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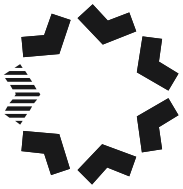

Declaration of Services

A guide to Declaration under Part IIIA of the *Trade Practices Act 1974* (Cth)

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The National Competition Council

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

Information on the National Competition Council, its publications and its current work program can be found on the internet at www.ncc.gov.au or by contacting the Council on (03) 9285 7474.

Foreword

Under Part IIIA of the *Trade Practices Act 1974* (Cth), the National Competition Council is responsible for considering applications for declaration of services provided by facilities that cannot be economically duplicated. The Council can recommend declaration where access to such a service would materially promote competition in a dependent market and meet certain other declaration criteria.

Declaration provides parties seeking access to services with a right to negotiate, and recourse to arbitration for disputes relating to terms and conditions for access that cannot be resolved through negotiation.

The purpose of this Guide is to assist parties considering making an application for declaration to assess the merits of such an application and to prepare any declaration application. It is also intended to assist the providers of services which are the subject of a declaration application and other interested parties in considering their position and responding to an application.

The Council's consideration of a declaration application includes a public submission process as well as inquiries and discussions initiated by the Council. The Council conducts its assessment of an application against the declaration criteria and other relevant factors in an open manner and seeks to assist all parties in understanding the requirements for declaration and the declaration process. Generally, applications, submissions and other substantive correspondence will be published on the Council's website.

Before making its recommendation, the Council will publish a draft recommendation setting out its views and allow an opportunity for parties to make submissions on this draft before finalising its recommendation to the designated Minister. That minister then makes the declaration decision. The minister's decision may be reviewed by the Australian Competition Tribunal.

This Guide replaces an earlier guide on declaration issued by the Council and reflects the Council's thinking as it has evolved through dealing with applications since 1996. It draws on relevant decisions by the Australian Competition Tribunal and the Courts since Part IIIA came into operation. The Guide also reflects amendments to the law following the enactment of the *Trade Practices Amendment (National Access Regime) Act 2006* (No. 92, 2006) (Cth) and the *Energy Legislation Amendment Act 2006* (No. 60, 2006) (Cth).

This Guide reflects the Council's current approach. However, each declaration application must be considered on its particular facts and may raise unique issues. As such, the Council's views continue to evolve and the views expressed in the Guide cannot be definitive.

This current version of the Guide will principally be available from the Council's website, although the Council will provide printed copies on request. The Guide will be subject to ongoing review and updated online when significant developments or legislative changes occur. Any person viewing a printed copy of this guide should check the Council's website

or call the Council on (03) 9285 7474 to ensure they have the current version (a version number and date appear on the front cover of this document).

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Glossary of terms and abbreviations

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
AGL Cooper Basin Natural Gas Supply Arrangements decision	Re Alliance Petroleum Australia Pty Ltd & Ors [1997] ACompT 2 (14 October 1997)
Australian Union of Students decision	Re Australian Union of Students (1997) 19 ATPR ¶41–573
BHP Billiton Iron Ore Pty Ltd v National Competition Council (High Court appeal)	BHP Billiton Iron Ore Pty Ltd v National Competition Council; BHP Billiton Iron Ore Pty Ltd v National Competition Council [2008] HCA 45 (24 September 2008)
BHP Billiton Iron Ore v NCC	BHP Billiton Iron Ore Pty Ltd v The National Competition Council [2006] FCA 1764 (18 December 2006)
clause 6 principles	The principles set out in clause 6 of the Competition Principles Agreement
Competition Principles Agreement	Competition Principles Agreement 11 April 1995 (as amended to 13 April 2007)
Council	National Competition Council
designated Minister	Has the meaning given to it in s 44D of the *Trade Practices Act 1974* (Cth)
Duke EGP decision	Re Duke Eastern Gas Pipeline Pty Ltd [2001] ACompT 2 (4 May 2001)
Economies of scale	Economies that occur where the average cost per unit of output decreases as output expands
Economies of scope	Economies that occur where the joint production of two or more products is less costly than producing the products individually
Federal Court	Federal Court of Australia
Full Court	Full Court of the Federal Court of Australia
Gas Code	National Third Party Access Code for Natural Gas Pipeline Systems
Hamersley Iron decision	Hamersley Iron Pty Ltd v. National Competition Council and others (1999) ATPR ¶41–705
High Court	High Court of Australia
Hilmer Report	Report by the Independent Committee of Inquiry into National Competition Policy (Chair: Prof F G Hilmer) 1993

National Gas Law	Schedule to the *National Gas (South Australia) Act 2008* which is applied as law in the following jurisdictions: *National Gas (New South Wales) Act 2008*, *National Gas (ACT) Act 2008*, *National Gas (Northern Territory) Act 2008*. *National Gas (Tasmania) Act 2008*, *National Gas (Queensland) Act 2008*, *National Gas (Victoria) Act 2008* and *National Gas Access (WA) Bill 2008* (forthcoming).
Part IIIA	Part IIIA of the *Trade Practices Act 1974* (Cth)
Rail Access Corporation v New South Wales Minerals Council Ltd	Rail Access Corp v New South Wales Minerals Council Ltd (1998) 87 FCR 517; (1998) 158 ALR 323; (1998) ATPR 41 - 663
Re QCMA	RE QCMA (1976) ATPR 40-012
Queensland Wire decision	Queensland Wire Industries Proprietary Limited v. The Broken Hill Proprietary Company Limited and another [1989] HCA 6; (1989) 167 CLR 177 F.C. 89/004
SACL	Sydney Airport Corporation Limited
Services Sydney decision	Re Services Sydney Pty Limited [2005] ACompT 7 (21 December 2005)
Sydney Airport decision	Re Sydney International Airport [2000] ACompT 1 (1 March 2000)
Sydney Airport Appeal decision	Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146 (18 October 2006)
TPA	*Trade Practices Act 1974* (Cth)
Tribunal	Australian Competition Tribunal
Virgin Blue decision	Re Virgin Blue Airlines Pty Limited (including summary and determination) [2005] ACompT 5 (12 December 2005)

Note: This guide contains hyperlinks to relevant Court and Tribunal decisions and legislation.

Version history

Version	Modifications made
August 2009	Correction of style/formatting problems
March 2009	Major redrafting and update, in particular to accommodate changes to the TPA and case law developments
December 2002	First edition

1 Overview

1.1 Australia's national regime for regulating third party access, enacted in 1995, is set out in Part IIIA of the *Trade Practices Act 1974* (Cth) (TPA).

1.2 There are three alternative pathways under Part IIIA for a party seeking access to a service:

- declaration, which provides access seekers with a legal right to negotiate terms and conditions for access with the service provider of a declared service and recourse to mandatory dispute resolution is necessary
- an effective access regime established by a state or territory (a service that is subject to an effective access regime under Part IIIA is immune from declaration)
- a voluntary access undertaking made by a service provider and accepted by the Australian Competition and Consumer Commission (ACCC).

1.3 This Guide deals with the first pathway, being the declaration of a service provided by means of a facility of national significance which is uneconomical to duplicate.

1.4 If declaration occurs, access seekers acquire a legal right to:

- negotiate access to the service with the service provider, and
- if necessary, have access disputes determined through arbitration by the ACCC.

1.5 In 2006 the Australian Government amended the TPA by, among other things, inserting an objects clause to explicitly set out the purpose of Part IIIA. Section 44AA of the TPA specifies that the objects of Part IIIA are to:

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

1.6 Access regulation aims to promote effective competition in markets that depend on using the services of facilities that cannot be economically duplicated. The intended outcome is that competition in dependent markets is promoted and inefficient duplication of costly facilities avoided. At the same time, access regulation looks to maintain a facility owner's usage rights and provide an appropriate commercial return on an owner's investment. Such an approach retains appropriate incentives and rewards for infrastructure investment but prevents infrastructure owners from exploiting their power over dependent markets.

The declaration and arbitration process

1.7 Under the declaration pathway, a party wanting access to a particular service may apply to the National Competition Council (Council) to have the service declared. The

Council considers the application before forwarding a recommendation to the designated Minister,[1] who decides whether to declare the service. The designated Minister's decision may be subject to review by the Australian Competition Tribunal (the Tribunal).[2]

1.8 Declaration of a service does not provide the access seeker with an automatic right to use that service. Rather, it is a first step which gives access seekers the right to negotiate for access. This two step process was described by the Tribunal in the Sydney Airport decision, where it was said:

> ... It can therefore be seen that obtaining access to a service as defined involves two stages. The first stage requires a declaration of the service which, of itself, does not entitle any person or organisation access to the service. Rather the declaration opens the door, but before an applicant to use the service can become entitled to use the service the applicant must progress to the second stage and either reach an agreement for access with the service provider or, in default of an agreement, have its request for access determined through an arbitration by the Australian Competition and Consumer Commission. It is at the second stage that the terms and conditions on and subject to which access is to be given are worked out and, in default of agreement, determined through arbitration by the Commission. Note, for example, s 44V(2)(c) of the TPA which provides, inter alia, that the Commission's determination may specify the terms and conditions of the third party's access to the service. In this review the Tribunal is concerned only with the first stage. (at 7)

1.9 While declaration of a service does not entitle the access seeker to access, it is an important step because it provides for a means of resolving disputes if negotiation fails between the access seeker and the provider. For declared services the ACCC has an arbitration role and may, among other things, require the provision of access and specify the relevant terms and conditions. In reaching its determination, the ACCC must comply with s 44X(1) of the TPA which provides:

> The ACCC must take the following matters into account in making a final determination:
>
> (aa) the objects of Part IIIA, as set out in s 44AA;
>
> (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);

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1 The State Premier or the Chief Minister of the Territory is the designated Minister where the service provider is a state or territory body and the state or territory concerned is a party to the Competition Principles Agreement. In all other circumstances, the designated Minister is the Commonwealth Minister (see s 44D(1) of the TPA).

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

(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.[3]

1.10 In addition, the ACCC is specifically prohibited from making an access determination which would prevent an existing user from having sufficient capacity to meet its reasonably anticipated requirements. Furthermore, no determination can result in a transfer of ownership of any part of a facility.

1.11 Where a facility needs to be extended to accommodate access seekers, a service provider can be required to undertake such extension, but the costs of this are to be met by the access seekers along with interconnection costs. Section 44V(2) of the TPA provides that in making an access determination the ACCC may deal with any matter relating to access by the third party to the service. The section then goes on to provide by way of example that such a determination may 'require the provider to extend the facility'. The ordinary meaning of the word 'extend' includes an expansion of the facility and such an interpretation is consistent with the objects of Part IIIA. In any event, the list provided in s 44V(2) is not exhaustive of the matters the ACCC may determine in order to enable access and thus while an 'extension' is expressly contemplated that does not preclude the ACCC from addressing other issues, including the need to expand a facility, as part of a determination by the ACCC of the terms and conditions of access.

1.12 If the ACCC is unable to arrive at access terms that appropriately recognise the interest of an infrastructure owner/service provider, then it does not have to require the provision of access to a declared service. The ACCC also has powers to deal with vexatious access disputes, or disputes not pursued in good faith, by terminating arbitrations.[4]

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[3] Relevant sections of the TPA governing the arbitration of access disputes are replicated in 10Appendix C. This includes s 44ZZCA, which provides that the prices of access to a service should be set so as to generate expected revenue that is at least sufficient to meet the efficient costs of providing access and to include a return on investment commensurate with the regulatory and commercial risks involved. It also allows for multipart pricing and price discrimination when this aids efficiency, but not where a vertically integrated access provider seeks to favour its own operations. The section also requires that access prices should provide incentives to reduce costs and improve productivity.

[4] Section 44V(3) of the TPA.

1.13 The ACCC's determination is reviewable by the Tribunal.[5]

Services that can be declared

1.14 The declaration process in Part IIIA provides for access to the service(s) provided by means of a facility (or part of a facility) rather than access to a facility itself. A service is distinct from a facility; for example, a declaration application and recommendation would relate to water transport services rather than to a water pipeline itself.

1.15 The services that are declarable under Part IIIA, and particular exclusions, are defined in s 44B of the TPA. The definition of service in s 44B is discussed in greater detail in section 2 of this Guide.

Services that cannot be declared

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

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

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

(c) any service provided by means of a pipeline which is the subject of either a 15-year no-coverage determination or a price regulation exemption in force under Chapter 5 of the National Gas Law

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

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

The declaration criteria

1.17 The Council cannot recommend that a service be declared unless it is satisfied that all of the following criteria (set out in s 44G(2) of the TPA) are met:

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

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

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

[5] Section 44ZP of the TPA.

(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; and

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

1.18 If the Council is not satisfied that one or more of the criteria are met, then it must recommend that the service not be declared. The designated Minister must also be satisfied that all the criteria are met before proceeding to declare a service (s 44H(4)).

1.19 The Council and the designated Minister must also consider whether it would be economical for anyone to develop another facility that could provide part of the service, as required by s 44F(4).

1.20 In interpreting the declaration criteria, the Council uses general principles of statutory interpretation. It therefore interprets the declaration criteria and other provisions of Part IIIA in a way that promotes the purpose and objects of Part IIIA specifically and the TPA more generally.

1.21 In addition, the Council has regard to relevant decisions of the Tribunal and Courts.[6]

1.22 The Council also has regard to the Hilmer Report for guidance, although the Council is aware that Part IIIA departs from the regime recommended by the Hilmer Committee in some significant respects. As discussed by the Tribunal in the Sydney Airport decision:

> Any submission as to the proper construction of the provisions in Pt IIIA of the Act, or as to the policy underlying Pt IIIA based upon the Hilmer report, must be considered with caution. The legal regime to enable access to essential facilities recommended by the Hilmer Committee was not implemented by Pt IIIA of the Act. ... (at 10)

[6] Relevant decisions may include the decisions of the Tribunal in relation to applications for coverage of gas pipelines made under the then Gas Pipelines Access Law and the National Third Party Access Code for Natural Gas Pipeline Systems (Gas Code). Apart from some minor variations (the significance of which, where relevant, will be discussed in sections 2–8 of this Guide), the words of the coverage criteria in s 1.9 of the Gas Code were the same as the words of the declaration criteria in s 44G(2) of the TPA. From 1 July 2008 the Gas Pipelines Access Law and the Gas Code were replaced by the National Gas Law and the National Gas Rules, the coverage criteria in these new arrangements (see s 15 of the Schedule to the National Gas Law) are substantially similar to the criteria under the Gas Code and also the relevant declaration criteria under Part IIIA of the TPA, and the Council envisages it will continue to draw on appropriate decisions relating to these in considering applications for declaration.

