets its intended policy objectives is discussed.

2 Development of the National Access Regime

The Hilmer Report

The development of the National Access Regime can be traced back to the report commonly referred to as the Hilmer Report².

After an extensive public inquiry a Committee lead by Prof Fred Hilmer recommended in 1993 a comprehensive National Competition Policy (NCP) for Australia aimed at improving productivity in order to enhance national living standards and opportunities.

Competition policy that sought to remove barriers to competition and promote efficiency, innovation and economic growth was central to the Hilmer recommendations. Providing for third-party access to certain facilities that are essential for competition was one of six specific elements of competition policy addressed by the Hilmer Report³.

In this regard the Committee concluded⁴:

Introducing competition in some markets requires that competitors be assured of access to certain facilities that cannot be duplicated economically — referred to as "essential facilities". Effective competition in electricity generation and rail services, for example, will require firms to have access to the electricity transmission grid and rail tracks.

While the misuse of market power provision of the [Trade Practices] Act can sometimes apply in these situations, submissions to this Inquiry confirmed the Committee's own assessment that something more is required to meet the needs of an effective competition policy.

The Committee noted that although there were some arrangements in place to prevent denial of access to facilities that were essential for competition, these had developed on an industry specific basis and there was no general mechanism capable of effectively dealing with this issue across the economy.

In the Committee's view an effective national competition policy needed to include provisions to "enable firms to have assured access to certain 'essential facilities' where such access is required to compete in markets". It recommended that a new legal regime be established to provide a right of access to specified 'essential facilities'. The regime was to

² Report by the Independent Committee of Inquiry into a National Competition Policy for Australia ["Hilmer Report"], August 1993.

³ The others were: limiting anti-competitive conduct of firms, reforming regulation that unjustifiably restricts competition, reforming the structure of public monopolies to facilitate competition, restraining monopoly pricing and fostering competitive neutrality between government and private businesses when they compete.

⁴ Hilmer Report at pp xxxi-xxxii.

provide safeguards for owners of such facilities and users, and was to be sufficiently flexible to deal with access issues across a range of industry sectors and facility types and to both publicly and privately-owned facilities.

The Hilmer Committee saw the key features of the proposed regime as including:

- That the regime could only be applied to a facility without the owner's consent if declaration was recommended by an independent body (the National Competition Council) after a public inquiry, on the basis that access was "essential to permit effective competition" and declaration was in the public interest "having regard to the significance of the industry to the national economy and the expected impact of effective competition in that industry on national competitiveness"
- Declaration would specify pricing principles for the individual facility; but "thereafter, actual prices would be determined through negotiation between the parties and, if need be, through binding arbitration"
- The access declaration would specify any other terms and conditions relating to access designed to protect the legitimate interests of the owner of the facility
- All access agreements would be placed on a public register and additional safeguards necessary to protect the competitive process could be added as required.

The Hilmer Report⁵ also specified that, although due to a history of government ownership many of the essential facilities around which access issues arose were in the public sector, "the public interest rationale for providing an access right is the same irrespective of ownership".

The Hilmer Committee did not make its recommendations in relation to access issues lightly. It considered the extent to which these matters might be addressed under the existing provisions of the TPA, in particular s46, or through judicial interpretations that might embrace approaches such as the United States essential facilities doctrine. The Committee correctly concluded that even if it were possible to overcome difficulties in proving a denial of access amounted to a contravention of s46, or any other restrictive trade practice proscribed by the TPA, there were very real difficulties in determining and implementing an appropriate remedy through the courts. The Committee also noted that the Australian courts had rejected or at best failed to adopt the United States essential facilities doctrine and in any event the limits of the doctrine are not yet clear. The Committee noted the observation that, "the doctrine has not developed with clarity, coherence or consistency, let alone with strong economic foundations"⁶.

⁵ Hilmer Report at p239.

⁶ See Vautier K M, The "Essential Facilities" Doctrine (1990) at 65. See also Areeda P, "Essential facilities: An Epithet in Need of Limiting Principles" (1990) 58 Antitrust Law Journal 841 - per Hilmer Report at footnote 18 (p 244).

The Committee also examined international experience beyond the United States. It examined the New Zealand situation where access issues were at the time dealt with under the general restrictive trade practice provisions of the Commerce Act which were and generally remain similar to those contained in the TPA. It noted that the New Zealand Commerce Commission had suggested that the general provisions of the Commerce Act were unlikely to be fully effective in removing obstacles to competition where an essential facility is involved⁷. This conclusion, even if in doubt at the time, has been borne out by subsequent events and the need for New Zealand to enact extensive additional regulation to overcome access difficulties in the telecommunications and energy sectors and ongoing debate about the need for a more generally applicable access regime.

The Committee also examined the experience from sectors and jurisdictions that had established special access rights for particular facilities. In this regard the Committee concluded that it was not persuaded of the need to address access issues on an industry specific basis. It noted⁸ that:

While each industry has its own peculiar characteristics, there are also important similarities between access and related issues across the key infrastructure industries. The development of a common legal framework offers the benefits of promoting consistent approaches to access issues across the economy. It also permits expertise and insights gained in access issues in one sector to be more readily applied to analogous issues in other sectors.

The Committee proposed the establishment of a general access regime which could potentially be applied to any sector of the economy. Importantly it noted that “such a regime should be applied sparingly, focussing on key sectors of strategic significance to the nation”.

The key elements of the Committee’s proposals were summarised in its report as follows⁹:

⁷ NZ Commerce Commission, Telecommunications Industry Inquiry Report, 23 June 1992.

⁸ Hilmer Report at pp248-249.

⁹ Hilmer Report, Box 11.1 at p 261.

General Access Regime – Summary of Key Elements	
WHEN:	<p>The designated Commonwealth Minister could only declare access to a particular facility if:</p> <p>(a) the owner agrees; or</p> <p>(b) the Minister is satisfied that</p> <p style="padding-left: 40px;">(i) access to the facility in question is essential to permit effective competition in a downstream or upstream activity;</p> <p style="padding-left: 40px;">(ii) such a declaration is in the public interest, having regard to:</p> <p style="padding-left: 80px;">(1) the significance of the industry to the national economy; and</p> <p style="padding-left: 80px;">(2) the expected impact of effective competition in that industry on national competitiveness; and</p> <p style="padding-left: 40px;">(iii) the legitimate interests of the owner of the facility will be protected by the imposition of an access fee and other terms and conditions that are fair and reasonable.</p> <p>Where the owner of a facility has not consented to a declaration, the Minister may only make such a declaration if recommended by the independent advisory body and only on terms and conditions recommended by that body or on such other terms and conditions as agreed by the owner of the facility.</p>
ACCESS PRICE:	<p>Each access declaration would specify pricing principles that provide for a "fair and reasonable" access fee. The principles would be determined by the NCC, but declared by the Minister. They could be altered by agreement with the owner of the facility. The parties are then free to negotiate their own agreements, subject to a requirement to place them on a public register.</p> <p>If the parties cannot agree, either party may seek binding arbitration by or under the auspices of the Australian Competition Commission.</p>
OTHER TERMS & CONDITIONS	<p>Each access declaration would specify any other terms and conditions relating to access designed to protect the legitimate interests of the owner of the facility and which were "fair and reasonable". The terms would be declared by the Minister and be based on the recommendations of the NCC.</p>
ADDITIONAL SAFEGUARDS	<p>As a general rule, the requirement to place access agreements on a public register should suffice to protect the competitive process. Where recommended by the independent body, the Minister may also declare that other safeguards should apply aimed at protecting the competitive process.</p>

National Competition Policy

Following receipt of the Hilmer Report in August 1993, in April 1995 all Australian Governments resolved to adopt a National Competition Policy.

This policy was centred on three intergovernmental agreements which set out the reforms that governments undertook to put in place. The reforms agreed to were ambitious and wide ranging.

The NCP reforms provided for:

- The extension of the provisions of the TPA prohibiting anti-competitive activities (such as the abuse of market power and market fixing) to all businesses. (Previously, most government owned and some private businesses were exempt)
- The introduction of competitive neutrality so privately owned businesses could compete with those owned by Government on an equal footing
- The review and reform of all laws that restrict competition unless it could be demonstrated that the restrictions are in the public interest
- The development of a National Access Regime to enable competing businesses to use nationally significant infrastructure (such as airports, electricity cables, gas pipelines and railway lines), and
- Specific reforms to the gas, electricity, water and road transport industries, including measures to facilitate access and to apply the National Access Regime.

These reforms extended and complemented other previous microeconomic reform initiatives such as floating the Australian dollar, reforming the regulation of financial markets and systematically reducing barriers to international trade.

Further, NCP transformed the Trade Practices Commission into the ACCC and incorporated the price monitoring role of the Prices Surveillance Authority into that body. It also reconstituted the Trade Practices Tribunal as the Australian Competition Tribunal.

NCP also saw the establishment of the National Competition Council (NCC) with the roles of overseeing achievement of NCP goals and advising on associated payments from the Commonwealth to States and Territories, and acting as the independent advisor on access matters as envisaged by the Hilmer Report.

As a part of NCP, governments agreed to a regime for third party access to services provided by infrastructure facilities. Clause 6 of the Competition Principles Agreement sets out the basis on which the Commonwealth was to legislate to establish a regime for access to services provided by means of significant infrastructure facilities where:

- (a) it would not be economically feasible to duplicate the facility;
- (b) access to the facility is necessary in order to permit effective competition in a downstream or upstream market;

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- (c) the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy; and
 - (d) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.

Clause 6 also recognised that the access regime to be established by the Commonwealth should not cover services that were subject to a State or Territory access regime unless that regime was ineffective or problems were created from a facility being situated in more than one jurisdiction. The clause also set out the principles that needed to be incorporated in a State or Territory access regime to be considered to be effective. As with the national regime, these principles sought to ensure that the regime was applied only in a limited set of circumstances and that the interests of facility owners and access seekers were balanced in accordance with the overall public interest.

While some differences are apparent and clause 6 adds additional specificity, NCP and in particular clause 6 of the Competition Principles Agreement, largely sought to implement the approach to regulation of access to essential facilities envisaged in the Hilmer Report and to apply these throughout Australia.