1.23 The Tribunal in both the Sydney Airport decision and the Duke EGP decision, however, had regard to the Hilmer Report for guidance on the policy underlying Part IIIA, bearing the above caution in mind.

1.24 The Federal Court also had regard to the Hilmer Report for guidance on Part IIIA. His Honour Justice Middleton noted in the BHP Billiton Iron Ore v NCC decision that:

> ... not all of the recommendations of the Hilmer Report were adopted by Parliament. Nevertheless, it provides an insight into the purpose of the access regime in Part IIIA of the Act. (at 39)

1.25 The Council has had particular regard to economic approaches to issues raised in previous applications for declaration considered by the Council and also applications for coverage, and revocation of coverage, of gas pipelines under the Gas Code.

1.26 Sections 2–8 of this Guide outline the Council's approach to the declaration criteria as it has evolved through dealing with applications since 1996 and as it draws on relevant decisions by the Tribunal and the Courts. The Council, in accordance with good regulatory practice, values consistency in its consideration of applications for declaration. However, each application must be considered on its own merits and facts.

1.27 The following is a summary of the Council's general approach to considering applications for declaration.

(a) On receiving an application, the Council will check that the application meets the requirements of regulation 6A of the *Trade Practices Regulations 1974* (Cth), and seeks access to a service within the definition of service in s 44B of the TPA. The Council will also consider the definition of the service for which the declaration is sought, the identification of the facility and the provider of the service for which declaration is sought. This information will normally be provided by an applicant in its application. The Council recommends that potential applicants consult with the Council before lodging an application to ensure that all requirements are met.

(b) For the purposes of criterion (a), the Council will assess whether access to the service would improve the conditions or environment for competition and thereby promote a material increase in competition in a market other than the market for the service (known as a dependent market). As part of this evaluation, the Council usually defines the dependent markets, considers whether these are separate from the market for the service and then considers whether competition in the dependent markets would be materially increased by considering issues such as the factors affecting the ability and incentive to exercise market power to adversely affect competition in a dependent market(s). This is discussed in more detail in section 3 of this Guide.

(c) For the purposes of criterion (b), the Council examines whether it is economic to develop another facility to provide the service. Criterion (b) seeks to ensure that declaration is confined to services provided by facilities that are uneconomical to duplicate. In doing so the Council applies a social cost-benefit test that considers this issue in terms of Australia's national interest. This criterion is discussed in more detail in section 4 of this Guide.

(d) For the purposes of criterion (c), the Council assesses whether the facility is of national significance, having regard to the size of the facility, the importance of the facility to trade or commerce, or the importance of the facility to the national economy. In assessing whether a facility is of national significance on the basis of its size, the Council considers relevant indicators to include the facility's physical dimensions, the facility's physical capacity and the throughput of goods and services using the facility. This is discussed in more detail in section 5 of this Guide.

(e) For the purposes of criterion (d), the Council assesses whether access to the service can be provided safely. The existence of relevant safety regulations which apply to the facility may suffice to satisfy criterion (d) where the regulations deal appropriately with any safety issues arising from access to the service provided by means of the facility. Another relevant consideration is whether the terms and conditions of access can adequately address any safety issues. This is discussed in more detail in section 6 of this Guide.

(f) For the purposes of criterion (e), the Council assesses whether access to the service is already the subject of an effective access regime. This may be an easy assessment, for example, a State or Territory access regime may have been certified an effective access regime for the service through a decision by the Commonwealth Minister under s 44N of the TPA. Generally the Council must follow such a decision.[7] Alternatively, there may be no certified State or Territory access regime in place in relation to the service, but an uncertified State or Territory access regime may exist. In these situations it will be necessary for the Council to assess the State or Territory access regime against the principles set out in the Competition Principles Agreement in order to determine whether the regime should be regarded as effective. This is discussed in more detail in section 7 of this Guide.

[7] In cases where there has been a material change, the Council may decide not to follow the Commonwealth Minster's decision under s 44N of the TPA. However, in such a situation, the applicant for declaration of a service that is subject to a certified regime will need to establish a material change has occurred.

(g) For the purposes of criterion (f), the Council determines whether access would not be contrary to the public interest. This criterion enables a consideration of factors not raised under the other declaration criteria — for example, the regulatory costs of providing access, any impact of access on investment and transitional pricing arrangements. This is discussed in more detail in section 8 of this Guide. This criterion allows the Council to recommend against declaration where it considers access would lead to costs to Australia that exceed the benefits.

1.28 The Council has a residual discretion not to recommend declaration of a service even if it is satisfied that all the matters specified in s 44G(2) of the TPA apply. The Tribunal accepted the existence of such a residual discretion in the Sydney Airport decision. It also made the following comments, however, on the scope of its residual discretion:

> … [W]hen one has regard to the nature and content of the specific matters in respect of which the Tribunal must be satisfied pursuant to s 44H(4) of the Act, that discretion is extremely limited. The matters therein specified cover such a range of considerations that the Tribunal considers there is little room left for an exercise of discretion if it be satisfied of all the matters set out in s 44H(4). (at 223)

1.29 The Council's residual discretion encompasses the Council's statutorily conferred discretion not to recommend declaration where it considers the application is not made in good faith (s 44F(3)). It may also be exercised where it would be economical to develop another facility to provide part of the service subject to declaration (s 44F(4)) and the Council considers declaration would be contrary to the objects of Part IIIA.

Application process

1.30 Any person may make a written application to the Council asking the Council to recommend that a particular service be declared (s 44F(1)). "Any person" could include an access seeker, the service provider or a minister.

1.31 Any party contemplating making an application for declaration should have regard to the Council's Application Template which sets out the information that should be contained and the issues to be addressed in an application. While it cannot prejudge an application the Council also encourages potential applicants to contact the Council's Secretariat in advance to discuss its proposed application.[8]

[8] The Application Template is available on the Council's website, www.ncc.gov.au. Parties submitting information to the Council should note that the giving of false or misleading information is a serious offence. In particular s 137.1 of the Commonwealth Criminal Code makes it a criminal offence for a person to supply information to a Commonwealth body knowing that the information is false or misleading in a material particular or omitting any matter or thing without which the information is misleading in a material particular.

1.32 The Council must use its best endeavours to make its recommendation on an application within four months of the day it received the application (s 44GA). The Council can extend that four month period by providing notice to the applicant and the provider and publishing a notice in a national newspaper. The Council may extend the standard period more than once (s 44GA(4)).

1.33 In the above process, is desirable for applicants, and parties making submissions in response to an application, to raise all relevant issues in the application or the submissions in response to the application as this maximises opportunities for information and arguments to be considered in an informed and transparent way.[9]

1.34 The Council notes that it expects submission deadlines to be complied with. Late submissions may not be able to be taken into account, especially where they canvass a broad range of issues or contain new detailed factual material. In cases where a submission is made at a later stage which raises novel issues which were not raised with the Council prior to it issuing the draft recommendation, the Council may have limited opportunity to test relevant assertions or information. Where this is so, the Council may have to give such information less weight as a result or extend its processes to allow for such matters to be exposed for comment by other interested parties.

1.35 The Council consults openly on all applications received. Following receipt of an application the Council will set a timeframe for receipt of submissions and has regard to those submissions in developing its recommendation. It also publishes a draft recommendation and provides a further opportunity for submissions on the basis of the draft recommendation. It is usual practice for the Council to allow 14 days for preparation of written submissions in response to a draft recommendation (s 44GB).

1.36 The Council informs the applicant and the service provider when it has provided its final recommendation to the designated Minister. As soon as practicable after the designated Minister makes his or her decision the Council publishes its final recommendation and the designated Minister's decision on the Council's website (www.ncc.gov.au) and provides a hardcopy of the final recommendation to the applicant and the service provider (s 44GC).

1.37 The designated Minister must publish by electronic or other means his or her decision on a declaration recommendation and his or her reasons for the decision (s 44HA). If the designated Minister does not publish his or her decision on a declaration recommendation within 60 days of receiving the Council's declaration recommendation, the designated Minister is taken to have decided not to declare the service and to have published that decision not to declare the service (s 44H(9)).

[9] Interested parties should have regard to the Council's Submission Guidelines before making a submission. All submissions should be made under a completed and signed Submission Cover Sheet. These documents are available on the Council's website, www.ncc.gov.au.

2 Identifying the service, the facility and the provider

The service

2.1 The starting point for considering a declaration application is to identify the service to which access is sought.

2.2 The term 'service' is defined in s 44B of the TPA:

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

Defining the service

2.3 The declaration process in Part IIIA provides for access to the services of a facility rather than a facility itself. A service is distinct from a facility; although it may consist merely of the use of a facility.

2.4 In Rail Access Corporation v New South Wales Minerals Council Ltd, for example, the use of the rail track was the subject of a declaration recommendation rather than the rail track itself.[10] In that decision, the Federal Court said:

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

2.5 Similarly declaration provides a right to negotiate access not to the facility, but to a service or services provided by means of the facility.

2.6 One facility may provide a number of different services. In specifying the service for which declaration is sought applicants should ensure that the service as defined is wide enough to enable them to undertake the business activity they desire and that sufficient access is available to enable a material promotion of competition in a

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

dependent market, but not so broad that the service as defined is provided by a facility or facilities which do not satisfy the declaration criteria.

2.7 The delineation of service should not be confused with the quite separate analysis that may occur for identifying relevant dependent markets.

2.8 A facility may provide a number of instances or occasions of the same kind of service. In the Hamersley Iron decision (at 36), the Federal Court found that the service provided by Hamersley Iron to itself by means of its railway line and the service sought by the access seeker, Robe River Iron Associates, were different instances of the same type of service.

2.9 In characterising the service provided by means of a facility it may be necessary to specify the purpose for which access to the service is sought. In particular, it may be necessary to incorporate the purpose for which the service is provided, to ensure the right to negotiate access to the service following declaration is suitably limited by a reference to that purpose. Further, incorporating the purpose of the service provision in the delineation of that service may help to determine the relevant dependent markets for the assessment of criterion (a).

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

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

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

2.12 The process of referring to the purpose for which the service is provided should, however, be distinguished from the process of characterising a service by referring to the identity of particular users or, more significantly, the particular activity an access seeker intends to undertake if access to a service is available. A service is the same service irrespective of the identity of the access seeker or the particular operational ends an access seeker intends to use the service for. In other words, a distinct service is not identified by reference to each user of the service or by the different operational ends to which the service may be used. Defining a service in terms of use by a particular access seeker would be contrary to the intention of Part IIIA that once a service is declared access may be available to a range of users not just the applicant.

2.13 The Tribunal recognised this in the Services Sydney decision where it stated:

> ... If a service is declared, access will potentially be available to anyone seeking it, not just Services Sydney. The Tribunal agrees with the NCC that the definition of the services for the purpose of declaration needs to be sufficiently broad to be relevant to alternative entry plans. The specific location of interconnection points is something that can be determined as part of the negotiation and arbitration of the terms and conditions of access. (at 17)

2.14 In the Hamersley Iron decision, the Federal Court distinguished between the purpose of running rolling stock and locomotives on the line, from the operational ends served by doing so (namely, the transportation of iron ore), and rejected the relevance of the operational ends to the characterisation of the service and said:

> ... Let it be accepted that the one facility may provide a number of different kinds of 'service', as well as a number of different instances or occasions of the same kind of service, within the meaning of the definition in s 44B. Yet it does not follow that Robe seeks a service relevantly different in kind to that provided to Hamersley by means of Hamersley's railway line. The service that Robe seeks is the use of Hamersley's railway line and associated infrastructure. ... The service provided to Hamersley and the service sought by Robe can be characterised as different only by reference to the different operational ends to which each of Hamersley and Robe would put the service. In the present case, the railway line is the facility by means of which a service is provided (i.e., the use of the line). That service is the same service, irrespective of the identity of the owner of the rolling stock and locomotives that are run on it and the operational ends served by running the rolling stock and locomotives over it. (at 36)

Services excluded from the s 44B definition of service

2.15 The structure of the definition of "service" is to give a meaning to the term (namely, "a service provided by means of a facility") and then to state what this meaning "includes" and what this meaning "does not include".

2.16 The term "service" in s 44B of the TPA means a service provided by use of a facility. It "... is one which does not include the supply and uses identified in any of pars (d), (e) and (f), except to the extent that this supply or use is "an integral but subsidiary part of the service"".[11]

'the supply of goods'

2.17 Paragraph (d) of the definition of "service" in s 44B of the TPA excludes the supply of goods, except to the extent that it is an integral but subsidiary part of the service. The transmission of gas along a pipeline, for example, can involve the supply of additional gas to fuel gas compressors. The supply of gas in that way is an example of a subsidiary supply of a good (the gas) that is integral to the provision of a gas transmission service.

[11] BHP Billiton Iron Ore Pty Ltd v National Competition Council (High Court appeal) (at 33).

'the use of intellectual property'

2.18 Paragraph (e) of the definition of "service" in s 44B excludes the use of intellectual property, except to the extent that it is an integral but subsidiary part of the service. A declaration may cover, therefore, services associated with the use of intellectual property without which the provider could not make the declared service available to a third party.

'the use of a production process'

2.19 Paragraph (f) of the definition of "service" in s 44B excludes the use of a production process, except to the extent that it is an integral but subsidiary part of the service.

2.20 The expression "a production process" in paragraph (f) has what in the Hamersley Iron decision was identified as its ordinary meaning of "the creation or manufacture by a series of operations of some marketable commodity".[12]

2.21 The service in question is the service that is the subject of an application for declaration by an access seeker under s 44F(1) of the TPA, which is provided by means of a facility.

2.22 The production process in question is the series of operations used by the service provider to create or manufacture a marketable commodity. The content of the production process is a matter of fact to be determined having regard to the circumstances of the particular declaration application.

2.23 As the High Court found in BHP Billiton Iron Ore Pty Ltd v National Competition Council (at 41), having identified the relevant service and the production process, the issue is whether the use of the service for which declaration is sought also answers the description of the use by the access seeker of a service provider's production process. In that case, the answer was found to be in the negative.

2.24 The fact that the service provider's production process uses integers[13] which the access seeker wants to use for its own purposes does not necessarily mean that a service using those integers will be excluded from the definition of service in s 44B.[14]

2.25 The Council must consider the use the access seeker intends to make of the service and whether that use 'answers the description' of the service provider's production process. If it does, the service falls within the exception created by paragraph (f) and declaration is not available. For example, were an access seeker to apply for

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12 at 32. See also BHP Billiton Iron Ore Pty Ltd v National Competition Council (High Court appeal) (at 37).

13 For example, the use of a specific facility or element of a process, like a railway line to run trains.

14 BHP Billiton Iron Ore Pty Ltd v National Competition Council (High Court appeal) (at 43) - "The circumstances that the CSMS production process employed by BHPBIO involves the use of integers which the access seeker wishes to utilise for its own purposes does not deny compliance with the definition of 'service'".

declaration of a flour mill operated by *Miller Pty Ltd* to make flour or similarly process grain, it is likely that the exception in paragraph (f) would apply. In most other circumstances the exception in paragraph (f) will not come into play, although of course declaration will not follow unless the other criteria for declaration are satisfied. In this flour mill example it seems unlikely a number of the declaration criteria could be satisfied.

2.26 Furthermore, even if an access seeker's use of the service does answer the description of the service provider's production process, it will not be excluded from the definition of "service" in s 44B if the use of the production process is an integral but subsidiary part of the service.

The facility

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

2.28 In the Australian Union of Students decision, the Tribunal stated:

> The word 'facility' is not defined; but the dictionary definitions may be of some help. For example, the Shorter Oxford Dictionary defines 'facility' as 'equipment or physical means for doing something'; but the Macquarie Dictionary adopts a broader concept, namely, 'something that makes possible the easier performance of any action; advantage; transport facilities; to afford someone every facility for doing something. (at ¶43957)

2.29 In the Sydney Airport decision, the Tribunal considered an application for declaration of the service of making available the freight aprons, hard stands and other areas to enable other persons carrying on other activities to provide their own services. The Tribunal said that 'a facility for the purposes of the Act is a physical asset (or set of assets) essential for service provision' (at 82). The relevant facility is therefore comprised of 'the minimum bundle of assets required to provide the relevant services subject to declaration' (at 192).

2.30 In the Sydney Airport decision, the Tribunal considered that delineating the set of physical assets that comprise a facility is a 'key issue' in determining whether criterion (b) is satisfied because:

> The more comprehensive the definition of the set of physical assets … the less likely it is that anyone … would find it economical to develop 'another facility' within a meaningful time scale. Conversely, the narrower the definition of facility, the lower the investment hurdle and inhibition on development … . (at 192)

2.31 The Tribunal considered "the complete suite of physical assets necessary to service international airlines flying into and out of the Sydney region" (at 99). It found that most (if not the whole) of the airport, including all the basic airside infrastructure (runways, taxiways and terminals) and related land side facilities, was (1) necessary

for international aircraft to land at Sydney Airport, load and unload passengers and freight, and depart, and (2) essential to the services to which access was sought. In practical terms, the whole of the airport constituted the relevant facility within the meaning of Part IIIA (Sydney Airport decision at 99).

2.32 In the Services Sydney decision the Tribunal considered the question of whether the Northern Suburbs Ocean Outfall Sewer, the Bondi Ocean Outfall Sewer and the South Western Suburbs Ocean Outfall Sewer were one facility or three separate facilities. The three networks were not physically interconnected but Services Sydney argued that while physically separate, the three networks were fully integrated and coordinated in terms of staffing operation and maintenance. The Tribunal found that there were three relevant facilities as it was conceivable that "a new entrant could offer sewerage collection services only to customers connected to one of the three reticulation networks" and that "[i]t would not be essential to access transportation and interconnection services provided by each of the reticulation networks in order to compete" (at 15).

The Service Provider

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

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

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

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

2.34 Section 44B of the TPA provides the following definition:

> … 'provider', in relation to a service, means the entity that is the owner or operator of the facility that is used (or to be used) to provide the service.

2.35 In effect, the provider is the entity that controls the use of a facility and has the legal power to determine whether—and on what terms—access is provided.

2.36 At law, a person generally cannot assign an interest greater than the one they possess. The provider must therefore be capable of negotiating an access contract (or similar arrangement) consequent on declaration or, if negotiation fails, implementing an ACCC arbitration determination.

2.37 A number of the provisions of the TPA such as ss 44S, 44U and 44V cannot operate unless the provider is, out of the owner and the operator, the entity with the legal power to determine whether—and on what terms—access is provided. In particular, s 44V(2)(a) (which states that the ACCC may require the provider to provide a third party with access to a service) presupposes that the provider controls access to the relevant service. Where an operator controls access to a service, an order directing the owner of the facility to provide a third party with access to that service may be

ineffective. If only the operator can be ordered to provide a third party with access to a service, then the operator is a necessary party to any arbitration of an access dispute (as per s 44U(a) of the TPA), which means that the ACCC would be required to provide the operator with notice of an access dispute notified by a third party (s 44S(2)(a)).

2.38 It should be noted that a partnership or joint venture that consists of two or more corporations can be treated as a single 'provider' under s 44C of the TPA.

2.39 More generally the rules of statutory interpretation and the *Acts Interpretation Act 1901* (Cth) provide that words expressed in the singular include the plural. Therefore the word "provider" can if necessary extend to more than one party including the owner, the operator and any person(s) that has control over the provision of the service or the use of the facility.

2.40 Where the owner and the operator of a facility are not the same entity, the identification of the provider depends on an assessment of the entity that controls the use of a facility. It is the Council's practice to include as the provider(s) of a service the owner(s), operator(s) and any other parties with control over its use.

3 Promotion of competition (criterion (a))

Introduction

3.1 Section 44G(2)(a) of the TPA (criterion (a)) provides that the Council cannot recommend that a service be declared unless it is satisfied that access (or increased access) to the service would promote a material increase in competition in at least one market other than the market for the service.[15]

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

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

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

- identifies the relevant dependent (upstream or downstream) markets (see paragraphs 3.5 to 3.18)
- considers whether the identified dependent market(s) is separate from the market for the service to which access is sought (paragraphs 3.20 to 3.27), and
- assesses whether access (or increased access) would be likely to promote a materially more competitive environment in the dependent market(s) (paragraphs 3.34 to 3.82).

Identifying dependent markets

3.5 Section 4E of the TPA provides that:

> For the purposes of this Act, unless the contrary intention appears, 'market' means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.[16]

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15 In 2006, criterion (a) was amended to introduce the requirement that access (or increased access) to the service promote "a material increase" in competition in at least one dependent market (See s 16 *Trade Practices Amendment (National Access Regime) Act 2006* (No. 92, 2006) (Cth)).

16 Section 44B of the TPA expands the definition of markets for the purposes of Part IIIA to include trade or commerce outside Australia.

3.6 In Re QCMA the then Trade Practices Tribunal (the predecessor to the present Australian Competition Tribunal) defined a market as:

> ... the area of close competition between firms or, putting it a little differently, the field of rivalry between them (if there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. ... Whether such substitution is feasible or likely depends [on a number of factors] ... in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction? (at 190)

3.7 This view of market has subsequently be referred to with approval by the High Court in the Queensland Wire decision and adopted by the Tribunal including in the Sydney Airport decision and the Duke EGP decision. This view of market has broad application across most aspects of competition law including analysis of mergers and potentially anticompetitive conduct and for the identification of markets in the context of a declaration application under Part IIIA.

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

- a product or service dimension
- geographic area, and
- functional level.[17]

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

3.10 Defining a product market requires identification of the goods and/or services traded and the sources or potential sources of substitute products. Separate product markets exist if their respective products are not closely substitutable in demand or supply. Products are demand-side substitutes if consumers would substitute one product for the other following a small but significant change in their relative prices. Supply side substitution occurs when a producer can readily switch from producing one product to producing another. Market entry can be distinguished from supply-side substitution by the requirement for significant investment in production, distribution or promotion.

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

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

3.12 Defining the relevant geographic market requires the identification of the area(s) that are supplied, or could be supplied, with the relevant product and to which consumers can practically turn. National, intrastate or regional markets, for example, may be defined. The reference to 'other markets' in criterion (a) includes markets outside Australia.[18]

3.13 The collective effect of substitution in demand and supply determines what is in and out of the relevant product and geographic market dimensions. The process of market definition begins with the narrowest feasible product and geographic market boundaries. If consumers would respond to an increase in price by switching to alternative products or services, then the market must be expanded and the process continues until the market boundaries include all those sources and potential sources of close substitutes, so as to identify the smallest area over which it would be profit maximising for a hypothetical monopolist to impose a small but significant and non-transitory increase in price.

3.14 Substitution possibilities can be gauged through cross-price elasticity assessments. However, it is often difficult to obtain sufficient data on the relevant cross-price elasticities to calculate these in order to define market boundaries and so other more qualitative, judgement-based assessments are often undertaken in defining markets.

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

3.16 In the context of considering applications for declaration the functional dimension of market definition often overlaps with consideration of whether a dependent market is separate from the market for the service for which declaration is sought (see paragraphs 3.20 to 3.27).

[18] While the promotion of competition in a market outside Australia might enable criterion (a) to be satisfied, in a situation where the only dependent market in which a material promotion of competition might result was outside Australia, it may be difficult to satisfy criterion (f) in terms of establishing that access is not contrary to the public interest as criterion (f) is concerned with the interest of the Australian public. Where the promotion of competition in a market outside Australia would reduce returns to Australia, it might be argued that access is contrary to the [Australian] public interest and criterion (f) is not met. In practice it is unlikely that the impact of access would only occur in relation to a market outside Australia or that access would materially affect competition in an international market.

3.17 In its consideration of criterion (a) the Council will seek to identify one or more dependent markets where competition appears likely to be significantly affected by the availability of access to the service for which declaration is sought. Often these markets will be vertically related to the market for the service for which declaration is sought. That is, they are upstream or downstream of that market in a supply chain.

3.18 The Council will identify dependent markets in terms of the dimensions set out above. The Council considers, however, that an assessment of criterion (a) may not always require a precise delineation of the boundaries of the market for the service. What must be determined is whether the market(s) in which competition is said to be promoted (the dependent market(s)) are distinct from the market for the service and the effect access will have on the conditions for competition in that dependent market(s).

3.19 It may also be unnecessary to consider all possible dependent markets. Criterion (a) is satisfied if access will materially promote competition in one or more dependent markets. In practice, it is unlikely that the Council will examine more than the two most likely dependent markets in relation to an application for declaration.

Separate market(s) from the market for the service

3.20 For the purposes of criterion (a), the Council needs to be satisfied access (or increased access) would promote a material increase in competition in 'at least one market ... other than the market for the service'. This means that dependent markets must be functionally distinct from the market for the service for which declaration is sought.

3.21 Although it is possible that criterion (a) may be satisfied where the service provider is not vertically integrated into a dependent market(s), criterion (a) will most commonly be satisfied where the service provider is vertically integrated into the dependent market(s). The Federal Court stated in BHP Billiton Iron Ore v NCC that:

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

In these circumstances it must be established that the provision of the service provided by the facility and the vertically related activity in the dependent market occur in distinct functional markets. Where there are such overwhelming efficiencies from vertical integration, and the provision of the service and the vertically related activity occur in the same functional market, there may not be a case for facilitating access to third parties.

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

3.23 In the Services Sydney decision the Tribunal was also concerned with economic separability and relevantly stated:

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

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

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

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

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

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

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

Access (or increased access) to the service

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

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

3.29 As the Tribunal noted in the Sydney Airport decision:

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

3.30 Criterion (a) does not require that access to the service is unavailable at the time a declaration application is made. In the Sydney Airport decision, the Tribunal held that "existing access to a service is no bar to a consideration whether a declaration should

be made in respect of that service" (at 229). This principle was further illustrated by the Tribunal's discussion in the Duke EGP decision of the equivalent criterion (a) in the Gas Code. In that case, Duke contended that the question of whether access or increased access to the service would promote competition in other markets does not arise unless, as a matter of fact, access to the Eastern Gas Pipeline was either unavailable or restricted.

3.31 The Tribunal rejected this argument in the following terms:

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

3.32 No threshold question as to whether access to a service is unavailable or restricted arises in the assessment of criterion (a). The Full Court stated in the Sydney Airport Appeal decision that it is not necessary ... "to identify and determine the existence and extent of a denial or restriction of access"[19] in order to satisfy criterion (a).

3.33 Declaration is available where existing or new users are permitted access to the service, and seek the right to:

- additional access beyond that presently permitted, and/or
- access on more efficient terms and conditions than those offered commercially, and/or
- access where only a limited number of users are permitted access.

Material promotion of competition

3.34 The notion of competition is central to the TPA. As noted by the Tribunal, competition is a very rich concept, containing within it a number of ideas (see Re QCMA). Competition is valued for serving economic, social and political goals. It is a mechanism for discovering market information and enforcing business decisions in light of this information. The basic characteristic of effective competition is that no one seller or group of sellers has undue market power. Competition is a dynamic process, generated by market pressure from alternative sources of supply and the desire to keep ahead. In this sense, competition expresses itself as rivalrous market behaviour.

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

[19] at 76.