3 The National Access Regime

Outline

The Australian Government established the National Access Regime envisaged by the NCP through Part IIIA of the TPA.

The stated objectives¹⁰ 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.

Part IIIA provides a regulatory framework for access negotiation supported by dispute resolution procedures. It sets out three parallel pathways for access to infrastructure services:

- Declaration
- Certification of a State or Territory Access Regime
- Provision of Access Undertakings

Declaration

Declaration provides a mechanism for determining whether the services provided by a particular facility¹¹ should be subject to regulation. Parties seeking access to particular service(s) provided by a facility can apply to the NCC for a recommendation that the service(s) be declared. The NCC then considers whether the service should be declared in terms of a set of declaration criteria and advises a decision making Minister¹² as to whether he or she should make a declaration in the particular case. Ministerial decisions on declaration applications are subject to review by the Competition Tribunal.

For the NCC to recommend declaration it must be affirmatively satisfied:

¹⁰ This objectives clause was inserted into Part IIIA by the Trade Practices Amendment (National Access Regime) Act 2006 (Cth).

¹¹ Under Part IIIA services provided by facilities may be declared. The facilities are not declared - ownership or control of facilities is not changed as a result of declaration.

¹² The decision making Minister is currently the Australian Government Minister for Competition Policy and Consumer Affairs, or in the case of facilities owned by a State or Territory Government the Premier or Chief Minister of the State or Territory.

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- (a) that access (or increased access) to the service would promote a material¹³ increase in competition in at least one market (whether or not in Australia), other than the market for the service;
 - (b) that it would be uneconomical for anyone to develop another facility to provide the service;
 - (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy;
 - (d) that access to the service can be provided without undue risk to human health or safety;
 - (e) that access to the service is not already the subject of an effective access regime;
 - (f) that access (or increased access) to the service would not be contrary to the public interest.

For a service to be declared all six declaration criteria specified in s44G(2) of the TPA must be met.

In addition, other provisions of the TPA preclude declaration in a range of other circumstances, including where it would be economical for anyone to develop another facility that could provide part of the service to which access is sought (TPA s44F(4)), or where a service is provided by a facility constructed and operated in accordance with a competitive tender process approved by the ACCC (TPA s 44H(3A)).

The definition of service in s44B of the TPA also excludes: the supply of goods; or the use of intellectual property; or the use of a production process, except to the extent that these are an integral but subsidiary part of the service.

The declaration and other criteria that must be met before a service can be subject to access regulation under the National Access Regime strictly limit the extent of regulation that can be imposed under this regime. In particular, declaration is not available unless a bottleneck monopoly situation exists and the relevant decision makers are satisfied that access will promote a material increase competition in a dependent market. Even in those circumstances a decision maker must also be satisfied that the facility providing the service is nationally significant and is not already subject to an alternative regulatory mechanism. Further, before declaring a service a decision maker must be satisfied that regulation is not

¹³ The materiality element of this criterion was introduced by the Trade Practices Amendment (National Access Regime) Act 2006 (Cth). It is, however, apparent from NCC recommendations and Competition Tribunal decisions that this amendment formalised an existing approach to applying criterion (a).

contrary to the public interest and can be provided without compromising human health and safety.

Once a service is declared, third parties have a right to negotiate access to the service(s). If those negotiations are unsuccessful then access seekers have the right to notify an access dispute and call on the ACCC to resolve the dispute through binding arbitration.

Declaration does not automatically provide access seekers with a right to use a service. It does however provide a basis for negotiation and recourse to arbitration. Importantly, neither declaration nor the arbitration process give access seekers a free ride.

In determining access prices and other terms the ACCC must seek to balance the demands of access seekers and the interests of providers of declared services. The law the ACCC must apply in arbitrating access disputes contains a range of safeguards to protect the legitimate interests of infrastructure owners. Appendix A contains the text of the key provisions of the TPA that govern the ACCC's arbitration role.

It would be totally contrary to the objectives specified for the National Access Regime for access prices or other conditions of access to be set so that providers were not compensated for the costs of providing access and provided with a commercial return on their infrastructure investment.

In determining a dispute as to access the ACCC is required to take the following matters into account:

- (a) the legitimate business interests of the provider, and the provider's investment in the facility;
- (b) the direct costs of providing access to the service;
- (c) the operational and technical requirements necessary for the safe and reliable operation of the facility; and
- (d) the economically efficient operation of the facility.¹⁴

Furthermore the ACCC is specifically prohibited from making an access determination where it would prevent an existing user having sufficient capacity to meet its reasonably anticipated requirements and no determination can result in any transfer of ownership of any part of the facility.

Where expansion or enhancement of a facility is needed to accommodate access seekers, the costs of this are to be met by the access seekers along with interconnection costs.

If it is unable to arrive at appropriate access terms to recognise the interests of an infrastructure owner, the ACCC does not have to require the provision of access to a

¹⁴ Sections 44X(1) (a) - (g) of the TPA.

declared service.¹⁵ Thus if an access seeker's demands were excessive or likely to unduly interfere with an infrastructure owner's operations access can and should be denied unless the demands can be moderated. The ACCC is also given powers to deal with vexatious access disputes or disputes pursued in bad faith by terminating arbitrations.

Certification

Certification provides a mechanism by which State or Territory access regulation can take precedence over declaration under Part IIIA. Where a State or Territory chooses to implement access regulation it can apply to the NCC for a recommendation that its regime be certified as effective. Where such a recommendation is made and accepted by a decision making Minister¹⁶ the relevant State or Territory access regime applies and services covered by the certified regime cannot be declared. Ministerial decisions in relation to certification applications are subject to review by the Competition Tribunal.

In order to be certified a State or Territory regime must apply the principles set out in clause 6 of the Competition Principles Agreement (see Appendix A) and have regard to the objectives of the National Access Regime set out in Part IIIA of the TPA. In this way the scope and operation of State and Territory regimes is aligned with the national regime.

The operation of certified State and Territory access regimes has been particularly significant in relation to the regulation of access to gas pipelines and railways. It is intended that the planned reform of regulation of electricity markets will also involve certification of harmonised access rules to be applied in most States and Territories. As a part of the National Reform Agenda agreed in April 2007, all Australian governments also agreed to certification of all State/Territory access regimes by 2010.

Access Undertakings

Part IIIA allows infrastructure providers to develop terms and conditions on which they will provide access and voluntarily submit these to the ACCC for approval as an access undertaking. This allows infrastructure providers, including those looking to establish new infrastructure, to settle the basis on which access will be available in advance. Where the ACCC accepts an access undertaking, the service(s) that are subject to the undertaking cannot be declared. Recent amendments to the TPA also allow owners or operators of declared facilities to submit access undertakings.

Section 44ZZA(3) of the TPA sets out the criteria that the ACCC must apply in considering whether to accept an access undertaking.

¹⁵ Section 44V(3) of the TPA.

¹⁶ The decision maker is currently the Australian Government Minister for Competition Policy and Consumer Affairs.

Declaration Decisions 1996 - 2007

The following sections summarise the key reasoning and conclusions reached by the NCC, decision making Ministers, the Competition Tribunal and courts in the declaration applications decided to date. Necessarily these summaries are incomplete and do not reflect all the information considered by, analysis undertaken, or conclusions reached by the NCC, a decision maker, the Competition Tribunal or a court. Additional information can be found in the Annual Reports of the NCC and, of course, in the recommendation reports prepared by the NCC, reasons for decisions provided by Ministers and the decisions of the Competition Tribunal or court.

Australian Union of Students (April 1996)

On 24 April 1996, the NCC received an application from the Australian Union of Students (AUS) seeking access to a service described by AUS as the 'Austudy Payroll Deduction Service'.

AUS sought to require the Commonwealth Department of Employment, Education, Training and Youth Affairs (DEETYA) to establish a system of payroll deductions to enable it to be paid membership fees directly from students' Austudy payments. The facility to provide the 'service' was DEETYA's computer network.

On 19 June 1996 the NCC recommended to the Commonwealth Treasurer that the service sought by the AUS not be declared. The NCC was not satisfied that it would be uneconomical for anyone to develop another facility to provide the service sought by AUS or that the facility used to provide the relevant service (DEETYA's computer network) was nationally significant. Furthermore, after weighing the likely costs and benefits of access the NCC considered that providing access to the service sought by AUS would be contrary to the public interest.

On 14 August 1996, the Treasurer announced his agreement with the NCC's recommendation and his reasons.

On 30 August 1996, AUS lodged an appeal with the Competition Tribunal, seeking a review of the Treasurer's decision. On 28 July 1997, the Tribunal affirmed the Treasurer's decision not to declare the service. The Tribunal found that the DEETYA computer system was not nationally significant. The Tribunal also found that providing access to the Austudy payroll system would be contrary to the public interest.

In its decision the Tribunal also questioned whether the service sought by the applicant was a service within the meaning of the TPA. The Tribunal said that "whether a computer network can constitute a 'facility' for the purposes of Part IIIA is also open to question".

Australian Cargo Terminal Operators (November 1996)

On 6 November 1996, the NCC received six concurrent applications from Australian Cargo Terminal Operators Pty Ltd (ACTO) to declare particular services at the Sydney and Melbourne International Airports.

ACTO sought declaration of the following services:

- The service provided through the use of the freight aprons and hard stands to load and unload international aircraft at Sydney International Airport ('S1') and Melbourne International Airport ('M1');
- The service provided by the use of an area at the airport to: store equipment used to load/unload international aircraft; and to transfer freight from the loading/unloading equipment to/from trucks at Sydney International Airport ('S2') and Melbourne International Airport ('M2'); and
- The service provided by use of an area to construct a cargo terminal at Sydney International Airport ('S3') and Melbourne International Airport ('M3').

ACTO identified the Federal Airports Corporation (FAC) as the provider of the service.

On 8 May 1997, the NCC forwarded its recommendations to the Commonwealth Treasurer. It recommended that the services specified in the applications S1, S2, M1, and M2 should be declared, but that those specified in applications S3 and M3 should not be.