3.36 In the Sydney Airport decision, the Tribunal stated:

> The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration. (at 106)

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

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

3.38 The Tribunal also adopted this approach in the Duke EGP decision, stating that 'the question for the Tribunal is whether the opportunities and environment for competition in market(s) upstream or downstream of the EGP would be enhanced if the EGP were to be covered in terms of the Code, than if it were not.'.[20] This question is assessed by a comparison of the future conditions and environment for competition with and without access.

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

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

[20] at 83.

> would remove a significant barrier to entry into at least one dependent market and that the probability of entry is thereby increased, competition will be promoted. (at 131)

3.40 The object of the criterion (a) requirement that access materially promote competition is to limit declaration to facilities to which access is essential for effective competition in a dependent market. The Hilmer Report described this rationale for access regulation in the following terms.

> In some markets the introduction of effective competition requires competitors to have access to facilities which exhibit natural monopoly characteristics, and hence cannot be duplicated economically. … Facilities of this kind are referred to as 'essential facilities'.
>
> An 'essential facility' is, by definition, a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole. (Hilmer Report, p. 239)

3.41 The Hilmer Report proposed that access to a facility should be regulated by Part IIIA only where:

> Access to the facility in question is essential to permit effective competition in a downstream or upstream activity. (Hilmer Report, p. 251)

3.42 The reference to 'competition' in criterion (a) is a reference to effective competition, rather than any theoretical concept of perfect competition. 'Effective competition' refers to the degree of competition required for prices to be driven towards economic costs and for resources to be allocated efficiently at least in the long term. It is unlikely that the reference to 'competition' in criterion (a) is intended to refer to the theoretical concept of perfect competition, not only given the Hilmer Report's stated objective of access regulation to promote effective competition, but also because the subject matter of the criterion (a) assessment involves an assessment of the competitive conditions in a real-life industry.[21]

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

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

> Whether competition will be promoted by coverage is critically dependent on whether EGP has power in the market for gas transmission which could be used

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

> to adversely affect competition in the upstream or downstream markets. There is no simple formula or mechanism for determining whether a market participant will have sufficient power to hinder competition. What is required is consideration of industry and market structure followed by a judgment on their effects on the promotion of competition. (at 116)

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

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

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

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

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

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

3.49 Access is unlikely to materially promote competition in the dependent market(s) if the service provider does not have the ability and incentive to exercise market power to adversely affect competition in the dependent market(s).

3.50 Finally, the Council observes that the Tribunal has made it clear that promotion of competition should not be gauged in terms of either:

(a) the effect of access on particular competitors, such as a particular applicant seeking to have a service declared, or

(b) the delivery of efficient outcomes.

3.51 The Council considers that the assessment of promotion of competition should focus on the impact of access on the competitive environment generally, rather than on particular competitors. In the Sydney Airport decision, the Tribunal said:

> The Minister and the Tribunal do not look at the promotion of 'competitors' but rather the promotion of 'competition'. Such an analysis is not made by reference to any particular applicant seeking to have a service declared. At the point of time at which a decision is to be made as to whether or not to declare a service under s 44H, it may not be known who will be seeking access if the relevant service is declared. (at 21)

3.52 It further stated:

> The Tribunal is concerned with furthering competition in a forward looking way, not furthering a particular type or number of competitors. ... (at 108)

3.53 The Tribunal noted in the Duke EGP decision (at 109) that criterion (a) is concerned with whether competition would be promoted, not with whether competition is efficient.[22]

Ability and incentive to exercise market power

3.54 Whether competition will be materially enhanced as a result of access depends critically on the extent to which the incumbent service provider can and is likely, in the absence of declaration, to use market power to adversely affect competition in a dependent market. If a service provider has market power, and the ability and incentive to use that power to adversely affect competition in a dependent market, declaration would be likely to improve the environment for competition.

3.55 In the Duke EGP decision (at 116-124), the Tribunal considered a range of factors in assessing whether Duke EGP could exercise market power t*o* hinder competition in the relevant dependent markets, including:

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

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

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[22] The effects of access on efficiency are considered under criterion (f) where appropriate.

3.57 In the Duke EGP decision the Tribunal did not indicate that it examined *all* the relevant factors for assessing competitive conditions in dependent markets in all instances. Rather, it focused on the pertinent aspects of industry and market structure of specific relevance to the Eastern Gas Pipeline. As the Tribunal stated:

> ... There is no simple formula or mechanism for determining whether a market participant will have sufficient power to hinder competition. What is required is consideration of industry and market structure followed by a judgment on their effects on the promotion of competition. (at 116)

3.58 Access will be likely to materially increase competition in the dependent market(s) where the service provider has both the incentive and ability to use its market power to adversely affect competition in the dependent market(s).

3.59 In essence, there are three mechanisms by which the use of market power in the provision of the service for which declaration is sought by a service provider may adversely affect competition in a dependent market:

- a service provider with a vertically related affiliate may engage in behaviour designed to leverage its market power into a dependent market to advantage the competitive position of its affiliate
- where a service provider charges monopoly prices for the provision of the service, those monopoly prices may restrict participation in that market, and/or
- explicit or implicit price collusion in a dependent market may be facilitated by the use of a service provider's market power. For example a service provider's actions may prevent new market entry that would lead to the breakdown of a collusive arrangement or understanding or a service provider's market power might be used to 'discipline' a market participant that sought to operate independently.[23]

3.60 Where competition in a dependent market(s) is not effective, a service provider may nonetheless lack the incentive to exercise market power to adversely affect competition in a dependent market. In some situations, a service provider may have an incentive to engage in strategies designed to increase competition in a dependent market(s). If, for example, a service provider has no vertical interests in a dependent market(s), and its facility has excess capacity, then it may be profit maximising for the service provider to promote increased competition in the dependent market(s), reduce margins and prices in the dependent market(s), and increase incremental demand for the services provided by the facility. In these circumstances, the service provider would not have an incentive to engage in the conduct described in paragraph 3.59 and access is unlikely to promote competition in a dependent market.

3.61 Accordingly, in assessing whether a service provider has the ability and incentive to use its market power to adversely affect competition in a dependent market, the

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

Council asks whether the service provider has the ability and incentive to engage in any of the types of conduct described in paragraph 3.59. This assessment is discussed in detail in the following sections.

Leveraging market power

3.62 A service provider may seek to leverage its market power into a dependent market(s). A service provider that is vertically integrated or has a vertically related affiliate in a dependent market(s), for example, is likely to have an incentive to discriminate in favour of itself or its affiliate. The service provider may charge lower prices for providing the service to its affiliate and/or offer non-affiliates access to the service on unequal or inferior terms.

3.63 This type of vertical leveraging is likely to hinder competition in the dependent market(s). The service provider seeks to extract monopoly rents in the dependent market(s) by engaging in strategies, made possible by its market power, to damage the competitive process in the dependent market(s).

3.64 Until relatively recently, a monopoly input supplier was thought to have no incentive to engage in vertical leveraging even where it had a vertically related affiliate in a dependent market because it is able to derive all the available monopoly rents without engaging in vertical leveraging. This view was based on what is referred to as *the theory of one monopoly rent*. This theory suggested that a monopolist can extract all the available monopoly rents by selling its services at a monopoly price and that vertical leveraging cannot increase the level of monopoly rents that are available.

3.65 More recently, however, it has been recognised that the assumptions underpinning the theory of one monopoly rent are rarely satisfied in the 'real' world. As Scherer and Ross state:

> … the world is a good deal more complex than assumed in the models generating the [proposition that downstream vertical integration by a monopolist cannot enhance monopoly power and thus profit-making opportunities]. In particular, those models ignore the possibility of substitution between monopolised and competitive upstream inputs, consider only the polar extremes of pure monopoly and pure competition, and abstract from market dynamics. Relaxation of the simplifying assumptions shows that monopoly power may be (but is not necessarily) enhanced through vertical combinations. (1990, p. 523)

3.66 Scherer and Ross conclude:

> Our analysis reveals that under plausible circumstances, vertical integration downstream by an input monopolist can lead to enhanced monopoly power and price increases (1990, p. 525).

3.67 Strategies for leveraging the service provider's market power into the dependent market(s) are not, however, necessarily anti-competitive. Strategies to leverage the service provider's presumed market power to advantage a vertically related affiliate in the dependent market(s) may be pro-competitive, for example, where they result

in enhanced competitive pressures on independent competitors in an imperfectly competitive dependent market.

3.68 In addition, a distinction must be drawn between situations where a service provider seeks to advantage its vertically related affiliates so as to achieve the transaction cost efficiencies from vertical integration and the situation where a service provider seeks to advantage its affiliates so as to capture monopoly rents. The former behaviour is likely to enhance efficiency while the latter is harmful to effective competition.

3.69 Generally, the Council considers that criterion (a) is satisfied if access (or increased access) would lessen the opportunities for differential treatment of vertically related entities. Criterion (a) is satisfied where the provider has an incentive and ability to engage in vertical leveraging to adversely affect competition in a dependent market(s). Ordover and Lehr articulated this in respect of the application of the then Gas Code coverage criterion (a) to the Moomba–Sydney Pipeline:

> Criterion (a) asks whether coverage of the pipeline would reduce entry barriers in at least one upstream or downstream market … Thus, if for example, coverage lessens the opportunities for anticompetitive differential treatment of firms that compete with the subsidiaries of the pipeline, the effects of coverage on competition may be salutary. (2001, p. 11)

Charging monopoly prices

3.70 In the 'without access' situation, a service provider may be able to set prices for the service/s that substantially exceed its forward looking, long run economic costs—that is, the level of prices that should prevail in the presence of effective competition.

3.71 If the service provider priced the services provided by the facility above the competitive level, then it would be likely that this would also have the effect of increasing the price of products in the downstream market above competitive levels, thus suppressing demand in a dependent market. In addition, where participants in a dependent market do not pass through the full above-competitive prices for the service, the lower margins in the market may reduce incentives to invest in the dependent market and thus could have an adverse effect on competition in those dependent markets.

3.72 The ability of the service provider to profitably raise price above a competitive price depends on:

- the elasticity of demand in the downstream market and the proportion of proper economic costs of production in that market that comprises the cost of the service
- the elasticity of demand for the service subject to declaration. For example, Ordover and Lehr (2001, p. 19) state that where the elasticity of demand for delivered natural gas is low and transportation costs represent only a small proportion of the delivered cost of natural gas, it does not necessarily follow that the demand elasticity facing a particular pipeline is also low

- the willingness of other economic factors to absorb some of the amount by which pricing exceeds long run economic costs, which will reduce the elasticity of demand for the services subject to declaration. Incomplete pass through to end users of the prices for the service because upstream or downstream market participants are prepared to reduce their margins to offset prices for the services will offset the reduction in demand that would otherwise be associated with a price increase for the services, and
- the ability of the service provider to charge differential prices for the services depending on the particular users' willingness to pay.

3.73 None of the above factors automatically implies that a service provider can set monopoly prices or that the setting of monopoly prices in the market for the service will necessarily impact on competition in a dependent market. As discussed at the outset, competition in a dependent market(s) may constrain the ability and incentive of a service provider to exercise market power through monopoly pricing.

3.74 Ordover and Lehr considered the ability of the Moomba to Sydney Pipeline (MSP) to monopoly price in the upstream production market and the downstream retail market for gas. They stated:

> The MSP's ability to monopoly price is potentially constrained by competition in upstream or downstream markets. Regarding the upstream markets, if gas producers can sell their gas to other retail markets via other pipelines, they will refuse to sell gas to MSP unless they earn the same return on the marginal unit of gas shipped to Sydney (or ACT) as they earn on shipments to other locales. This type of competition will constrain MSP's ability to set transport prices substantially above economic costs, even if MSP remains a monopolist with respect to transport between Cooper Basin and the markets in NSW/ACT. Regarding the downstream markets, if there are other sources of natural gas supply to the retail markets in NSW/ACT then MSP cannot overprice transport since this would render the gas shipped over it uneconomic. As noted, this ability of consumers to switch to gas from other sources also constrains the MSP's ability to set transport prices substantially above economic costs.
>
> Source and/or destination competition is an effective constraint on MSP, if there is sufficient independent capacity to absorb gas output on pipelines going to other destinations and if there is sufficient volume of gas output from other sources to which consumers can divert their demand in the face of elevation in price of the gas delivered over MSP. If these conditions are met, a substantial price increase above the competitive level will likely be unprofitable. This is so, despite the fact that the pipeline (here the MSP) is actually a natural monopoly over transport from the Cooper Basin to NSW and ACT. (2001, p. 13)

3.75 In addition to competition in a dependent market(s), the market power of the participants in a dependent market(s) may constrain the ability of a service provider to exercise monopoly power in those market(s). If, for example, a dependent market has only one participant, then that participant may have substantial bargaining power in negotiating with a service provider for the provision of a service (particularly if there is generally no alternative use for the service provided by the facility). There is a

danger here, however, of collusion between a service provider and a dependent market participant to foreclose access to the service and thus new entry into the dependent market.

3.76 One of the best indicators of whether the service provider has the ability and incentive to engage in monopoly pricing is whether prices (without access) are substantially above competitive prices. The Council observes, however, that it is often very difficult to estimate competitive prices to use as a benchmark for assessing whether monopoly pricing exists.

3.77 In this regard, the Tribunal in the Duke EGP decision warned against the use of regulated prices for an assessment of whether pricing exceeds the competitive level:

> AGL argued that the extant competition was not efficient competition because the downstream and upstream markets were not fully competitive, and there was no evidence presented that the prices being charged by EGP were prices that would result from the operation of efficient competition. … [T]he AGL argument was that a tariff set under the Code represents the price which would be produced by efficient competition because that is what the Code requires in s 8.1; it then follows that a difference between the Duke tariff and one determined under the Code is evidence that there is not efficient competition even when there is competition in the marketplace.
>
> This argument does not take sufficient account of the fact that regulation is a second best option to competition. The complex nature of the tariff-setting process, the number of assumptions it relies on, and the fact that the reference tariff is a publicly available price which may be varied by negotiation between the pipeline owner and user depending on the user's requirements and conditions in the marketplace, all point to the fact that the reference price is not necessarily the price which would result from competition. Indeed, ACCC in its Draft Decision on MSP tariffs pointed out that if the EGP did not exist the reference tariff for the MSP would be lower as it would be transporting more gas. This is not what one would expect in a competitive market (Draft Decision at 97). (at 109–110)

3.78 Nonetheless, it may be possible to conclude that current prices exceed competitive levels where, without access, pricing deviates substantially from proposed regulated tariffs and/or the circumstances surrounding past price movements.

Explicit or implicit price collusion

3.79 If there is limited competition in a dependent market, participants in that market (including the service provider or affiliate) may be able to jointly implement above-competitive prices through explicit or implicit coordination. Implicit or explicit price coordination has the same implications for competition in a dependent market as those of monopoly pricing (discussed above).

3.80 Where demand for the service subject to declaration is derived from competition between bundled products in a dependent market, parallel pricing behaviour between participants in the dependent market may not result in identical prices.

Parallel behaviour may involve pricing strategies for above-competitive returns that result in parity in the price of the bundled product. Parallel behaviour between a gas pipeline owner/operator, for example, may result in parity in delivered gas prices, allowing the pipeline owner/operator to earn supra-competitive returns.

3.81 In considering the potential for price collusion in relation to the application for revocation of coverage of the Moomba–Sydney Pipeline under the then Gas Code, Ordover and Lehr stated:

> We have not undertaken an independent inquiry as to whether collusion among the pipelines is either likely or feasible. However, we note that the number of pipelines serving the NSW/ACT retail markets is small and is likely to remain so for the foreseeable future. …
>
> It is critical to note that the ability to sustain a collusive outcome does not depend solely on the number of competing pipelines. Indeed, there are many markets with a small number of participants that are effectively competitive. Other market characteristics also impinge on the ability of firms to charge prices that significantly exceed competitive levels. For example, if each of the pipelines has excess capacity and if it is relatively easy to price discriminate so as to offer deals to potential customers that are unlikely to be observed by the competitor pipeline then price coordination may not be sustainable. Long-term contracts and large-scale purchases are also thought to hinder cooperation. (2001, p. 14)

3.82 Some commentators suggest that access regulation enhances the ability of participants to sustain a collusive outcome because the disclosure requirements associated with third party regulated access arrangements make pricing transparent. This approach, however, ignores the effect of access regulation on constraining prices to levels determined by reference to costs. Regulation sets a benchmark for unregulated prices that buyers can use in negotiating access to the facility subject to regulation (and access to other unregulated facilities that may compete in the dependent market(s)). On balance, the Council considers that access regulation is unlikely to facilitate price collusion.

Time horizon for assessment

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

3.84 An example is provided by the AGL Cooper Basin Natural Gas Supply Arrangements decision, in which the Tribunal recognised that substitution possibilities and market boundaries are changing over time, given the dynamic quality of gas markets and the emerging competition between gas and electricity due to technological change. The Tribunal defined the relevant market at three points in time for the purpose of assessing the competition effects of the long term supply contract between

Australian Gas Light Company and a group of producers of natural gas in the South Australian sector of the Cooper Basin. The Tribunal stated:

> We have concluded, as canvassed with counsel in the course of the hearing, that the appropriate approach in this matter is to think in terms of a market expanding over time — i.e. an expanding market definition. Such an approach is consistent both with commercial reality and the traditional methodology of market definition, and is apt to expose the issues in this matter.
>
> In considering this expanding market, we specify three dated markets of interest: the market in 1986, the market today, and the market in 'the future' — perhaps ten or fifteen years hence. Quite obviously the geographic market is expanding over this time period, and the product market is also expanding, as we explain below. (at 12–15)

3.85 Accordingly, in assessing whether access would promote a material increase in competition in a dependent market, the Council may appropriately define that market at different points in time, to account for changes in technology and/or market conditions.

3.86 Alternatively, changes in market conditions may not result in a changing definition of a dependent market, but may nonetheless have implications for the competitive conditions in the dependent market and thus have an impact on the criterion (a) assessment. Planned new entry or capital investment in expanded capacity, for example, may increase the alternatives to the use of the service in a dependent market and thus change conditions for competition in that market. These changes may have an impact on the ability of, and incentive for, the service provider to exercise market power to adversely affect competition in the market.

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

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

3.88 While there is a time horizon to the assessment of both criteria (a) and (b), the time horizon over which the Council accounts for relevant changes for the two assessments may not necessarily be the same. (The time horizon for the assessment of criterion (b) is discussed at paragraphs 4.50–4.51.)

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

Introduction

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

4.2 Criterion (b) is concerned with Australia's national interest not the private interests of any particular parties. The Council and the Tribunal have consistently found that the appropriate test for assessing whether criterion (b) is met is a social test and that the term 'uneconomical' should be construed in a social cost benefit sense rather than in terms of private commercial interests. In the Sydney Airport decision the Tribunal explained that:

> ... If 'uneconomical' is interpreted in a private sense then the practical effect would often be to frustrate the underlying intent of the Act. This is because economies of scope may allow an incumbent, seeking to deny access to a potential entrant, to develop another facility while raising an insuperable barrier to entry to new players (a defining feature of a bottleneck). The use of the calculus of social cost benefit, however, ameliorates this problem by ensuring the total costs and benefits of developing another facility are brought to account. ... (at 205)

4.3 The assessment of criterion (b) centres on identifying whether a facility exhibits "natural monopoly" characteristics such that a single facility is capable of meeting likely demand at lower cost than two or more facilities. Therefore it is uneconomical to duplicate the facility and society's resources are most efficiently used, and costs minimised, if it is not necessary for additional facilities to be developed. In the Duke EGP decision, the Tribunal stated:

> ... the 'test is whether for a likely range of reasonably foreseeable demand for the services provided by means of the pipeline, it would be more efficient, in terms of costs and benefits to the community as a whole, for one pipeline to provide those services rather than more than one'. (at 137)

4.4 Under this approach, criterion (b) limits declaration to the services of facilities with natural monopoly characteristics. The key characteristics of a natural monopoly relate to the presence of significant economies of scale and/or economies of scope in the production of the service or services the facility provides, the existence of substantial fixed (or capital) costs and relatively low variable (or operating) costs, and large and lumpy investment costs.

4.5 In interpreting criterion (b), the Council has particular regard to the following Tribunal decisions the Sydney Airport decision and the Duke EGP decision. In the Duke EGP decision, the Tribunal considered the coverage criteria in s 1.9 of the then Gas Code in the context of AGL Energy Sales & Marketing Limited's application for coverage of the Eastern Gas Pipeline under the then Gas Code. Apart from two differences, criterion (b) in s 1.9 of the Gas Code mirrored the language of declaration criterion (b)

in s 44G(2) of the TPA. The differences are that declaration criterion (b) considers whether it would be uneconomical (rather than uneconomic, as it was in the Gas Code and continues to be in the National Gas Law) to develop another facility (rather than another pipeline, as it was in the Gas Code and continues to be in the National Gas Law) to provide the service.

4.6 The Council considers that nothing rests on the variation between 'uneconomical' in declaration criterion (b) and 'uneconomic' in coverage criterion (b). In the Duke EGP decision (at 58), the Tribunal adopted the reasoning that it used in the Sydney Airport decision with respect to the meaning of 'uneconomical' in declaration criterion (b), in interpreting the term 'uneconomic' in the Gas Code's criterion (b) and stated in relation to the Gas Code that "nothing turns upon this difference in language"[24].

4.7 The use of the word 'pipeline' in the then Gas Code's coverage criterion (b) (and similarly in s 15(b) of the now National Gas Law) precludes the Council from considering whether a facility other than a pipeline could provide the services provided by the pipeline that is the subject of the application for coverage. In the context of the Gas Code and the National Gas Law, the Council cannot examine, for example, whether liquefying natural gas and then transportation by ship may provide the service of gas transportation provided by the pipeline that is the subject of the application.[25] The declaration provisions in s 44G of the TPA are broader in that they contemplate a consideration of whether other types of facilities could provide the service provided by the facility that is the subject of the application for declaration. In this sense, criterion (b) is technology neutral.

'uneconomical'

4.8 Criterion (b) is intended to limit declaration to a service(s) provided by a facility that exhibits natural monopoly characteristics. The Tribunal articulated this intention in the Duke EGP decision, stating:

> The Hilmer Report suggests that criterion (b) was intended to describe a pipeline which exhibits 'natural monopoly characteristics'. ... (at 60)

4.9 Criterion (b) gives effect to this intention through the term 'uneconomical'. In the Duke EGP decision, the Tribunal referred to statements from the Hilmer Report that equate the terms 'uneconomical' and 'natural monopoly', including the following:

> Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. While it is difficult to define precisely the term 'natural monopoly', electricity transmission grids, telecommunication networks, rail tracks, major pipelines, ports and airports are often given as examples. (Hilmer Report, p. 240)

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24 At 58.

25 The Council can however consider competition from gas transported in this way in its assessment of the National Gas Law coverage criterion (a).

4.10 In the Sydney Airport decision, the Tribunal confirmed that 'uneconomical' should be construed in a social cost-benefit sense rather than in terms of private or commercial interests:

> ... The Tribunal considers … that the uneconomical to develop test should be construed in terms of the associated costs and benefits of development for society as a whole. Such an interpretation is consistent with the underlying intent of the legislation, as expressed in the second reading speech of the Competition Policy Reform Bill, which is directed to securing access to 'certain essential facilities of national significance'. This language and these concepts are repeated in the statute. This language does not suggest that the intention is only to consider a narrow accounting view of 'uneconomic' or simply issues of profitability.
>
> … If 'uneconomical' is interpreted in a private sense than the practical effect would often be to frustrate the underlying intent of the Act. This is because economies of scope may allow an incumbent, seeking to deny access to a potential entrant, to develop another facility whilst raising an insuperable barrier to entry to new players (a defining feature of a bottleneck). The use of the calculus of social cost benefit, however, ameliorates this problem by ensuring the total costs and benefits of developing another facility are brought to account. ... (at 204 - 205).

4.11 An enquiry into whether it is uneconomical in a social cost-benefit sense for two or more facilities to provide the service is essentially an enquiry into the existence of a natural monopoly.

Natural monopoly

4.12 As acknowledged in the Hilmer Report, it can be difficult to define a 'natural monopoly' with any precision. For the purposes of criterion (b), defining a test for natural monopoly that can be applied to all (or at least most) cases to produce accurate results, without introducing unnecessary technicality and complexity, is fraught with difficulty. This is the challenge faced by the Council and other parties responsible for considering criterion (b).

4.13 The traditional approach to natural monopoly was to classify certain industries, particularly public utilities, as being natural monopolies without particular regard to a theory of natural monopoly. The defining characteristic of such 'natural monopoly' industries was thought to be decreasing long run unit costs of production—that is, economies of scale. Whether an industry was a natural monopoly was considered self-evident, given the relatively easily observed presence or absence of scale economies in an industry.

4.14 The technical definition of natural monopoly, indicates that a natural monopoly will exist if, over the relevant range of output, any division of each and every level of

output within that range among two or more firms results in greater total costs of production than result if a single firm produces that level of output.[26]

4.15 Put more simply, a natural monopoly exists if a single source can produce every level of output in a given range of output at a lower cost than two or more sources.

4.16 In the Duke EGP decision, the Tribunal adopted this definition of natural monopoly in giving meaning to the term 'uneconomic':

> We agree with the submissions of NCC that the 'test is whether for a likely range of reasonably foreseeable demand for the services provided by the means of the pipeline, it would be more efficient, in terms of costs and benefits to the community as a whole, for one pipeline to provide those services rather than more than one'. (at 137)

4.17 In the Council's view, for the purpose of criterion (b), a natural monopoly exists if, for the relevant range of demand, it is always cheaper for a single facility rather than multiple facilities to provide the service subject to declaration.

Conditions for the existence of natural monopoly

4.18 For the assessment of criterion (b), it is necessary to consider the conditions under which a natural monopoly will occur.[27]

4.19 The key characteristics of a natural monopoly relate to the presence of significant economies of scale and/or economies of scope in the production of the service or services that the facility provides, the existence of substantial fixed (or capital) costs and relatively low variable (or operating) costs, and large and lumpy investment or sunk costs.

4.20 In determining whether a natural monopoly exists, the Council also considers any incumbency advantages that confer a monopoly on a service provider. An incumbency advantage is a natural, economic or technological advantage associated with the initial establishment of a facility.

4.21 Therefore, in assessing whether an infrastructure facility is a natural monopoly, the Council may consider factors such as:

(a) the size of the initial or start-up investment

(b) the cost structure of operating the service

(c) the existence of any other existing facilities that provide the defined service

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[26] This is known as the sub-additivity condition for natural monopoly. A natural monopoly exists, over the relevant range of output, if the cost function of a firm is sub-additive. The cost function of a firm is sub-additive for a particular level of output if any division of that output among two or more firms results in greater costs of production than result if a single firm produces that level of output.

[27] The economic literature refers to these conditions as the sufficient conditions for sub-additivity.

(d) the nature of demand for the service, particularly the dynamic aspects such as growth or otherwise in demand

(e) the current and maximum potential capacity of the facility

(f) the particular technology employed to supply a service

(g) the rate of technological innovation in the industry, and

(h) the existence of any environmental, planning or other regulations that prevent anyone else from building their own facility.

4.22 Natural monopoly characteristics are common to significant infrastructure facilities, where substantial fixed costs and low operating costs may combine to generate economies of scale and scope over the range of reasonably foreseeable demand. Generally, under these conditions, one facility can supply the entire range of demand more cheaply than two or more facilities can. This makes it economically efficient for only one facility to service the entire foreseeable range of demand. In such situations the development of another facility to provide the service would amount to a wasteful use of society's resources.

4.23 The sufficient conditions for the existence of a natural monopoly, in effect, simply recognise that the following factors determine the existence of a natural monopoly:

(a) pervasive **economies of scale**, whereby average costs per unit of output decrease as output rises. These may occur if a facility requires large up-front investment, but has relatively low operating costs that vary little as more of the facility's capacity is brought on line. Building and activating a gas or electricity distribution network, for example, involves substantial fixed costs, but the variable costs of sending more gas or current around a network once it is operating are relatively small. Unit costs thus decrease because the initial capital costs are spread over each additional unit of output. Rather than making a competitor develop a second network to compete with the existing network, it makes more economic sense to give that competitor access to the existing network so further economies of scale can be captured.