The NCC determined that the services ACTO wanted declared fell within a market for airport services that are necessary for international airline operations at both Sydney and Melbourne. The NCC identified the main market in which competition might be promoted if access were granted as the markets for ramp handling services and the market for cargo terminal operator (CTO) services, at Sydney and Melbourne respectively. These two markets are both elements in the airfreight chain but are functionally distinct from each other because each market requires the use of different skills and equipment.

Having identified the relevant markets, the NCC then considered whether access would promote competition in the CTO and ramp handling markets. It surveyed the present state of competition in those markets. It noted the FAC's views that the current ramp operators and CTOs gave priority to their own cargo and passenger business as opposed to cargo delivered by other airlines and that the recovery of import freight suffered from long delays. The NCC found evidence that there was under-investment in facilities, rapidly increasing prices, and poor and undifferentiated service in these markets. It considered market access was the key to increasing competition. The NCC concluded increased access could have positive effects on price, service quality and differentiation, and investment in new facilities that relieve congestion.

The NCC rejected the following arguments made against declaration:

- Providing access to parties whose methods of operation were unknown or unproven would not increase competition.
- Declaration would result in too many participants entering the market, which would diminish the efficiency of freight handling at the airport.
- Scarcity of land would impose an absolute constraint on access.

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- Airline alliances for reciprocal freight handling services could make it difficult for an independent operator to enter the market, even after declaration.

The NCC considered that there was a strong connection between the services provided by the facilities and the other services provided by airport infrastructure, such as runways. To duplicate the facilities to provide the services that the applicant intended to provide, it would be necessary to duplicate the Sydney and Melbourne International Airports. The NCC also considered whether it was economic to construct another airport to handle the freight services sought to be declared in the application. The NCC found that Sydney and Melbourne International Airports possessed features that gave them significant market power and natural monopoly characteristics. The NCC concluded they would be uneconomic to duplicate.

The NCC found that on-airport and off-airport CTOs were imperfect substitutes. But that it was economic to duplicate the off-airport cargo terminals. As a result the NCC concluded that applications S3 and M3 did not meet this requirement for declaration (criterion (b)).

The NCC considered that, as a matter of statutory interpretation, the national significance criterion related to the facilities that provided the service to which access was sought rather than the whole airport. However, it found that the location of the facilities at the airports was a highly important factor in assessing the facilities' significance. On a variety of measures the NCC found the facilities were nationally significant.

A further significant issue in this application was whether it was possible to operate an off-airport CTO facility safely. The FAC contended that on-airport entry by an off-airport CTO operator was dangerous because it created unacceptable congestion. However, the NCC concluded that provided new entrants observed existing safety regulations, access could be provided without undue risk.

Submissions to the NCC suggested possible alternative access regimes as effective alternatives that would preclude declaration. Of these the NCC considered only the opportunity for declaration under the Airports Act to be relevant and then only in relation to Melbourne Airport. Because that regime did not come into effect until 12 months after the airport's sale the NCC was not satisfied that an effective access regime was in place. The prospect of an effective access regime coming into force in relation to Melbourne Airport did however lead the NCC to recommend declaration only until just before expiry of the 12 month period following sale in order to give the new airport owner a chance to lodge an undertaking prior to the services being declared under the Airports Act.

The NCC considered, and rejected, several claimed public interest objections to declaration of the service, as follows:

- It was argued that declaration would deprive a new airport owner of the opportunity to lodge an undertaking. The NCC considered that it was unjustifiable to delay access by potentially over twelve months. If declaration expired in twelve months, the new owner would still have some time to lodge an undertaking.

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- The NCC considered that declaration would not prevent the FAC from pursuing its plans for Sydney Airport, noting that investment decisions made in a competitive environment were more likely to be economically efficient.
 - It was argued that declaration would discourage the investment necessary for effective competition. The NCC did not see it as appropriate to judge between the commercial feasibility of different forms of operations. These were market-place decisions.
 - It was argued that declaration would interfere with normal planning processes. In the NCC's view, these issues could be addressed during negotiations of the terms and conditions of access. The NCC noted safeguards in Part IIIA of the TPA to protect existing rights of access and observed that many facilities have competing uses and appropriate judgments about trade-offs are difficult without competition in all types of usage.

On 14 July 1997, the Treasurer announced his acceptance of the NCC's recommendations and the reasons supporting them.

The FAC subsequently lodged an appeal with the Australian Competition Tribunal in relation to declaration of services at Sydney Airport (S1 and S2). The Tribunal handed down its decision on 1 March 2000.

The Tribunal:

- Declared the service provided by the use of the freight and passenger aprons and the hard stands at Sydney International Airport for the purpose of enabling ramp handlers to load freight from loading equipment onto international aircraft and to unload freight from international aircraft onto unloading equipment;
- Declared the service provided by the use of an area at Sydney International Airport for the purpose of enabling ramp handlers:
 - to store equipment used to load and unload international aircraft, and
 - to transfer freight from trucks to unloading equipment and to transfer freight from unloading equipment to trucks, at the airport.

The declarations were effective from 1 March 2000 until 28 February 2005.

In its decision the Tribunal endorsed the view that declaration is primarily concerned with the services of natural monopoly infrastructure where access (or increased access) to those services would promote competition in another market. Specifically, the Tribunal considered "that the 'uneconomical to develop' test should be construed in terms of the associated costs and benefits of development for society as a whole". The Tribunal considered that this interpretation was consistent with the underlying intent of the legislation as expressed in the second reading speech and picked up in the language of the statute.

The Tribunal also supported the concept that the ‘promotion of competition’ involves creating the conditions or environment for improving competition from what it would be otherwise. The Tribunal noted that as:

“the purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service, the ‘promotion of competition’ test is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market”.

Carpentaria Transport (December 1996)

On 24 December 1996, the NCC received an application from Carpentaria Transport Pty Ltd seeking declaration of specified rail freight services on the Brisbane-Cairns corridor.

Carpentaria sought increased access to services provided by Queensland Rail (QR) needed to run dedicated trains along the Brisbane-Cairns line. It specified a range of facilities — including narrow gauge track, rolling stock, shunting equipment, lifting equipment, and terminals — which it argued were necessary to provide the service.

Because QR was owned by the Queensland Government the NCC’s recommendation was provided to the Queensland Premier.

The NCC recommended that the Premier not declare the service sought by Carpentaria because it considered that the service did not satisfy the section 44F(4) test (whether it is economic to duplicate part of the facilities). While the NCC accepted that it was not economic to duplicate the rail track to which access was sought, it was not satisfied that rolling stock, terminal facilities and lifting equipment also included in the application could not be economically duplicated. The NCC also concluded that these above rail facilities were not of national significance.

On 1 August 1997, the Queensland Premier announced his decision not to declare the service. However the Premier’s reasoning differed from that of the NCC in several respects. Specifically:

- The Premier agreed that it would be economical in part to develop above track facilities such as rolling stock and terminals.

However, in his reasons, the Premier stated that “...it may not, however, be commercially feasible to reproduce all of the components of the above track service within the timeframe to which the access application has laid claim”.

The NCC, in its reasons, did not accept the idea that the declaration period sought defined the criterion of whether a facility would be economic to duplicate on the basis that applicants could specify unreasonably short periods for declaration to meet this criterion.

- The Premier was *not* satisfied that access would promote competition in another market.

In his decision, the Premier argued that without more data and extensive economic research, it was not possible to determine whether access would promote competition in another market. The Premier also indicated that he was not satisfied there is a separate market for the service, and did not accept that freight forwarding is a distinct market.

This differed from the NCC's assessment, which concluded on several grounds that rail line haul services and freight forwarding services were in separate markets, and that increased access would promote an increase in competition which, while unlikely to be large, would not be trivial either.

The Premier also argued that, even if freight forwarding was a distinct market, access would not promote competition due to constrained capacity resulting in queuing problems.

It had been the NCC's view that this issue is not relevant for considering whether a service should be declared. Rather, the issue properly arose in the negotiation and arbitration phase. Arbitration could require that an infrastructure owner extended the facility at an access seeker's expense.

- The Premier also stated in his decision that he did not consider Carpentaria's application "demonstrated a public interest benefit", and that granting access to QR's above track services would discourage investment by both QR and other users.

The NCC noted that the test of criterion (f) is expressed in the negative — 'not contrary to the public interest' — rather than the positive — 'in the public interest'. This reflected the fact that criteria (a) to (e) already addressed positive elements in the public interest.

On 21 August 1997, Carpentaria applied to the Competition Tribunal for a review of the Premier's decision but subsequently withdrew its application.

Specialized Container Transport and Sydney-Broken Hill rail service (February 1997)

On 4 February 1997, Specialized Container Transport (SCT) applied to the NCC for declaration of the Sydney-Broken Hill rail service provided by the NSW Rail Access Corporation (RAC).

SCT wished to offer its own rail freight forwarding service between Sydney and Perth and sought declaration of:

- Standard gauge railway lines between Sydney and Broken Hill along the routes, Sydney-Lithgow-Parkes-Broken Hill and Sydney-Cootamundra-Parkes-Broken Hill; and
- Services provided by rail infrastructure facilities which are integral to providing access to these lines.

SCT claimed that access to these facilities would promote competition in the freight transport market and the broader door-to-door freight forwarding market.

A key factor in determining if access would promote competition in these dependent markets was the extent to which rail transport was substitutable for transport services provided by other modes. In this regard the NCC found that competition between modes was not sufficiently strong to limit any gain in competition from increased access to rail.

The NCC concluded that access to the Sydney-Broken Hill service would promote competition in the markets for interstate and intrastate transport of non-bulk goods by rail and for the intrastate transport of bulk goods, by improving the prospects for entry of other rail freight operators into those markets.

The NCC also considered that it would be uneconomical for anyone to develop another facility to provide the Sydney-Broken Hill service, or to provide part of that service and that the facilities were nationally significant on the basis of their importance to the national economy.

The NCC observed that several pieces of legislation and other regulatory instruments govern rail operations in NSW and that all public and private rail operators in NSW must comply with these controls. It therefore concluded that access to the Sydney-Broken Hill service could be provided without undue risk to human health and safety.

Infrastructure services covered by 'effective' access regimes cannot be declared under Part IIIA of the TPA. At the time of this application, NSW had established an access regime for its rail network but as that regime had not been certified, the NCC was required to consider its effectiveness in relation to SCT's declaration application.

The NCC judged that the regime was ineffective on several grounds including:

- The uncertainty of the funding methodology for rail customer service obligations in NSW;
- A general lack of clarity on the application of the NSW regime's pricing principles;
- The absence of adequate information on access prices; and
- The absence of provisions within the regime to review the right to negotiate access.

The prospect of implementation of a national rail access arrangement was also put forward as a basis for the NCC not recommending declaration, but the NCC considered it was necessary to ensure that effective access arrangements are implemented as soon as possible in those areas where such arrangements are appropriate. As there was no guarantee of when any necessary changes would be made to the NSW regime, the NCC could not be sure of when this regime would be effective.

The NCC also noted that it had the ability to recommend revoking an access declaration after an effective regime was introduced. Therefore, it considered that declaring this service would not compromise the NSW Government's ability to implement uniform, effective

access arrangements for the NSW rail network. Accordingly, the NCC considered that there were no public interest grounds which would preclude a decision by the NCC to declare the Sydney-Broken Hill service.

In this case, the NCC recommended that the duration of declaration should be 15 years. In doing so, the NCC noted that this duration period provides a greater level of certainty about rail access rights than currently enjoyed by private rail operators in Australia. It also noted that declaration of the Sydney-Broken Hill service could be reconsidered at the end of the 15 year period. As access seekers were able to negotiate contracts which extended beyond the period of declaration, the period of certainty for individuals could be extended, while still allowing the application of the access regime to be reviewed.

On 16 June 1997, the NCC recommended to the Premier of NSW that the service to which SCT sought access be declared.

On 18 August 1997, the Premier announced that he had decided not to make a decision in relation to the NCC's recommendation given work being undertaken in relation to an application for certification of the NSW Rail Access Regime. Where a decision maker does not make a decision on an NCC recommendation within 60 days, the decision is deemed to be to refuse to declare a service. As a result, the service was not declared.

On 27 August 1997, SCT lodged an application for review with the Competition Tribunal. SCT later withdrew its application after reaching an agreement with the RAC.

New South Wales Mineral Council Limited (April 1997)

On 3 April 1997 the NCC received an application from NSW Minerals Council Limited for declaration of the Hunter Rail Line service provided using the railway line and associated infrastructure facilities controlled by the Rail Access Corporation (RAC).

A threshold issue in considering this application was the interpretation of Section 78 of the *Competition Policy Reform Act 1995* (CPRA) which provided a five year exemption from Part IIIA for a government coal-carrying service. The Minerals Council argued, and the NCC accepted, that this exemption applied only to declaration of a coal carrying service not to the underlying infrastructure.

The NCC's analysis of the declaration criteria in relation to this matter mirrored that undertaken in other rail access applications. The NCC did however outline a three step process to examining if access to the market for the service would improve the terms and conditions of products/services in other markets. This process involved:

1. *Assessing the current level of competitiveness in the market for the service.* If the market for the service was already a competitive market, introducing Part IIIA processes to it would not increase competition and hence provide an improvement in its terms and conditions sufficient to affect the competitiveness of other markets.

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2. *Verifying that nominated markets are additional.* Ensuring that the products affected by access are in additional markets, not in the market subject to the application.
 3. *Determining if access benefits are likely to be retained in the terms and conditions of products in other markets:*
 - (i) The structure of the other market needed to be examined to see if the benefits flowing from access in the market for the service were likely to be retained in the terms and conditions applying to products in the other markets. The benefits were likely to be maintained if the other market was competitive. If the additional market was uncontested, the benefits from access were likely to be absorbed by monopoly pricing.
 - (ii) If the subject service was an insignificant input into the other products, the benefits from access were unlikely to significantly alter the competitiveness of the other market.

On 1 September 1997, the NCC recommended to the Premier of NSW that the service be declared for a period of 15 years.

When the NSW Premier failed to make a decision within 60 day period, the NSW Minerals Council applied to the Competition Tribunal for a review of the resulting deemed decision not to declare.

The NCC's view on the application of the exemption under the CPRA was also subject to a Federal Court challenge, which needed to be heard before the Tribunal could proceed. In October 1998 the Federal Court upheld the NCC's view that the Hunter Rail Line was not a 'government coal-carrying service' and therefore the exemption in the CPRA did not apply¹⁷.

In November 1999, the NSW Rail Access Regime was certified as 'effective'. This regime covered the services provided by rail track in New South Wales, including the Hunter Rail Line. The NSW Minerals Council then withdrew its application for review, as there was then an 'effective' access regime under Part IIIA of the TPA, for the service.

Specialized Container Transport and certain Western Australian rail services (July 1997)

On 25 July 1997, the NCC received applications from Specialized Container Transport (SCT) for the declaration of certain Western Australian rail services including the service provided through the use of the Westrail railway network and associated infrastructure between Kalgoorlie and the Perth metropolitan area and particular marshalling and shunting services operated on Westrail track referred to collectively as 'freight support services'.

¹⁷ Rail Access Corp v New South Wales Minerals Council Ltd [1998] 1266 FCA (9 October 1998)

Again the NCC followed its conventional analysis including the three step assessment of promotion of competition outlined in the previous section.

On 21 November 1997, the NCC recommended to the Western Australian Premier that the rail service be declared but that the freight support services not be declared.

On 20 January 1998, the Western Australian Premier announced that he had decided not to declare Westrail's rail line service and its freight support services. The Premier considered that an access regime drafted the previous year (but not at that time legislated or submitted to the NCC for certification) to be an 'effective access regime' for the purposes of the Part IIIA criteria.

On 10 February 1998 SCT lodged an application for review of the WA Premier's decision with the Competition Tribunal. SCT later withdrew its appeal after reaching an agreement with Westrail.

Freight Victoria Limited (May 2001)

On 1 May 2001 the NCC received an application from Freight Victoria Limited, a private company trading as Freight Australia, for declaration of services provided by the rail lines it leased from the Victorian Government, excluding services provided by sidings and some branch lines.

The Victorian Rail Access Regime regulated access to all rail lines leased to Freight Australia, including sidings and branch lines, but only for the purposes of transporting freight. If the services under application were declared, then their access terms and conditions could be negotiated under Part IIIA, rather than under the Victorian regime.

While the NCC was satisfied that the other criteria for declaration were met, it was not satisfied that access would promote competition in a market other than the market for the service itself (criterion (a)). The NCC reasoned that declaration was unlikely to promote competition in these other markets to a greater extent than the Victorian rail access regime, notwithstanding that that regime was not certifiable as being effective. As a consequence of its view on criterion (a), the NCC was also not satisfied that access was not contrary to the public interest. The NCC therefore recommended that the service should not be declared.

The NCC forwarded its recommendation to the Commonwealth Minister in December 2001. The Minister accepted the NCC's recommendation and decided on 1 February 2002 not to declare the service that was the subject of the application.

In February 2002, Freight Australia applied to the Competition Tribunal for a review of the Minister's decision. In August 2002, it withdrew this application.

Aulron Energy Limited (September 2001)

On 12 September 2001, the NCC received an application from Aulron Energy Limited (Aulron) for declaration of the service provided by the Wirrida–Tarcoola rail track.

The service comprised a point-to-point rail track service provided by the use of the facilities under lease to APT. The rail track formed part of the Tarcoola–Darwin rail track, which was under construction from north of Alice Springs.

Third party access to the Tarcoola–Darwin rail track service was to be regulated under the Australasia Railway Third Party Access Regime to be established under the *AustralAsia Railway (Third Party Access) Act 1999*. The Commonwealth Treasurer had certified the regime as being effective in March 2000, but given that the Wirrida–Tarcoola rail track had not been prescribed in the access code, the NCC considered the Australasia railway access regime was not effective for the service that was the subject of this declaration application.

The NCC forwarded its final recommendation to the decision-maker (the Parliamentary Secretary to the Treasurer) in June 2002, recommending that the Wirrida–Tarcoola rail track be declared under Part IIIA.

The NCC was satisfied that the application by Aulron had met all of the declaration criteria. On 4 September 2002, the Parliamentary Secretary declared the service provided by the Wirrida–Tarcoola rail track for five years, effective from 27 September 2002.

On 18 October 2002, Asia Pacific Transport applied to the Competition Tribunal for a review of the declaration. On 10 March 2003, the various parties appeared before the Tribunal. At that hearing no party sought to place any material before the Tribunal. While the Tribunal noted it had general discretion to control its own proceedings and could call upon the NCC to provide information and other assistance, the Tribunal did not consider that it should take the initiative. Without any material before it the Tribunal was unable to be affirmatively satisfied that the declaration criteria were met, and the Minister’s declaration was set aside.

Virgin Blue Airlines Pty Ltd (October 2002)

On 1 October 2002, the NCC received an application from Virgin Blue Airlines Pty Ltd for a recommendation to declare the following services:

- The use of runways, taxiways, parking aprons and other associated facilities (airside facilities) necessary to allow aircraft carrying domestic passengers to:
 - take off and land using the runways at Sydney Airport; and
 - move between the runways and the passenger terminals at Sydney Airport (airside service); and
- The use of domestic passenger terminals and related facilities for the purposes of processing arriving and departing domestic airline passengers and their baggage at Sydney Airport (domestic terminal service).

In December 2002, Virgin Blue withdrew its application for declaration of the domestic terminal service after reaching a commercial agreement on terminal access with the service provider, Sydney Airports Corporation Limited (SACL).

In June 2003, the NCC issued a draft recommendation that the airside service should be declared. However, having undertaken further analysis and considered the submissions received in response to its draft determination the NCC concluded in its final recommendation that it could not be satisfied that criteria (a) and (f) of the declaration criteria were met and recommended against declaration.

For criterion (a) to have been met, the NCC needed to have been satisfied that access to the airside service would promote competition in the relevant passenger or freight domestic air transport markets. There was evidence that Sydney Airport's incentive to exercise market power by increasing prices for the airside service, for example, was tempered by the desire to increase passenger traffic to maximise revenue from retail concessions. A further likely constraint on the exercise of market power was the threat of re-regulation. The NCC concluded that the effect of these dual constraints would be unlikely to completely hinder Sydney Airport's ability and incentive to exercise market power. However, the NCC could not be satisfied that the impact of such a tempered exercise of market power on competition in the dependent markets would adversely affect competition to a material degree. The NCC went on to conclude that criterion (f), which considers whether access would be contrary to the public interest, was not met because the NCC could not be satisfied that the costs of access would be less than the resultant competitive benefits.