(b) **economies of scope**, whereby a facility is able to provide a range of different but complementary products at a lower total cost than that of separate assets providing the products. These may occur in the case of network externalities — that is, where the benefits to consumers of being linked to a network depend on the number of other consumers linked to the network. Airlines, for example, prefer to locate at a single airport in a particular destination to" gain commercial benefits from interconnecting with other services and airlines" (Sydney Airport decision, at 85).

(c) **incumbency advantages**, natural, economic or technological advantages associated with the initial establishment of a facility.

These advantages could mean that new businesses may be unable to access the same advantages as the incumbent.

Sustainability of natural monopoly

4.24 Where one firm can supply the entire range of demand more cheaply than two or more facilities, a natural monopoly exists. However, as Ordover and Lehr state:

> … even natural monopoly does not assure that all of the demand is served by a single firm. Not all natural monopolies are sustainable against cream-skimming entry (i.e. entry that seeks to serve only a portion of the market). For a particular combination of costs and market demand, entry on a smaller scale than the size of the market may be profitable, even though the cost of meeting total demand when it is supplied by multiple firms is higher. (2001, p. 5)

4.25 A facility can exhibit natural monopoly characteristics whether or not there is only one facility or firm. As Posner states:

> The term [natural monopoly] does not refer to the actual number of sellers in a market but to the relationship between demand and the technology of supply. If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more the market is a natural monopoly regardless of the actual number of firms in it. (1999, p. 1)

4.26 As previously discussed, criterion (b) requires a broad social construction (rather than a commercial view) of 'uneconomical'. While social considerations and private considerations are likely to lead to similar results in many cases, private considerations can sometimes make it commercially viable for another facility to be built even though this would be inefficient if all social costs were considered. Declaration and the application of Part IIIA generally does not prevent these situations. What these provisions seek is to make available the socially optimal sharing alternative.

4.27 In these circumstances, it is possible to envisage a case where criterion (b) is satisfied even though competing services exist. Criterion (b) is a test of whether a facility can serve the range of foreseeable demand for the services provided by the facility at less cost than that of two or more facilities. The status of a facility against this test does not change merely because another facility is inefficiently developed.

4.28 The extent to which the inefficient development of another facility to provide the same service as provided by the facility subject to declaration constrains the behaviour of the service provider in the dependent markets is a matter relevant to the assessment of criterion (a), not criterion (b). Criterion (b) is concerned only with whether the facility exhibits natural monopoly characteristics, whereas criterion (a) assesses whether access will promote a material increase in competition. Criterion (a) is unlikely to be satisfied where a second inefficient facility has been developed, having a direct impact on the market power of an incumbent and has effectively made the dependent markets competitive.

4.29 In the Duke EGP decision, the Tribunal considered the potential for inefficient development of another facility to provide the service and it recognised this difference in the roles of criterion (b) and criterion (a). The Tribunal said:

> Thus we accept that if a single pipeline can meet market demand at less cost (after taking into account productive allocative and dynamic effects) than two or more pipelines, it would be 'uneconomic', in terms of criterion (b), to develop another pipeline to provide the same services. … it is a matter for a pipeline owner to decide whether or not to construct an 'inefficient' pipeline. Generally speaking, owners act on private cost, rather than social cost considerations. If development of a competitive pipeline is economic, in a private cost sense, and is driven by opportunities in the market, then this may have implications for the assessment of criterion (a). (at 64)

4.30 The Tribunal acknowledged that the inefficient development of another pipeline (or facility) may occur where private cost and social cost considerations diverge. Further, the inefficient development of another pipeline (or facility) based on private cost considerations will be relevant to the assessment of criterion (a), not criterion (b), which posits a test based on social cost considerations.

'another facility to provide the service'

4.31 Criterion (b) requires that it be uneconomical for anyone to develop 'another facility to provide the service'. As discussed above, the facility is likely to be 'uneconomical' to duplicate if a single facility is capable of meeting likely demand at lower cost than two or more facilities. In the Council's view, in this context the 'demand' in question is the demand for the service provided by the facility (ie the likely level of demand in the market for the service provided by the facility) and for which declaration is sought.

4.32 In the Sydney Airport decision, the Tribunal emphasised that criterion (b) requires that it be uneconomical to develop another facility to provide the *same* service as that provided by the facility. The Tribunal stated:

> It is important to understand, in the terms of s 44H(4)(b), what it is that must be uneconomical for anyone to develop. It is not simply another 'facility' but rather 'another facility to provide the service'; that is to say, the service provided by the use of aprons and hard stands at SIA [Sydney International Airport] to load and unload international aircraft at SIA and the service provided by the use of an area at that airport to store equipment and to transfer freight from the loading and unloading equipment to and from trucks. It should also be noted that s 44H(4)(b) requires satisfaction that it would be uneconomical to develop 'another facility' to provide that service. ... (at 190)

4.33 Accordingly, the Tribunal considered that criterion (b) required that it be uneconomical to develop 'another facility' to provide the service of providing, or making available, the use of freight aprons, hard stands, equipment storage areas and freight transfer areas for the specified purpose, ie the same service. It found that the proposed Sydney West Airport would not provide the same service as that provided

by Sydney International Airport (SIA) and thus would not constitute 'another facility' for the purpose of criterion (b).

> Given the Tribunal's findings in relation to the definition of facility, would it be uneconomical for anyone to develop another facility to provide the service? The answer to this question is clearly, 'yes'. This is because the very powerful economies of scale and scope of SIA discussed above preclude anyone, even the incumbent owner and operator, from developing another facility offering the physical infrastructure and the associated rich inheritance of market attributes at SIA. Any future Sydney West airport, for which SACL has development responsibility, does not qualify as another facility since it is not an effective substitute in an operationally sensible time scale for those seeking access to the services at SIA declared by the Minister. Also it does not qualify in terms of the manner in which we have construed s 44H(4)(b) as it would not provide a service for use at SIA. The criterion for declaration in s 44H(4)(b) is therefore satisfied. (at 202)

Assessment of the natural monopoly facility test for criterion (b)

4.34 The assessment of criterion (b) under the natural monopoly facility approach depends on the economic characteristics of the facility.

4.35 To determine whether a facility is a natural monopoly it generally suffices to compare reasonably foreseeable demand for the service for which declaration is sought with the capacity of the facility (where the relevant information is available). If the capacity of the facility is sufficient to meet reasonably foreseeable demand for the service subject to declaration, then the facility is a natural monopoly facility and uneconomical to duplicate, and criterion (b) is satisfied.

4.36 If the facility does not have sufficient capacity to meet reasonably foreseeable demand for the service subject to declaration, but would have sufficient capacity following relatively low cost modifications, then the facility is again likely to be a natural monopoly facility and uneconomical to duplicate.

4.37 By contrast, if the reasonably foreseeable demand for the service outstrips both the existing capacity and maximum achievable capacity of the facility, then it will likely be economical to develop another facility to provide the service, with the result that criterion (b) will not be satisfied.

4.38 Similarly, if another existing facility could be modified at lower cost to meet the additional demand for the service subject to declaration, then it may be economical to develop that other facility to provide the service subject to declaration, with the result that criterion (b) may not be satisfied. The Council's approach to taking account of other existing facilities in the criterion (b) assessment is discussed at paragraphs 4.40 to 4.47.

4.39 In cases where reasonable estimates of demand and capacity are unavailable or are unable to be reliably or accurately determined, then the assessment of criterion (b) must turn to identifying whether the economic characteristics that underpin a natural

monopoly are present. Such an examination will focus on the issues and factors discussed in paragraphs 4.18 to 4.23.

4.40 In assessing whether it is uneconomic to 'develop' another facility, it is appropriate to consider the scope to adapt other facilities that already exist. In the Duke EGP decision, the Tribunal stated:

> There is no logic in excluding the existing pipelines from consideration in the determination of whether criterion (b) is satisfied. The policy underlying the Code would not be advanced if the Tribunal were to proceed in that blinkered way. We therefore think it appropriate to enquire whether the MSP or the Interconnect provide or could be developed to provide the services provided by means of the EGP. ... (at 57)

4.41 The term 'develop' is sufficiently broad to encompass modifications or enhancements to existing facilities. If an existing facility does not provide the services provided by the facility subject to declaration, but could economically be modified or expanded to do so, this must be considered in assessing criterion (b).

4.42 In assessing criterion (b), therefore, the Council must consider whether it would be uneconomic to develop either new or existing facilities to provide the services of the facility subject to declaration.

4.43 Where, however, an existing facility already provides (or could provide with only minor modifications or enhancements) the services provided by the facility subject to declaration, it does not necessarily follow that criterion (b) will not be satisfied. A facility can have natural monopoly characteristics whether or not it is the only one. Private commercial considerations can make it commercially viable to build an additional facility even where an existing facility can service all likely demand and building the additional facility is inefficient and wasteful in terms of the social test to be applied in assessing criterion (b). The existence of another facility that provides (or could provide with modifications or enhancements) the service subject to declaration must be considered in two ways when assessing likely demand for the service for which declaration is sought.

4.44 First, a consideration of other existing facilities that could be developed to provide the service subject to declaration may be critical to the outcome of the criterion (b) assessment where the facility subject to declaration would be unable to serve the reasonably foreseeable demand for that service without some modification or augmentation. In these circumstances, the Council would need to consider whether the additional demand for the service could be served at lower cost by modification or augmentation of the other existing facility or by modification or augmentation of the facility subject to declaration. If the former holds, then criterion (b) may not be satisfied.

4.45 In the Duke EGP decision, the Tribunal applied criterion (b) in circumstances where foreseeable demand for the services of the pipeline subject to coverage—namely, the Eastern Gas Pipeline—was expected to exceed the current capacity of that pipeline. As a result, the Tribunal considered whether other existing pipelines—namely, the

Moomba–Sydney Pipeline and the Interconnect—could provide, or be developed to provide, the services of the Eastern Gas Pipeline. After concluding that the Moomba–Sydney Pipeline was not capable of being developed to provide the services subject to coverage (at 135), the Tribunal compared the incremental costs to develop the Eastern Gas Pipeline (the pipeline subject to coverage) and the Interconnect (the existing pipeline). The Tribunal concluded that criterion (b) was satisfied — that is, that it would be uneconomic to develop the Interconnect to provide the services of the Eastern Gas Pipeline.

4.46 A case-by-case assessment is required to determine whether criterion (b) is satisfied in circumstances where additional demand can be served at lowest cost by modification or augmentation of an existing facility other than the facility subject to declaration. Care must be taken to ensure the assessment does not involve an implicit assumption that the construction of the other existing facility was efficient.

4.47 Second, the existence of another facility that provides the service subject to declaration will be relevant to the identification of the reasonably foreseeable range of demand for that service. In these circumstances, the reasonably foreseeable demand for the service subject to declaration is that arising from both the demand that facility for which declaration is sought would serve and the demand the competing facility would be likely to serve.

Meaning of 'anyone'

4.48 The term 'anyone' does not include the provider of the facility subject to declaration.[28] Construing the term 'anyone' to include the provider of the facility subject to declaration would subvert the underlying policy of Part IIIA and would give rise to a result that is contrary to the objectives of Part IIIA. As the Tribunal noted in the Sydney Airport decision:

> ... This interpretation is more consistent with the underlying policy of Part IIIA and economic and commercial commonsense. If 'anyone' were to include the provider owning or operating the bottleneck facility in issue, a second facility might be developed by the provider without a second competing service being available to prospective users. The bottleneck would persist. ... (at 201)

4.49 Where it is economical for any party to develop an alternative facility criterion (b) is not met. However, criterion (b) will likely be satisfied if:

(a) there are overwhelming economies of joint production between the facility subject to declaration and the second facility such that it would only be economical for the provider of the facility subject to declaration to develop the second facility, or

[28] The ability of the provider to develop a facility to provide the service may indicate it is generally economic for a facility to be duplicated unless the existing provider has advantages available to it but not other parties. In a natural monopoly situation such advantages are likely to exist and it is more appropriate to regard facilities developed in such circumstances as expansions of the provider's existing facility rather than a new development.

(b) the provider of the facility subject to declaration has development responsibility for the second facility. For example the Tribunal observed in the Sydney Airport decision that SACL had development responsibility for the proposed Sydney West airport which was suggested as a possible alternative facility that could provide the services for which declaration was sought.

Time horizon for assessment

4.50 Consideration of whether it would be uneconomical for someone to develop another facility to provide the service has temporal elements. The Council recognises that a conclusion that it would be uneconomical for anyone to develop another facility to provide the service may change over time as a result of changes in demand and changes in supply conditions, such as those due to technological change.[29]

4.51 The Council may elect not to recommend declaration of a service if, as a result of predicted and likely changes in demand and supply conditions, criterion (b) would no longer be satisfied during the time horizon for the criterion (b) assessment. The time horizon over which criterion (b) must be satisfied varies from case to case, and is determined with regard to the timing and probability of the foreseeable changes in demand and supply conditions. Where, for example, the service subject to declaration is expected to become contestable in the future as a result of changes in demand and supply conditions, the Council may consider such matters as the investment timetable for competing investment in determining whether contestability will be introduced in the time horizon for the criterion (b) assessment. The Council may determine, therefore, that criterion (b) is not satisfied by reason of a foreseeable change in demand and supply conditions where there is a significant probability of these changes occurring in the not too distant future.

[29] Similarly, the applicability of the other declaration criteria to a particular service may change over time.

5 National significance (criterion (c))

Introduction

5.1 Section 44G(2)(c) of the TPA (criterion (c)) requires that the Council be satisfied that the facility providing the service for which declaration is sought is nationally significant.

5.2 The section also provides that national significance is to be determined having regard to:

(i) the size of the facility, or

(ii) the importance of the facility to constitutional trade or commerce, or

(iii) the importance of the facility to the national economy.