The final recommendation was forwarded to the Parliamentary Secretary to the Treasurer, being the relevant Minister, in November 2003. On 28 January 2004, the Minister decided not to declare the airside service. Virgin Blue sought a Competition Tribunal review of the Minister's decision.

In December 2005, the Competition Tribunal overturned the decision of the Parliamentary Secretary and declared the service for five years.

The Tribunal was satisfied that criteria (a) and (f) were met. Regarding criterion (a), it considered that SACL had misused its monopoly power in the past and that, unless the airside service is declared, competition in the dependent market would continue to be affected. In particular, the Tribunal was satisfied that SACL had misused its monopoly power by the manner in which, and the reasons for which, it had changed the basis for its charge for providing the airside service from an aircraft's maximum take-off weight to a charge on a per-passenger basis. (The Tribunal noted that this change adversely affected low cost carriers such as Virgin Blue as against full cost carriers such as Qantas.) Further, the evidence disclosed before the Tribunal indicated that SACL had chosen a passenger-based charge "because Qantas preferred it" and that SACL knew that the charge would impact more adversely on Virgin Blue than on Qantas.

SACL appealed the Tribunal's decision to the Full Federal Court and the appeal was heard in May 2006. On 16 October 2006, the Full Court rejected the appeal.

In doing so the Full Court concentrated on the promotion of competition within the declaration criteria (criterion a). The Full Court emphatically rejected the contention that in order to satisfy this criterion it was necessary to demonstrate a denial or restriction of access. The Full Court said:

The whole scheme of Part IIIA, when understood against the background of its passing, is antithetical to s 44H(4)(a) operating to limit the possibility of declaration except where it can be demonstrated as a fact that the service provider has in the past denied or restricted access to the service or supply of the service.

While, like the Tribunal, the Full Court was satisfied that this criterion, and indeed the declaration criteria as a whole, were met the Full Court's reasoning differed in a significant respect.

The Full Court considered that the Tribunal had assessed the promotion of competition criterion in terms of the effect that regulated access, or the declaration of the service, would have on competition in dependent markets. If, as it appears, that was the Tribunal's approach it would have been one shared by a number of others when applying, or advising on, that criteria. The Full Court disagreed with that approach which it saw as one "whereby 'access' becomes 'declaration' under Part IIIA". It held that:

Virgin is correct in its submission that all s44H(4)(a) requires is a comparison of the future state of competition in the dependent market with a right or ability to use [the] service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service.

These findings led a number of commentators to a view that criterion (a) was likely to be readily satisfied and the scope for services to be declared significantly expanded as a result. Indeed the Productivity Commission which was at the time completing an inquiry into the Price Regulation of Airport Services¹⁸ concluded that the Full Court's approach "potentially makes the Part IIIA national access regime a more intrusive regulatory instrument" and recommended that the Government consider amending Part IIIA to restore the prevailing interpretation of s44H(4)(a) prior to the Federal Court decision. The Government has announced its acceptance of that recommendation.

SACL sought special leave to appeal the Full Court's decision to the High Court but that application was denied. In denying leave, Gleeson CJ noted:¹⁹

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

¹⁸ Productivity Commission 2006, *Review of Price Regulation of Airport Services*, Report No 40, Canberra.

¹⁹ [2007] HCATrans 098

Services Sydney Pty Ltd (March 2004)

On 3 March 2004, the NCC received an application under Part IIIA from Services Sydney Pty Ltd for a recommendation to declare the following services provided by Sydney Water's sewage reticulation network in the Sydney metropolitan area:

- A service for the transmission of sewage via Sydney Water's Sydney sewage reticulation network from the customer collection points to the interconnection points
- A service for the connection of new trunk main sewers owned and operated by Services Sydney to the existing Sydney sewage reticulation network at the interconnection points.

Although the NCC found the three sewer systems encompassed by the application were economically linked, it considered the physical and operational interconnection between the systems was marginal. The NCC therefore considered that Services Sydney application was properly divided into six separate applications related to a transport and connection service for each of three sewer systems – the North Head, Bondi and Malabar reticulation networks. Each of these six applications was assessed against the declaration criteria.

The NCC was satisfied that it was uneconomical for anyone to develop alternative facilities to provide any of the services and in each case access to those services would promote competition in both a sewerage collection market and a recycled water market. On the basis of the size and importance of each system the NCC was also satisfied that the sewer systems were nationally significant.

The NCC also found that comprehensive regulation and licensing arrangements including those undertaken by the NSW Environmental Protection Agency would ensure that access to the services could be provided without undue risk to human health and safety.

At the time of the application NSW did not have an access regime that applied to the services, and although IPART regulated the prices charged by Sydney Water, including the price of 'sewer mining', the NCC concluded that the relevant services were not subject to an effective access regime.

In assessing whether access to the services sought by Services Sydney might be contrary to the public interest, the NCC examined environmental issues, the general costs and benefits from declaration and the implications for NSW water strategy. The NCC concluded that access to the services would not be contrary to the public interest.

On 1 December 2004 the NCC provided its recommendation to the Premier of New South Wales—the decision maker—that the six sewage transport and sewer connection services be declared for a period of 50 years.

The Premier of New South Wales did not publish a decision within 60 days of receiving the NCC's recommendation, he was therefore deemed to have decided not to declare the services. Services Sydney sought review of the Premier's deemed decision by the Competition Tribunal.

On 21 December 2005, the Tribunal handed down its decision to set aside the deemed decision of the Premier and to declare the services for a period of 50 years from 21 December 2005.

In its decision the Tribunal considered a submission by Sydney Water that the Tribunal did not have jurisdiction to consider the review because there was a disconformity between the services identified by Services Sydney in its application to the NCC and those identified in the recommendation for declaration by the NCC to the Premier, and a further such disconformity between the declaration sought by Services Sydney in its review and that recommended by the NCC.

The various disconformities alleged related to varying descriptions of the services to which access was sought.

In addressing this submission the Tribunal held that:

It is clear enough that the NCC is limited to dealing with the application made to it pursuant to s 44F(1) of the Act. It is also clear enough that a recommendation to declare must be limited to the particular service identified in the application. However, that does not require a literal or pedantic adherence to the nature of the application or to the particular description of the service when deciding whether the same application and the same service is being dealt with.

The Tribunal found:

In the present case the splitting of the facility (and so the services) into three does not affect the substance of the service to be declared in any respect material to this case. It is the kind of precise and detailed formality that does not affect substantial compliance with the statutory regime (cf Stephen J in *Scurr v Brisbane City Council (No 5) (1973) 133 CLR 242* at 256). The added flexibility in relation to interconnection provided by the NCC recommendation does not change the essential nature of the application or the service. A literal and pedantic construction of the provision would not accord with the wider purpose of Pt IIIA of *the Act* and would create anomalous and capricious results - as this case would illustrate if Sydney Water's submission were to be accepted.

Having dealt with that issue the Tribunal appeared to have relatively readily found the declaration criteria to have been met on much the same basis that had underpinned the NCC's recommendation.

Fortescue Metals Group – Mount Newman Railway (June 2004)

On 15 June 2004, the NCC received an application from Fortescue Metals Group Ltd (FMG) for declaration of a service described as the use of the facility, being that part of:

- The Mount Newman railway line that runs from a rail siding that will be constructed near Mindy Mindy in the Pilbara to port facilities at Nelson Point in Port Hedland, and is approximately 295 kilometres long.

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- The Goldsworthy railway line that runs from where it crosses the Mount Newman railway line to port facilities at Finucane Island in Port Hedland, and is approximately 17 kilometres long.

The applicant identified the service provider as BHP Billiton Minerals Pty Ltd, Mitsui-Itouchu Iron Pty Ltd and CI Minerals Australia Pty Ltd trading as joint ventures and BHP Billiton Iron Ore Pty Ltd.

On 15 December 2004, the NCC released decisions on two preliminary issues in relation to the FMG application. The NCC concluded that the two railway lines each provided a separate service and that the Mount Newman line service was capable of being considered further for declaration, while the Goldsworthy line was not because it was part of a production process. A service that constitutes the use of a production process is exempt from declaration under Part IIIA of the TPA. The NCC was bound by a previous Federal Court decision (the Hamersley decision)²⁰ that held a service involved the use of a production process (and thus was exempt from declaration) until a marketable product was produced. The NCC noted that it had significant reservations about that approach and, in particular, that such an approach appeared to allow a vertically integrated business to arrange its activities to avoid application of Part IIIA. The NCC also determined its views on the identity of the providers of the services covered by the FMG applications.

Following the publication of the NCC's views on these preliminary issues, BHP Billiton Iron Ore Pty Ltd (BHPBIO) challenged the NCC's view that the Mt Newman railway line service was not part of a production process, and FMG challenged the view that the Goldsworthy railway line was part of a production process and therefore not a service for the purposes of Part IIIA. On 24 December 2004 BHPBIO commenced proceedings to review the NCC's decision in respect of the Mt Newman line. On 25 February 2005 FMG commenced proceedings in respect of the decision relating to the Goldsworthy line. Neither party sought interim relief which might have prevented the NCC from proceeding to consider the Mt Newman application.

After an extensive and lengthy process of investigation and analysis the NCC provided its recommendation to the Parliamentary Secretary to the Treasurer on 24 March 2006. The NCC recommended that the Mt Newman service be declared for a period of 20 years, although, as is the usual case, the nature of the recommendation was confidential until the matter was determined by the decision maker.

The Australian Treasurer, who assumed responsibility as the decision maker for this matter, did not publish a decision within 60 days of receiving the NCC's recommendation and was therefore deemed to have decided not to declare the service. The NCC's recommendation was made public at this time.

In summary, in its recommendation the NCC found that each declaration criterion was met.

²⁰ Hamersley Iron Pty Ltd v National Competition Council [1999] FCA 867

The NCC found that it would be uneconomic to develop another facility to provide the Mt Newman Service. In the Council's view it was clearly more economical to use the existing railway to provide a link between Mindy Mindy and a point near Port Hedland than to build a new railway and that the existing railway could be augmented or expanded to provide any additional capacity at a much lower cost than a new railway.

The NCC was also satisfied that access to the Mt Newman Service would promote competition in the market for rail haulage services in the Pilbara and the market for iron ore tenements in the Pilbara, although it did not accept various contentions in respect of promotion of competition in the global iron ore market and other markets covered in FMG's application.

The NCC considered that the Mt Newman line was nationally significant. This was the only criterion that was not the subject of extensive submissions and argument.

The NCC examined the nature of potential risks to health and safety associated with access and whether access could be provided in a manner that removed or minimised those risks, including the potential for access terms to stipulate measures to maintain the prevailing standard of safety that applied to the facility. The NCC acknowledged that access would give rise to a number of risks in comparison to the situation of a single-user railway line, but that access could (and probably would) be provided in a manner that allowed the control functions over the Mt Newman Service to be retained by BHPBIO and it was unlikely that any access arrangements would require access to be granted where the third party lacked the skills, planning and assets necessary to safely operate and maintain its trains on a multi-user facility. Thus, the NCC was satisfied that access could be provided without undue risk.

The NCC noted the existence of a Western Australian Rail Access Regime but that this did not cover the services for which access was sought and therefore the services were not already subject to an effective access regime. In May 2006, the State of Western Australia announced plans to develop an access regime for haulage on the Pilbara iron ore railways, initially between the WA Government and BHP Billiton, but with potentially wider application in the future. The WA Government intended that the regime be an effective access regime under Part IIIA. As at the time of writing, no draft of the proposed regime has been publically released. In any case, the proposal for the new regime was made after the NCC issued its recommendation regarding FMG's Mt Newman application.

There is no reason why a regime to require provision of haulage and the application of Part IIIA to a rail network could not co-exist. Indeed the potential for competition to emerge through a competing haulage operator accessing track services might well reduce the level of regulation needed to ensure a haulage service was offered on competitive terms.

Submissions received by the NCC raised a number of issues relating to whether access was contrary to the public interest (criterion (f)). It was suggested by both BHPBIO and Rio Tinto that allowing access to the Mount Newman rail to facilitate a small increase in iron ore exports would jeopardise the much larger and more valuable exporting activities of BHPBIO and discourage the investment needed to expand the company's exports. Economist's reports were commissioned to estimate the cost to Australia of such an eventuality.

Clearly such an outcome would be undesirable and give rise to real concerns and could lead to a declaration application being rejected under criterion (f). However, before reaching such a conclusion the NCC needed to be persuaded that the concerns were in fact likely to eventuate and would not be appropriately addressed in resolving an access dispute. In this case the NCC did not accept BHPBIO's claims that its exporting and investment activities would be curtailed if access were available.

There have also been efforts to equate the result of access to the Mt Newman railway with perceived deficiencies in the operation of coal railways in Queensland. However there are significant differences between the two situations – not least different ownership and management and regulatory arrangements – such that headline grabbing comparisons have no foundation.

The rejection of calls to refuse declaration due to purported effects on an infrastructure operators' business activities has given rise to calls for an additional "efficiency override" to be introduced into the declaration process. It is, however, unclear what additional factors such a provision might allow to be considered particularly where the basis for claimed efficiency losses was not able to be established in the first place.

The NCC accepted that there were mixed views as to whether the shared use of railways, or the construction of multiple railways would better support growth in iron ore exports, but was not persuaded that declaration would have a negative impact on the industry's performance. Several parties also argued that declaration of the Mt Newman Service would have a negative impact on investment in infrastructure in the Mt Newman line and more generally in infrastructure in the Australian economy, but the NCC considered that although declaration might create some added investment risk (or perceptions of added risk), that risk could generally be addressed through the application of appropriate access terms and conditions. The NCC found that any effect of declaration on efficient investment would be mitigated by negotiated or arbitrated outcomes that accounted for the costs of access and which provided certainty to the parties on the allocation of costs of future capacity and technology investment. The NCC noted that Part IIIA obliged the arbitrator to address these issues and furthermore that Part IIIA contained a number of safeguards that sought to minimise the risk faced by infrastructure owners from regulatory error and the increased cost of operating in a regulated environment. These had largely been ignored or given little weight by parties claiming adverse result from declaration. The NCC recognised that declaration had the potential to impose costs that, if poorly managed, could be significant in this instance. The NCC considered that there were mechanisms available to manage the risk of such costs and that the benefits of declaration would outweigh the potential costs.

Overall the NCC found that access to the Mt Newman railway would not be contrary to the public interest. The NCC concluded that the benefits of declaration included the promotion of competition in the Pilbara rail haulage and tenements markets and the economic and environmental benefits of avoiding unnecessary duplication of rail infrastructure were significant and outweighed a realistic assessment of the consequences of the effects on BHP's own operations.

On 9 June 2006, FMG applied to the Competition Tribunal for a review of the deemed decision not to declare the service provided by the relevant part of the Mt Newman railway line. The NCC expects the Tribunal to hear the matter sometime during 2008.

Rio Tinto subsequently commenced proceedings in the Full Court of the Federal Court seeking an order prohibiting the Tribunal from hearing FMG's appeal. In short, Rio Tinto's position was that the Tribunal did not have jurisdiction to determine the matter due to differences in the definition of the Mt Newman Service in, respectively, FMG's initial application to the NCC, the NCC's final recommendation and FMG's appeal application to the Tribunal. The matter was heard by the Full Court on 22 November 2007. Rio Tinto's application was dismissed by the Full Federal Court on 14 February 2008.

The proceedings commenced by BHPBIO and FMG relating to the application of the production process exception to the Mt Newman and Goldsworthy lines were heard in the Federal Court in October 2006. On 18 December 2006 the court dismissed BHP's application concerning the Mt Newman railway line and, in respect of FMG's application, found the Goldsworthy railway line to be a service for the purposes of Part IIIA. Rather than adopt the approach taken in the Hamersley decision²¹, the court held that a production process necessarily involved a transformation process, whereas railway lines transported the same material from one place to another.

BHP appealed this matter to the Full Court of the Federal Court of Australia on 12 January 2007. The Full Court heard the matter on 30 April 2007, and delivered its decision on 5 October 2007. By majority, the Full Court dismissed BHP's appeal. The court did not uphold what may be called the "transformation test" adopted by the Federal Court. Neither did it adopt the approach of the Hamersley decision, where the court held that a service involved the use of a production process until a "marketable product" was produced. Instead, the Full Court held that the proper approach is to identify the service sought to be declared, identify the production process which that service is alleged to use, and then ask whether the use of the service is the use of *that* production process. The production process exception did not apply to the use of *part* of a production process.

On 23 October 2007, BHP applied to the High Court for special leave to appeal the decision. The NCC expects the High Court will hear the special leave application in March or May this year.

Lakes R Us Pty Ltd (October 2004)

On 8 October 2004, Lakes R Us Pty Ltd applied to the NCC for a recommendation for declaration of the services provided by certain water facilities operated by Snowy Hydro Limited and State Water Corporation. (At the request of the NCC, on 12 January 2005 Lakes R Us provided supplementary material to augment its application.)

²¹ Refer footnote 20

Lakes R Us is a venture company that was set up to manage unused water allocations in the Snowy Scheme. It proposed to store water using the excess storage capacity (vacant air space) of the Snowy Scheme facilities operated by Snowy Hydro and to release and transport water to users in the Murray and Murrumbidgee systems using the services provided by facilities operated by Snowy Hydro and State Water.

The NCC published a draft recommendation on 8 September 2005 that the services not be declared. It provided its recommendation, also that the services not be declared, on 10 November 2005.

The decision maker—the Acting Premier of New South Wales—determined on 6 January 2006 not to declare the services. On 30 January 2006 Lakes R Us sought review of the Acting Premier’s decision. Lakes R Us sought leave on 26 May 2006 to withdraw its application for review. Leave to withdraw was granted by the Tribunal on 31 May 2006.

Tasmanian Rail Network (May 2007)

On 2 May 2007, the NCC received an application from the Rail Unit within the Tasmanian Department of Infrastructure, Energy and Resources, for declaration of a service provided through use of the rail tracks and certain associated infrastructure on the Tasmanian railway network, for the purpose of operating a rail service on that network (Service). The operator was identified as Pacific National Tasmania Pty Ltd.

The NCC provided its final recommendation to the Premier of Tasmania on 15 August 2007, recommending that the Service be declared. On 2 October 2007, the Premier declared the Service for a period of 10 years.

The Pilbara Infrastructure Pty Ltd – Goldsworthy railway (November 2007)

The Pilbara Infrastructure Pty Ltd – Hamersley railway (November 2007)

The Pilbara Infrastructure Pty Ltd – Robe River railway (January 2008)

The NCC is currently considering three further applications for access to services provided by Pilbara iron ore railways.

On 16 November 2007, the NCC received two applications from The Pilbara Infrastructure Pty Ltd (TPI), a wholly owned subsidiary of FMG. These seek access to:

- a service provided through use of the Goldsworthy Railway in the Pilbara, Western Australia, from a location near Yarrie, at one end, to a location near Finucane Island within the port of Port Hedland, at the other end, and all points in between (**The Goldsworthy Service**), and
- a service provided through use of certain parts of the Hamersley Rail Network.
Those parts were:

-
- the railway line from Paraburdoo to Dampier, including all points in between,
 - the railway line from Yandicoonga to Rosella Siding, including all points in between, and
 - the railway line from Brockman No 2 to Rosella Siding, including all points in between (**The Hamersley Service**).

On 18 January 2008, the NCC received a third application from TPI regarding Pilbara railways. This application was for declaration of a service provided through use of the Robe River Railway (from a location near Mesa J to Cape Lambert and all points in between) (**The Robe Service**).

At a similar time the NCC also received supplementary material from TPI to support its earlier applications in relation to the Hamersley and Goldsworthy railways enabling the NCC to commence the formal consideration of all three applications at the same time. The NCC plans to consider the three applications in parallel, although it will issue separate recommendations for each application.