5.3 Criterion (c) is designed to ensure that only those facilities that play a significant role in the national economy fall within the scope of Part IIIA. The Council notes that while declaration is concerned with access to services rather than facilities, criterion (c) relates national significance to the facility providing the service.

Tests of national significance

5.4 In identifying infrastructure of national significance, the Council considers the matters listed in s 44G(2)(c) of the TPA. A facility needs to satisfy only one of the three benchmarks listed in paragraph 5.2 above. There is, however, considerable overlap particularly between the second and third benchmarks. The similarities are indicative of both the importance of the facility to constitutional trade or commerce and its importance to the national economy.

Size

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

Constitutional trade or commerce

5.6 Section 44B of the TPA defines 'constitutional trade or commerce' to mean trade or commerce:

(a) among the States

(b) between Australia and places outside Australia, or

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

5.7 The importance of the facility to constitutional trade or commerce may be indicated by the monetary value of trade that depends on the facility, or the importance of the facility to trade or commerce in related markets.

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

Importance to the national economy

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

Examples of national significance assessment

The Sydney and Melbourne International Airports application related to services provided by international freight handling facilities at those airports. The Council considered national significance in terms of:

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

The Council also considered that an assessment of national significance should account for the location of a facility. It found, therefore, that the relevant facilities acquired greater significance as a result of their co-location with other facilities of Sydney and Melbourne International Airports.

The Tribunal confirmed this view with respect to Sydney International Airport. It stated:

The evidence before the Tribunal … make[s] clear the predominant and pervasive role that SIA [Sydney International Airport] plays in Australia's commercial links with the rest of the world. In 1997 in-bound and out-bound freight to a value exceeding $21 billion was cleared at SIA. Evidence was given that 50% of the airfreight into and out of Australia goes through SIA and approximately 80% of the airfreight which goes through SIA is carried by passenger aircraft. The Tribunal is affirmatively satisfied that the facility provided by SIA is of national significance for the purpose of s 44H(4)(c). (at 208)

The Tribunal stated further in the Virgin Blue decision in regard to Sydney Airport that:

... the facility at Sydney Airport is of national significance having regard to its size, its importance to constitutional trade and commerce, and its importance to the national economy. As noted earlier, approximately 50% of all international passengers arriving in Australia pass through Sydney Airport, as do approximately 30% of all domestic passengers in Australia. It is thus a major gateway for Australia's tourism industry, and also makes a substantial and significant contribution to trade in Australia. Accordingly, we are satisfied of the matter set out in s 44H(4)(c). (at 78)

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

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

6 Health and safety (criterion (d))

6.1 Section 44G(2)(d) of the TPA (criterion (d)) provides that in order to be declared access to a service must be able to be provided without undue risk to human health or safety.

6.2 Under this criterion the Council must be satisfied that access to the service can be provided without undue risk to human health and safety. In considering criterion (d) the Council considers, among other relevant matters, the following issues:

(a) whether there is a statutory scheme which will apply to the service in circumstances where access is granted to third parties, and

(b) whether the terms and conditions of access can adequately deal with any safety issues.

6.3 The rationale for criterion (d) is that declaration should not occur where access or increased access to a service provided by a facility may pose a legitimate risk to human health or safety.

6.4 Some facilities require a degree of spare capacity to provide appropriate safety margins (then an appropriate level of spare capacity will need to be maintained and the facility expanded, if necessary, to allow for this). In addition, access to facilities may need to be governed by conduct codes and operational guidelines. For a service to be declared, access must be possible without compromising system and operational integrity, and safe scheduling or timetabling must be feasible.

6.5 Criterion (d) does not refer to increased access specifically, but to access generally. If access is being provided, then this should not be automatically construed as evidence that access is being provided safely. The Council must still be satisfied that access or increased access can be provided without undue risk to human health or safety (Sydney Airport decision, at 210–211).

6.6 The existence of relevant safety regulations may satisfy criterion (d) where these regulations deal appropriately with any safety issues arising from access to the service provided by the facility.

6.7 Alternatively, criterion (d) may be satisfied where the terms and conditions on which access is provided could address any safety concerns raised by access to the service. In considering criterion (d) in the Sydney Airport decision, the Tribunal concluded that the significant potential for accidents of serious dimensions on aprons and surrounding areas could be addressed by including in the terms and conditions for the provision of access to any ramp handler and obligation to satisfy strict safety requirements and a right for SACL to apply appropriate and enforceable sanctions on any operator who breaches that requirement.

6.8 The Tribunal stated that s 44G(2)(d), if applied at Sydney International Airport:

> … would in practice see the terms and conditions of access for any ramp handler — whether they are agreed by negotiation or determined by

> independent arbitration — include enforceable provisions as to operational safety. (Sydney Airport decision, at 214)

6.9 Accordingly, if the terms and conditions of access can appropriately address safety concerns, then criterion (d) may be satisfied. The safety requirements and their enforcement may be left to the second stage of the two-stage process of obtaining access to the service - ie the negotiation or arbitration stage.

6.10 Declaration applicants are required to provide the Council with a description of how access can be provided, along with details of any risk to human health or safety caused by the proposed method of providing access. Where a service provider seeks to oppose declaration on safety grounds, the provider should supply detailed information to the Council demonstrating that access to the service would be unsafe.

7 Effective access regime (criterion (e))

Introduction

7.1 Section 44G(2)(e) of the TPA (criterion (e)) requires the Council to consider whether access to the service is already subject to an effective access regime. Infrastructure services already covered by an effective access regime cannot be declared under Part IIIA of the TPA.

7.2 The main purpose of criterion (e) is to recognise that State or Territory governments may develop industry specific access regimes that comply with the Competition Principles Agreement and for such access regimes to apply to the exclusion of Part IIIA of the TPA.

7.3 The TPA does not define the term 'effective access regime'. In the Sydney Airport decision, the Tribunal discussed the meaning of the term as follows:

> ... The expression 'effective access regime' is not defined in the Act but it is apparent from s 44H(5) that it is a reference to a regime for access to a service or a proposed service established by a State or Territory that is a party to the Competition Principles Agreement which the Commonwealth Minister has decided is an effective access regime for the service or proposed services: ss 44M and 44N. ... (at 217)

7.4 Nonetheless, a State or Territory access regime may constitute an effective access regime even if it has not been the subject of a Commonwealth Minister decision or a Commonwealth or private access regime decision regarding its effectiveness. The Explanatory Memorandum to the *Competition Policy Reform Bill 1995*, which enacted Part IIIA, stated:

> An effective access regime could be a regime established under other Commonwealth legislation; for example, the [then] access regime for the Moomba-Sydney gas pipeline. (at 117)

7.5 Part IIIA provides guidance on what constitutes an effective access regime implemented by a State or Territory government. In contrast, there is no legislative indication of how to assess the effectiveness of Commonwealth and private access regimes. Commonwealth regimes will generally deal with these issues in the statute and specifically exclude the operation of Part IIIA, but if they do not then the service may be subject to an application for declaration.

Effectiveness of State and Territory access regimes

7.6 For State and Territory access regimes,[30] clauses 6(2)–(4) of the Competition Principles Agreement (the clause 6 principles) set out the criteria for determining the effectiveness of an access regime.

[30] Where the relevant jurisdiction is a party to the Competition Principles Agreement.

7.7 Pursuant to s 44G(3), the Council assesses whether a State or Territory regime is effective at the time it considers an application for declaration.[31] In its assessment, the Council:

(a) must apply the clause 6 principles

(b) must have regard to the objects of Part IIIA, and

(c) must, subject to s 44DA of the TPA, not consider any other matters, as per s 44G(3) of the TPA.

7.8 Under s 44DA of the TPA the Council must in applying each individual clause 6 principle, accord each principle the status of a guideline rather than a binding rule. An effective access regime may also contain additional matters that are not inconsistent with the clause 6 principles.

7.9 A State or Territory government can remove doubt as to the effectiveness of an access regime it operates (and the availability of declaration in relation to the services the regime applies to) by applying to the Council for certification of the regime. Once certified, a State or Territory regime must be considered effective, with the result that declaration criterion (e) is not satisfied, unless the Council believes the regime or the clause 6 principles have been substantially modified since the certification. If a substantial modification has occurred, then the Council may need to re-examine effectiveness, in accordance with s 44G(4) of the TPA.[32]

7.10 A State or Territory access regime that is not found to be an effective access regime may nonetheless have implications for the assessment of the 'promotion of competition' criterion in s 44G(2)(a) of the TPA. For criterion (a) to be satisfied, the conditions for competition with access or increased access must be an improvement on the conditions for competition without access or increased access. In the Council's *Application for Declaration of Rail Network Services provided by Freight Australia: Final Recommendation* (December 2001), for example, the Council found that the Victorian rail access regime established by the *Rail Corporations Act 1996* (Vic), although not an effective access regime, nonetheless constrained the market power that Freight Australia would otherwise possess in the dependent market (the bulk freight transport market).

7.11 Where a State or Territory access regime is under development at the time a declaration application is being assessed, the service is not already subject to an access regime and so there is no automatic impediment to criterion (e) being satisfied. The Council may, however, take account of a State or Territory access regime that is under development when assessing criterion (a) and criterion (f) and when considering the appropriate duration of any declaration.

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31 Except where the regime is already certified.

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

Effectiveness of Commonwealth and private regimes

7.12 Part IIIA provides no indication of how to assess the effectiveness of Commonwealth and private access regimes. Rather, as stated in the Explanatory Memorandum to the *Competition Policy Reform Bill 1995*, which lead to the enactment of Part IIIA, the Council has a broad discretion in assessing the effectiveness of Commonwealth and private access regimes:

> Where the access regime applying to a facility is established by a State or Territory that is a Party to the Competition Principles Agreement, the Council must apply the guiding principles for access regimes set out in that Agreement in considering whether that regime is effective or not. In other cases, the Council is free to determine how it assesses the effectiveness of an access regime — it might, for example, consider the outcomes produced by that regime. (at 176)

7.13 In considering the effectiveness of such a regime, the Council has regard to:

(a) whether outcomes produced by the regime are efficient

(b) the legal enforceability of the regime by all interested persons, and

(c) whether the regime reflects the clause 6 principles.

7.14 There is no certification procedure for Commonwealth and private access regimes. The Council will therefore examine the effectiveness of these regimes at the time it assesses an application for declaration of relevant services.

7.15 The requirement for legal enforceability makes it unlikely that a private regime could be regarded as effective. For example, in the Council's *Application for Declaration of a service provided by the Tasmanian Railway Network: Final Recommendation* (August 2007) the Council concluded that contractual provisions requiring the operator to provide access to rail users on a non-discriminatory basis did not constitute the contractual arrangement as an effective access regime.

7.16 Private infrastructure owners have the option, however, of submitting an access undertaking to the ACCC for approval. A service cannot be declared where it is the subject of an access undertaking approved by the ACCC, as per ss 44G(1) and 44H(3) of the TPA.

7.17 In the Council's view provision of an access undertaking to the ACCC is the appropriate mechanism for excluding declaration of services that are the subject of 'private' access regimes.

An effective access regime for a substitute service

7.18 Section 44G(2)(e) of the TPA expressly requires that 'access to *the service* is not already the subject of an effective access regime'. Criterion (e) therefore requires an examination of whether there is an effective access regime for the specific service to which access is sought.

7.19 If there exists an effective access regime for a service which is or could be a substitute for the service the subject of an application for declaration, the Council may consider whether the service the subject of the effective access regime is truly a substitute for the service the subject of the application for declaration and the implications of this in its consideration of criteria (a) and (f) as appropriate.

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

Introduction

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

8.2 With regard to s 44H(4)(f) of the TPA, the Tribunal stated in the Services Sydney decision*:*

> This criterion does not require the Tribunal to be affirmatively satisfied that declaration would be in the public interest. Rather it requires that it be satisfied that declaration is not contrary to the public interest. It enables the consideration of the overall costs and benefits likely to result from declaration and the consideration of other public interest issues which do not fall within criteria (a)-(e). ... (at 192)

8.3 The term 'public interest' is not defined in the TPA but the Council considers that this term allows a consideration of a broad range of issues that access seekers and service providers may wish to raise.

8.4 Consideration of criterion (f) does not revisit the issues considered under the other declaration criteria. Rather it draws on the Council's conclusions in relation to those criteria. For example, where the Council has concluded that access will promote a material increase in competition in one or more dependent markets, this will give rise to benefits that should be included in the assessment of criterion (f). Similarly where access will aid in avoiding duplication of a facility that exhibits natural monopoly characteristics, this too will lead to benefits that are appropriately considered under criterion (f).

8.5 In the Duke EGP decision, the Tribunal clarified the interpretation of the public interest criterion (that is, criterion (d) for coverage under the then Gas Code) as follows:

> … criterion (d) does not constitute an additional positive requirement which can be used to call into question the result obtained by the application of pars (a), (b) and (c) of the criteria. Criterion (d) accepts the results derived from the application of pars (a), (b) and (c), but enquires whether there are any other matters which lead to the conclusion that coverage would be contrary to the public interest. (at 145)

8.6 Ordover and Lehr (2001) stress that access regulation is not necessarily the rational policy response in all circumstances where criteria (a) and (b) are satisfied. After concluding that the Moomba–Sydney Pipeline is a natural monopoly facility and that the pipeline possibly possesses sufficient market power to engage in anticompetitive differential treatment in the provision of gas transport services, Ordover and Lehr stated:

> This does not mean that direct regulation is necessarily the rational policy response to the potential danger of abuse of market power. … [A]s is well known, regulation has its own costs and inefficiencies. Thus, the potential risks of removing coverage must be weighted against the benefits of lessening regulatory burdens. (2001, p. 24)

They concluded:

> … as a matter of policy it is important to recognize that regulation has its own costs and should not be mandated when the potential benefits from regulation are small relative to the inefficiencies and other burdens that regulation engenders. (2001, p. 25)

8.7 The criterion's use of the double negative—requiring satisfaction that access 'would not be contrary to the public interest'—does not constitute an additional positive requirement for satisfaction – ie it is not required that access be in the public interest. Rather, the Council must be satisfied that the overall costs of declaration do not outweigh the benefits of declaring a service or services provided by bottleneck or essential facilities. The extent of these benefits depends on the likely effect of access (or increased access) on competition in the dependent markets (as considered under criterion (a)) and the resultant positive effects on economic efficiency (as identified in the consideration of criterion (f)).