The NCC has begun its consideration of the applications and commenced seeking and considering the views of interested parties. Public submissions on these applications close on 30 April 2008. The NCC plans to release draft recommendations in early June and will seek further submissions at that time before finalising its recommendation to the Minister.

On 24 December 2007 Hamersley Iron Pty Ltd applied to the Federal Court for orders preventing the NCC from considering TPI's declaration application for the Hamersley railway. Hamersley contends that the NCC cannot do so by reason of the Hamersley decision in 1999 and the Federal Court's orders in that case²². The NCC considers that the 1999 orders and decision of the Federal Court do not prevent it from considering TPI's declaration application and resisted Hamersley's application.

²² Refer footnote 20

4 The Experience of Declaration – Some General Observations

Since the National Access Regime came into force the NCC has considered some 23 applications for declaration. A number of these were considered to in fact comprise multiple services. On that basis the number rises to 41. Of these the greatest number have related to rail services covering both general freight operations and in relation to transport of iron ore. Multiple applications have also been considered relating to airport and water or waste water services. Single applications have been considered for gas pipeline (outside the National Gas Access Code), electricity transmission and data processing services. The NCC is currently considering three further applications. From the 41 services the subject of declaration applications, 9 were withdrawn. For 14 services declaration was refused. Services were declared on 14 occasions. The declarations made under Part IIIA to date relate to:

- Two sets of applications covering cargo handling services at Sydney (3 services) and Melbourne (also 3 services) airports. These declarations have now lapsed.
- Airside services at Sydney Airport.
- Sewerage transmission and sewer connection services in Sydney (6 services).
- Rail track and associated infrastructure services on the Tasmanian railway network.

None of the declarations that were made in the 1990s resulted in notifications of access disputes to the ACCC. The declarations relating to cargo handling at Melbourne Airport were of short duration and although the declarations relating to the same services at Sydney Airport lasted somewhat longer they were effectively supplanted by industry specific regulation.

The more recent declarations have both led to access disputes and the commencement of arbitrations by the ACCC. Of these one involving an access dispute between Virgin Blue and the operator of Sydney Airport was withdrawn after the matter was resolved through further commercial negotiations. The ACCC concluded its arbitration of the other dispute, between Services Sydney and Sydney Water, on 19 July 2007. (Services Sydney applied to the Australian Competition Tribunal for review of the ACCC determination, though subsequently withdrew its review application.)

The number and scope of declaration applications seems in line with expectations. The industries and facilities that have been subject to applications exhibit obvious natural monopoly characteristics. Most applications have also focussed on facilities where an owner or operator was vertically integrated and access was seen as necessary to overcome incentives to limit competition faced in up or downstream markets. Even in the Sydney Airport matter, where the airport operator was not vertically integrated into the dependent markets, the Tribunal's finding that the operator's revised pricing basis favoured full service airlines over low cost operators and was preferred by Qantas, introduced a vertical flavour to the analysis. This focus on situations involving vertical integration is clearly reflected in the range of applications made under Part IIIA and is unsurprising.

The preference for access to be resolved through commercial dealings is also supported by how the regime can be seen to have operated. Declaration and even the commencement of arbitration of an access dispute do not preclude negotiated access arrangements. The balance of power in such negotiations and incentives to reach agreement are altered but parties retain the scope to avoid further intrusion from regulation.

Of course the scope of access regulation extends beyond declaration under Part IIIA. As noted earlier, gas pipelines are regulated under a set of State and Territory access regimes, most of which have been certified as effective and therefore operate to the exclusion of declaration. Electricity transmission and distribution services are also separately regulated through access undertakings accepted by the ACCC and the telecommunications sector is subject to an industry specific regulatory scheme.

There are other State or Territory schemes that regulate access in areas such as ports, grain handling and railways. Most of these are not certified and therefore declaration under Part IIIA may be available. However applications for declaration in respect of these types of services have been few. Even in the relatively large number of railway related access applications evident in the early years of the National Access Regime it would not be unreasonable to conclude that these may have been designed to prompt action to implement effective regulation at a State or Territory level. In addition, there are some industry regulatory arrangements that are primarily concerned with objectives other than those associated with access regulation (restraining monopoly pricing per se is one example) that nevertheless involve some overlap.

Properly characterised the National Access Regime is narrowly focussed regulation operating within a set of criteria that confines its effect. The National Access Regime is a targeted form of regulation applicable to a limited range of infrastructure with natural monopoly characteristics and then only where access is needed to promote competition in related markets and the efficient utilisation of infrastructure and avoidance of wasteful duplication that would be harmful to the Australian economy.

Regulation of infrastructure involves tradeoffs—in particular, a trade-off between the interests of consumers and infrastructure owners, and between the development of competition in markets that depend on a particular infrastructure and the effects of regulation on the returns to infrastructure owners and the consequential effects on investment.

Some owners of bottleneck infrastructure rail against being forced to share bottleneck facilities; nevertheless some infrastructure operators do have clear incentives to exploit their market power by restricting output and charging monopolistic prices to businesses using the infrastructure. Where an infrastructure owner also has a commercial interest in upstream or downstream markets, it also has incentives to deny its competitors access or to impose prices for access that curb a competitor's ability to compete. In those circumstances consumers and the national economy generally are denied the benefits of that competition.

By allowing third parties to use major infrastructure facilities on commercial terms and conditions, the National Access Regime encourages new firms to enter upstream and

downstream markets and expand output and competition. Of course access regulation also involves significant administrative and compliance costs. Generally these costs will be modest in comparison to the gains from increased competition. However, if regulation is applied inappropriately or too widely such costs will increase and there will not be a concurrent increase in benefits. In such circumstances, where the extent of regulation is excessive, the potential exists for costs to grow to outweigh the benefits.

Concerns are sometimes expressed that access regulation can deter decisions to invest in new infrastructure, or that it is an inappropriate intrusion on property rights, especially in relation to privately-owned infrastructure. It is similarly argued that access regulation heightens sovereign risk and undermines opportunities to earn blue-sky profits in high-risk markets. On the other hand, those seeking access argue that it is not sensible to force them to invest in new infrastructure at high cost to the whole community when existing facilities have spare capacity, and all users can be supplied at lower cost if existing facilities are shared.

Access regulation is intrusive, and should only be imposed where competition and public interest benefits are likely to outweigh the costs. The declaration criteria that apply under Part IIIA require careful consideration to balance the benefits of access for potential users with the costs to existing and potential infrastructure operators and to the wider community. It has been suggested that the declaration process lacks some form of national interest override to deny access where it would be contrary to the national interest. This overlooks the content of the declaration criteria and seems not to distinguish between the existence of such an element in the declaration process and having a particular set of claims accepted in a specific case.

The existence of the difficult tradeoffs inherent in the declaration process and associated regulation is not a reason to avoid regulation, but it means that a proper consideration of the tradeoffs involved is critical in deciding whether to regulate. That consideration is central to the application of the criteria for declaration.

Under the National Access Regime the determination of what is subject to regulation is generally separated from the administration of regulation. Except in the case of telecommunications, Ministers (or the Competition Tribunal on review) are responsible for declaration decisions and the NCC, rather than a regulator, advises the relevant ministerial decision maker on whether access to a particular infrastructure facility should be subject to regulation. These institutional arrangements seem to operate to reduce incentives for regulatory creep and to ensure decision makers have access to independent advice developed through transparent public processes.

5 Recent Developments

Productivity Commission Review/Government Response

As part of its commitment to review legislation that restricts competition (clause 5 of the Competition Principles Agreement) the Australian Government asked the Productivity Commission to review the National Access Regime.

The Productivity Commission report²³, released in September 2002, supported retention of the regime but made 33 recommendations aimed at improving its operation. These recommendations proposed changes to clarify the regime's objectives and scope, encourage efficient investment in new infrastructure, strengthen incentives for commercial negotiation and improve the certainty and transparency of regulatory processes.

The Australian Government endorsed the majority of the Productivity Commission recommendations and legislated in August 2006 to give effect to its approach (Trade Practices Amendment (National Access Regime) Act 2006). The major effects of these amendments were to:

- Reinforce that declaration is granted only where the expected increase in competition in upstream or downstream markets is material.
- Introduce best endeavours time limits to various processes under Part IIIA. In particular, the NCC is required to use its best endeavours to complete assessments of applications for declaration within four months.
- Formalise requirements for public input on declaration and certification applications and for publication of the reasons for recommendations and decisions.
- Require the NCC to report annually on the operation and effects of the National Access Regime.

The introduction of best endeavours time limits for a number of the processes under Part IIIA was a response to the lengthy time periods associated with the determination of some declaration applications. The extremely lengthy and convoluted process associated with FMG's application for access to the Mt Newman railway is clearly inconsistent with reasonable commercial expectations.

The introduction of best endeavours time limits is an indication of the Government and Parliament's intention that the timeliness of decision making within the National Access Regime be significantly improved.

²³ Productivity Commission 2001, *Review of the National Access Regime*, Report no. 17, AusInfo, Canberra.

In order to meet these time limits the NCC has revised its processes and introduced a new template for declaration applications. The initial key milestones²⁴ within this 120 day period are as follows:

Pre-application discussions with NCC	--
Complete application lodged	day 0
Public notification of application	day 1
Application posted on NCC website	
Identified interested parties notified	
Public notice placed in newspaper	
Closing of submissions in response to application	day 35
Draft recommendation released	day 70
Closing of submissions in response to draft recommendation	day 100
Final recommendation provided to decision maker	day 120

This revised process dispenses with the production of an issues paper by the NCC at the commencement of consideration of a declaration application. The new template for applications significantly expands the information applicants are requested to provide in their applications. While the information requirements are extensive, they are designed to assist applicants to make out a prima facie case for declaration. Inevitably many applicants will face an information asymmetry when seeking declaration but if applicants are able to provide soundly based claims in support of declaration they can maximise the likelihood of a successful application and may be able to pre-empt some tactics that can be used to delay decision making.

Where applicants choose not to provide the information requested in the Council's application template the timetable set out above is unlikely to be met. More complex matters are also likely to take longer than the four month timeframe.

COAG Competition and Infrastructure Reform Agreement

At its meeting on 10 February 2006, the Council of Australian Governments (COAG) agreed the Competition and Infrastructure Reform Agreement. COAG's objective was to provide for a simpler and consistent national system of economic regulation for nationally-significant infrastructure. The aim of this agreement was to reduce regulatory uncertainty and compliance costs for owners, users and investors in significant infrastructure and support the efficient use of infrastructure.

²⁴ The NCC intends to keep these milestone times under review and adjust them as it gains more experience of dealing with applications within the new time frame.

Among other things this agreement provides that:

- All third-party access regimes include objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure
- All access regimes include consistent principles for determining access prices that among other things generate revenue at least sufficient to meet the efficient costs of providing access and include a return on investment commensurate with regulatory and commercial risks, and
- Where merits review of regulatory decisions is provided for, the review is to be limited to the information submitted to the regulator.

These decisions are to be implemented via amendment of the Competition Principles Agreement and the TPA. A number of the amendments to the TPA to give effect to this agreement (including inclusion of an objects clause into Part IIIA) were included in the Trade Practices Amendment (National Access Regime) Act 2006. Some other amendments foreshadowed by the COAG agreement have yet to be implemented.

Light Regulation and Regulatory Holidays under the Gas Code

The National Third Party Access Code for Natural Gas Pipelines (the Gas Code or Code) is a set of State and Territory access regimes that operate together to regulate access to gas pipelines. In most cases these regimes have been certified as effective for the purposes of Part IIIA.

A discussion of the operation of the Gas Code is generally beyond the scope of this paper. However recent changes to the Code have introduced two reforms that should be noted in this context.

Firstly the Code is being revised to include two levels of regulation for pipelines that are covered by the Code. Regulation of pipelines covered by the Code has usually involved a pipeline operator setting out standard access terms and reference tariffs which were then submitted to the ACCC for approval. In addition to this approach the Code will include an option for "light regulation". The proposed light regulation will involve a negotiate-arbitrate approach similar to that for services declared under the National Access Regime. Broadly the light regulation option equates with the regulatory consequences of declaration under the National Access Regime.

Changes to the Gas Code have also introduced the prospect of 15 year price regulation exemptions for new pipeline developments. The decision making Minister may grant a price regulation exemption after receiving a recommendation from the NCC. The NCC and the decision maker, in making their recommendation and decision respectively, must have

regard to a number of factors including the national gas objective²⁵ and the implications of an exemption for affected markets and the public interest. Pipelines that receive a price regulation exemption are required to lodge limited access arrangements that do not include price or revenue regulation. For international pipeline developments that link international gas sources to Australian markets, a 15 year binding no coverage ruling is also available. These greenfield pipeline incentives are intended to encourage pipeline developments, although as yet no applications under either have been made.

²⁵ The national gas objective is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

6 Scope for Further Enhancements

It is perhaps premature to look to identify areas for further improvement before the most recent changes to the National Access Regime have been fully legislated and tested in practice. Nevertheless, there appears to be scope for further change to the processes for review or appeal of decisions relating to declaration that could further streamline that process while retaining proper oversight of decision makers.

Review of Declaration Decisions

As it currently operates Part IIIA of the TPA provides for parties to apply to the NCC for declaration of services provided by bottleneck monopoly facilities. The NCC then considers that application against specified criteria and makes a recommendation to a Ministerial decision maker.

The decision maker then has 60 days to make a decision based on the same criteria that were the basis for the NCC's recommendation. If he or she fails to make a decision in this time then the application is deemed to have been declined.

The decision maker's decision can be challenged before the Competition Tribunal. The challenge is in the form of a *de novo* rehearing of the application. The Tribunal takes on the role of the decision maker and remakes the decision.

While the Tribunal considers the same criteria as the NCC and the decision maker, it does so on the basis of evidence and submissions put to it afresh. In its past decisions, the Tribunal has regularly considered arguments and evidence, including from new expert witnesses, which parties had not put to the NCC or the decision maker.

As noted earlier, the Government has announced amendments that will limit the material to be considered by the Tribunal to that which was also considered by the NCC and the decision maker. However, the opportunity to have a new body rehear and redetermine a matter reduces certainty.

Bodies making regulatory and similar decisions should be accountable for those decisions and those decisions should be subject to appropriate appeal or review arrangements. Appropriate appeal or review arrangements assist in improving regulatory decision making and adding to regulatory certainty, but the current *de novo* rehearing process does not achieve either of these goals and detracts from the effectiveness of Part IIIA. The *de novo* rehearing process effectively turns the Tribunal into a first instance decision maker in relation to declaration applications. The rehearing process also adds significantly to the costs for private parties of making and defending applications for declaration and adds what can be lengthy delay to the resolution of such matters. Such delays generally benefit asset owners as they usually defer declaration.

If *de novo* rehearsals were not common this might be of limited concern. However to date virtually every determination of an application for declaration under Part IIIA has been

subject to such a rehearing by the Tribunal, irrespective of whether the original determination supported declaration or not.

While appropriate mechanisms for oversight of declaration decisions must be retained, there are a number of further changes that would enhance timeliness, accountability and quality of decision making. Rather than a *de novo* rehearing before the Tribunal, a challenge to a declaration decision should be by way of an appeal process that requires appellants to establish to the satisfaction of the Tribunal that the decision maker made an error such that the decision should be reversed or amended.

In New Zealand the High Court (augmented by one or more lay members sitting with the Judge) acts in a similar role to the Competition Tribunal in considering appeals from decisions of the New Zealand Commerce Commission. Such appeals are by way of 'rehearing', but this is distinguished from an appeal *de novo*. In this environment the court has held²⁶ that appellants must show that the decision appealed from was wrong, that the court will not readily substitute its own preferred views and that there can be no proper basis for intervention unless the Commerce Commission has been shown to have erred in a material way.

Errors of law and legal interpretation, failures to properly consider submitted material, or errors in interpreting economic evidence and submissions by a decision maker (including such errors that flow from acceptance of NCC recommendations) should be remedied, but reasonable judgments made by the NCC and the decision maker should not be overturned because the Competition Tribunal might prefer a different view.

As the Government has already decided such reviews should proceed on the basis of evidence submitted to the NCC in the process of it making its recommendation or otherwise before the decision maker, the only new evidence that should be able to be introduced in the appeal proceeding should be evidence that the Tribunal determines could not have been made available to the NCC and decision maker. This will allow appropriate updating material to be introduced where there are any significant developments between a decision and the hearing of the appeal, while reducing the incentive for parties to 'game' the decision making process. It should also reduce the time and cost of Tribunal proceedings as most evidence should be available from the record made available by the decision maker when proceedings are commenced. Lengthy delays while the parties assemble evidence for a Tribunal hearing should be avoidable in most cases.

Where a decision maker does not determine a matter within the required 60 days, he or she should be deemed to have accepted the NCC's recommendation, rather than to have declined the application in all cases. This avoids the prospect of appeals against decisions for which there are no reasons, which would be the case where the NCC had recommended declaration yet the application was deemed to be declined.

²⁶ Air New Zealand/Qantas v Commerce Commission (No 6) (2004) 11 TCLR 347 at paras 9-13

These changes would also be consistent with the desire to streamline regulatory processes and improve the timeliness of regulatory decision making.

7 Conclusion

The issue of access to bottleneck monopoly facilities is complex. It can be left unaddressed but to do so is likely to lead to limited competition in markets where access to a bottleneck is necessary or to the unnecessary duplication of facilities at significant cost to an economy. The problem can be treated in terms of unreasonable denial of access or monopolisation and left to litigation and the courts' interpretation and application of these provisions, or ongoing public ownership and administrative determination of access can be relied upon. Alternatively a regulatory solution can be imposed.

Properly focussed regulation seems the most realistic approach. The National Access Regime contained in Part IIIA of the TPA has now been in operation for over 10 years. It has not lead to widespread intervention but it has provided an incentive for parties to arrive at commercial arrangements for access and for governments to put in place effective regimes for access in particular sectors. The Regime has also remained as a final recourse when a commercial impasse is likely to impact on the wider economy.

While there is likely to be further room for improvement as the experience of regulation of access develops or as a response to outcomes that are inconsistent with the underlying objectives of the National Access Regime, the experience to date suggests that the Regime should remain an important element of Australia's competition policy into the future.

Appendix A - Determination of Access Disputes by ACCC

TRADE PRACTICES ACT 1974 - SECT 44V

Determination by Commission

(2) A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:

- (a) require the provider to provide access to the service by the third party;
- (b) require the third party to accept, and pay for, access to the service;
- (c) specify the terms and conditions of the third party's access to the service;
- (d) require the provider to extend the facility;
- (da) require the provider to permit interconnection to the facility by the third party;
- (e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

(3) A determination does not have to require the provider to provide access to the service by the third party.

(4) Before making a determination, the Commission must give a draft determination to the parties.

(5) When the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

TRADE PRACTICES ACT 1974 - SECT 44W

Restrictions on access determinations

(1) The Commission must not make a determination that would have any of the following effects:

- (a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;
- (b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;
- (c) depriving any person of a protected contractual right;
- (d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;
- (e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility;

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

TRADE PRACTICES ACT 1974 - SECT 44X

Matters that the Commission must take into account

Final determinations

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

(aa) the objects of this Part;

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

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

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

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

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

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

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

(g) the economically efficient operation of the facility;

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

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

TRADE PRACTICES ACT 1974 - SECT 44XA

Target time limits for Commission's final determination

(1) The Commission must use its best endeavours to make a final determination within:

(a) the period (the *standard period*) of 6 months beginning on the day it received notification of the access dispute; or

(b) if the standard period is extended--that period as extended.

TRADE PRACTICES ACT 1974 - SECT 44Y

Commission may terminate arbitration in certain cases

(1) The Commission may at any time terminate an arbitration (without making a final determination) if it thinks that:

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- (a) the notification of the dispute was vexatious; or
 - (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
 - (c) the party who notified the dispute has not engaged in negotiations in good faith; or
 - (d) access to the service should continue to be governed by an existing contract between the provider and the third party.

(2) In addition, if the dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

TRADE PRACTICES ACT 1974 - SECT 44ZZCA

Pricing principles for access disputes and access undertakings or codes

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:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.