8.8 Consideration of criterion (f) must also take into account the nature of the negotiation/arbitration regime that applies to declared services. In particular the provisions of the TPA that seek to balance the interests of access seekers and service providers and that govern, and in some cases limit, the scope of ACCC determinations of access disputes must be considered. In considering any adverse consequences due to the effect of declaration on a service provider's interests, the Council will consider how the provisions governing arbitration of access disputes would be likely to apply and whether these prevent or limit any potentially adverse public interest consequences.

8.9 The Council generally considers that when access results in costs to a service provider that are capable of being compensated for through the conditions of access (notably access terms and prices), such costs of themselves do not lead to declaration being contrary to the public interest. Unless those costs are less than other costs an access seeker would face in achieving access in another way, access will not occur and hence the costs will not arise. Compared to an appropriate counterfactual the overall costs are less and this represents a public interest benefit.

Public interest considerations

Economic efficiency

8.10 A key public interest consideration is the net impact of access on economic efficiency. This is consistent with the objects of Part IIIA as set out in s 44AA of the TPA. Economic efficiency must be assessed from the perspective of Australian society as a

whole. The concept of economic efficiency involves the best use of society's resources to maximise welfare. Economic efficiency encompasses:

(a) producing at least cost — ie, technical efficiency,

(b) ensuring services are provided to those who value them most highly — ie, allocative efficiency, and

(c) preserving incentives for innovation and investment — ie, dynamic efficiency.[33]

8.11 In considering whether granting access would be economically efficient, it is necessary to assess the efficiency gains and costs of declaration. Declaration should be avoided where it is likely to yield short term gains in technical and allocative efficiency that constrain the realisation of longer term dynamic efficiency gains.

8.12 The promotion of effective competition is generally consistent with the encouragement of economic efficiency. Economists generally consider that effectively competitive markets lead to conditions that encourage economically efficient outcomes. Where access promotes effective competition, efficiency gains are likely to result, including for the following reasons:

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

8.13 Thus, if there is a promotion of competition from access that satisfies criterion (a) then it is also likely that that promotion of competition will be associated with efficiency gains that are relevant when considering criterion (f).

8.14 However, declaration may also impose efficiency costs, particularly in the provision of the service subject to declaration. Just as the promotion of effective competition by declaration is likely to result in efficiency gains, the regulatory burden associated with declaration is likely to result in efficiency losses. The regulatory burden imposed on businesses by declaration—or by regulatory failure associated with either the declaration of a service or the terms and conditions of access determined by an ACCC arbitration—may result in inefficiencies.

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

8.15 Potential efficiency losses from declaration include:

- in the short term, the distortion of price signals, which may result in the allocation of resources to the provision of services that are not of most value to society (a reduction in allocative efficiency);
- in the longer term, the dampening of incentives for innovation (a reduction of dynamic efficiency); and
- in the longer term, the deterrence of investment (a reduction of productive or technical efficiency).

8.16 In advocating the inclusion of a public interest criterion for declaration, the Hilmer Report identified the effects of declaration on incentives for future investment in infrastructure projects as a key consideration in any public interest assessment of an application for declaration. The Hilmer Report stated:

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

8.17 Effects on investment are discussed further at paragraphs 8.28-8.31.

8.18 Effects of access on service providers (including increases in a service provider's costs) are generally to be reflected in access costs payable by access seekers. Where efficiency losses incurred by a service provider are addressed in access charges or are otherwise prevented or reduced by the requirements governing determination of access disputes these will not generally be relevant to the consideration of criterion (f).

Regulatory costs

8.19 The Council accepts that declaration and Part IIIA access create regulatory costs that must be considered under criterion (f). These are the costs that service providers may incur in conducting negotiations with access seekers and responding to arbitration of access disputes. They also include the costs of the ACCC and other public bodies in carrying out their functions in relation to a declared service.

8.20 The Council recognises these inherent regulatory burdens, costs and inefficiencies associated with declaration, and in applying the public interest test, it considers whether the costs of declaration outweigh the benefits.

8.21 Direct regulatory costs that may follow declaration include the costs of negotiating access with third parties or arbitrating an access dispute. In determining whether the benefits of declaration are likely to outweigh the costs, it may be helpful if the information is available to compare the direct costs of declaration with the potential price reductions for the provision of the service where there is evidence of monopoly pricing by the service provider.

8.22 The Council is of the view that the regulatory costs which are taken into account under criterion (f) do not include costs associated with an application for declaration. Such costs are incurred irrespective of whether any declaration is made and these are not costs that result from access.

Disruption costs

8.23 The Council recognises that the provision of access to a facility may involve some disruption to the operations of the service provider and potentially other parties (such as existing third party users). However, in general terms, disruption costs should be incorporated in access charges or ameliorated through other access terms and conditions and are, therefore, appropriately dealt with at the second stage of the access process where access terms are negotiated or if necessary subject to arbitration.

8.24 The TPA includes a number of provisions to protect service providers. Notably, when the ACCC is making a determination on an access arbitration regarding a declared service, the ACCC:

- does not have to allow access
- cannot prevent an existing user from obtaining a sufficient amount of the service to meet its current and reasonably anticipated future requirements (which is to be measured at the time of the arbitration)
- must have regard to the service provider's legitimate business interests
- cannot make the service provider pay for extensions or interconnections to the facility
- must, in setting any access price, take into account the need to give a return on investment commensurate with relevant regulatory and commercial risks and must take into account the direct costs of providing access and the economically efficient operation of the facility
- can make a determination dealing with any matter relating to the dispute
- must use its best endeavours to resolve the dispute within six months
- can accept as a party (and therefore submissions from) any person having a sufficient interest in the dispute.

8.25 The TPA also includes provisions allowing the ACCC to terminate an arbitration of a vexatious or trivial dispute.

8.26 In the absence of specific reasons why these safeguards are generally ineffective, or would be ineffective in relation to a particular application for declaration, the Council must accept that the TPA will operate as intended and that the ACCC in undertaking an arbitration and making an access determination (and the Tribunal in conducting a review and 're-arbitrating' a dispute) will act in accordance with these provisions.

8.27 Any service provider opposing an application for declaration of a service on the basis of disruption costs should provide clear evidence as to why the protections in the TPA

do not adequately deal with those costs either generally or in the context of the particular service to which access is sought.

Investment effects

8.28 It is important for Australia's economy that there is sufficient investment in infrastructure. The promotion of efficient investment in infrastructure is one of the objects of Part IIIA (s 44AA(a) of the TPA).

8.29 The enactment of Part IIIA by Parliament, and the possibility of declaration of services provided by facilities that are uneconomical to duplicate, did create some additional risk for investors in these kinds of facilities; the risk that they may not receive the same level of return on their investment that they otherwise might have. This 'regulatory risk' is attendant on the establishment of the Part IIIA regime. However some similar risk would likely have followed from any form of intervention or regulation aimed at addressing the policy issues underlying Part IIIA. It is reasonable to assume that Parliament considered that these costs were outweighed by the benefits to Australia from effective regulation of access in the circumstances allowed for under Part IIIA.

8.30 Part IIIA provides for service providers/facility owners to receive a commercial return on infrastructure providing a declared service that recognises the risks associated with their investment. Investors in infrastructure can therefore expect that if infrastructure provides a service(s) that is declared and a third party access seeker successfully seeks access through arbitration, they will receive an appropriate return on their investment. This fact will form the background to access negotiations and encourage a negotiated access arrangement that allows an appropriate return on investment. Some of the protections in the TPA in this regard include the fact that the ACCC in any arbitration:

- cannot prevent an existing user from obtaining a sufficient amount of the service to meet its current and reasonably anticipated future requirements (which is to be measured at the time of the dispute)
- must have regard to the service provider's legitimate business interests
- cannot make the service provider pay for extensions or interconnections to the facility
- must, in setting any access price, take into account the need to give a return on investment commensurate with relevant regulatory and commercial risks and must take into account the direct costs of providing access and the economically efficient operation of the facility.

8.31 The ACCC in various decisions across a range of industries has accepted the importance of maintaining appropriate commercial returns for investment lest such investment be inefficiently deterred. In any event it is obliged to allow appropriate commercial returns and to consider investment effects in determining access prices and other terms in any arbitration of an access dispute.

8.32 There is one element of the return on a particular investment for which Part IIIA does not seek to compensate an investor in declared infrastructure for. That is any monopoly profits arising from its power in a dependent market. To quote the Hilmer Report:

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

8.33 Access under Part IIIA is designed to eliminate such monopoly profits. To the extent that the application of Part IIIA discourages investment that is predicated on such profits, this is not a cost as it does not discourage *efficient* investment in infrastructure.

Other public interest considerations

8.34 While no attempt to list public interest considerations can be exhaustive, among the matters that the Council may consider under criterion (f) are the following items specified in clause 1(3) of the Competition Principles Agreement:

(a) ecologically sustainable development

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

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

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

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

(f) the competitiveness of Australian businesses, and

(g) the efficient allocation of resources.

8.35 Other relevant matters may include impending access regimes or arrangements, national developments, the desirability for consistency across access regimes, relevant historical matters and privacy.

Examples of public interest assessment

In the Sydney Airport decision, the Tribunal approached the assessment of criterion (f) by first affirming, in effect, the presumption that declaration is in the public interest where criteria (a)–(e) are satisfied. The Tribunal stated:

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

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

In the Services Sydney decision, the Tribunal considered whether *'declaration would be against the public interest because of the impending introduction of a comprehensive State based access regime'*. Having examined the evidence, the Tribunal found:

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

9 Develop a facility for part of the service

9.1 In deciding whether or not to recommend that a service be declared the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service (s 44F(4)). This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.

9.2 The designated Minister must also consider this issue in deciding whether or not to declare a service (s 44H(1)).

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

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

9.4 In the Council's view, while this identifies one course of action open to the Council it is clear from the words used in the Explanatory Memorandum, and the second sentence of s 44F(4), that the Council is not obliged to follow that particular course. The wording of s 44F(4) makes it clear that even if the Council forms the view that part of the service is economical to duplicate, the Council still has a discretion as to whether to recommend declaration. In exercising this discretion the Council will take into account the objects of Part IIIA.

10 Duration of a declaration

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

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

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

10.3 To date declarations have generally been for periods of longer than five and up to fifty years.

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

- changes in the level of demand and in supply conditions—such as technological change—may mean that the facility would no longer possess natural monopoly characteristics that are necessary to satisfy criterion (b)
- changes in technology and market conditions may have implications for the satisfaction of criterion (a) such that the service provider would no longer have the ability and/or incentive to use market power to adversely affect competition in the dependent market(s) and thus declaration would no longer promote a material increase in competition in the market(s), and
- reform initiatives—such as the development of a State or Territory access regime to regulate access to the service—may mean that criterion (e) would not be satisfied.

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

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Appendix A Sections 44F and 44G of Part IIIA of the *Trade Practices Act 1974* (Cth)

Section 44F: Person may request recommendation

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

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

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

(b) must recommend to the designated Minister:

(i) that the service be declared; or

(ii) that the service not be declared.

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

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

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

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

A.6 44G(1) [Access undertakings] The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under section 44ZZA.

A.7 44G(2) [Council to be satisfied of matters] The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

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

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) 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.

A.8 44G(3) [Effective access regimes] In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Council:

(a) must apply the relevant principles set out in that agreement; and

(b) must not consider any other matters.

A.9 44G(4) [Council to follow Minister's decision] If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the Council must follow that decision, unless the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or the relevant principles set out in the Competition Principles Agreement.

Appendix B Trade Practices Regulations 1974 (Cth) — Regulation 6A

Application to Council for declaration recommendation

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

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

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

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

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

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

(f) a brief description:

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

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

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

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

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

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

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

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

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

Appendix C Sections 44W, 44X, 44XA and 44ZZCA of Part IIIA of the *Trade Practices Act 1974* (Cth)

Section 44W: Restrictions on access determinations

C.1 44W(1) The Commission must not make a determination that would have any of the following effects:

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

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

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

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

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

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

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

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

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

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

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

C.5 Note: Without infringing paragraph (1)(b), a determination may deprive a second person of the right to be supplied with an amount of service equal to the difference

between the total amount of service the person was entitled to under a pre-notification right and the amount that the person actually needs to meet his or her actual requirements.

C.6 44W(5) In this section:

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

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

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

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

Final determinations

C.7 44X(1) The Commission must take the following matters into account in making a final determination:

(aa) the objects of this Part;

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

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

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

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

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

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

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

(g) the economically efficient operation of the facility;

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

C.8 44X(2) The Commission may take into account any other matters that it thinks are relevant.

Interim determinations

C.9 44X(3) The Commission may take the following matters into account in making an interim determination:

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

(b) any other matter it considers relevant.

C.10 44X(4) In making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in subsection (1).

Section 44XA: Target time limits for Commission's final determination

C.11 44XA(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.

Extensions

C.12 44XA(2) If the Commission is unable to make a final determination within the standard period, or that period as extended, it must, by notice in writing, extend the standard period by a specified period.

C.13 44XA(3) The Commission must give a copy of the notice to each party to the arbitration.

Multiple extensions

C.14 44XA(4) The Commission may extend the standard period more than once.

Publication

C.15 44XA(5) If the Commission extends the standard period, it must publish a notice in a national newspaper:

(a) stating that it has done so; and

(b) specifying the day by which it must now use its best endeavours to make a final determination.

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

C.16 44ZZCA The pricing principles relating to the price of access to a service are:

(a) that regulated access prices should:

(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

(ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:

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

(iv) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

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

C.17 Note: The Commission must have regard to the principles in making a final determination under Division 3 and in deciding whether or not to accept an access undertaking or access code under Division 6.