

National Competition Council

Level 21, 200 Queen Street Melbourne 3000 Australia

GPO Box 250 Melbourne 3001 Australia

Telephone 03 9981 1600 Facsimile 03 9981 1650

Website: www.ncc.gov.au



Office of
Council President

1 November 2012

Ms Patricia Scott
Presiding Commissioner
Inquiry into the National Access Regime
Productivity Commission
Locked Bag 2, Collins St East
Melbourne VIC 8003

Dear Ms Scott

Inquiry into the National Access Regime

As you know the National Competition Council is the statutory agency responsible for advising decision making Ministers on the scope of third party access to infrastructure services under the National Access Regime established by Part IIIA of the Competition and Consumer Act 2010 (CCA).

The Council makes recommendations in relation to applications for the declaration of infrastructure services and for the certification of state and territory access regimes. In addition, as a result of a recommendation by the Productivity Commission in 2001,¹ the Council is responsible for reporting annually on the operation of Part IIIA of the CCA (see s 29O(2)).

In due course the Council will provide the Commission with submissions to its inquiry into the National Access Regime. The Council is also happy to provide any other information and participate in the inquiry any other way that the Commission considers would assist it.

The Council appreciates that the Commission's inquiry process is only just beginning. Nonetheless there are some issues that the Council considers are important to raise at this early stage and some materials that might be of most assistance to the Commission if provided now.

To that end, this letter sets out the Council's views on the following preliminary issues:

- The timeliness of the declaration process

¹ Productivity Commission, Review of the National Access Regime, Inquiry Report No 17, 28 September 2001, Recommendation 16.1.

- The interpretation of the declaration criteria and the likely impacts of the recent *Pilbara Rail decision* of the High Court in relation to the declaration of the Hamersley and Robe railways²
- The nature of the declaration decision and the consequences for the form of review of that decision: in particular the Council's support for judicial review as preferable to full or limited merits review of declaration decisions.

In addition I have enclosed with this letter some information which may be of value to the Commission as it commences its inquiry process. This material comprises:

- A table setting out the declaration applications made since Part IIIA was enacted (Appendix 1). This table is in date order (commencing from the most recent matter) and lists each service for which declaration was sought. In some cases a single application spanned several services and in some of these different outcomes flowed for the different services. While I accept there are various ways of looking at and counting declaration applications, I consider that the services based approach in the attached table is probably the most useful.
- A table summarising for each declaration decision the conclusions of the Council, the decision making Minister, Tribunal and courts as to the satisfaction of each declaration criterion (Appendix 2). As with the table in Appendix 1 this is in date order (most recent first) and provides information for each service for which declaration was sought. This table does not include matters that did not proceed to a decision.

The Council's recent annual reports contain information required under s 29O(2) of the CCA. The annual reports also address areas where the Council considers amendments to Part IIIA are desirable. Some of these suggestions have been implemented while others remain to be considered.

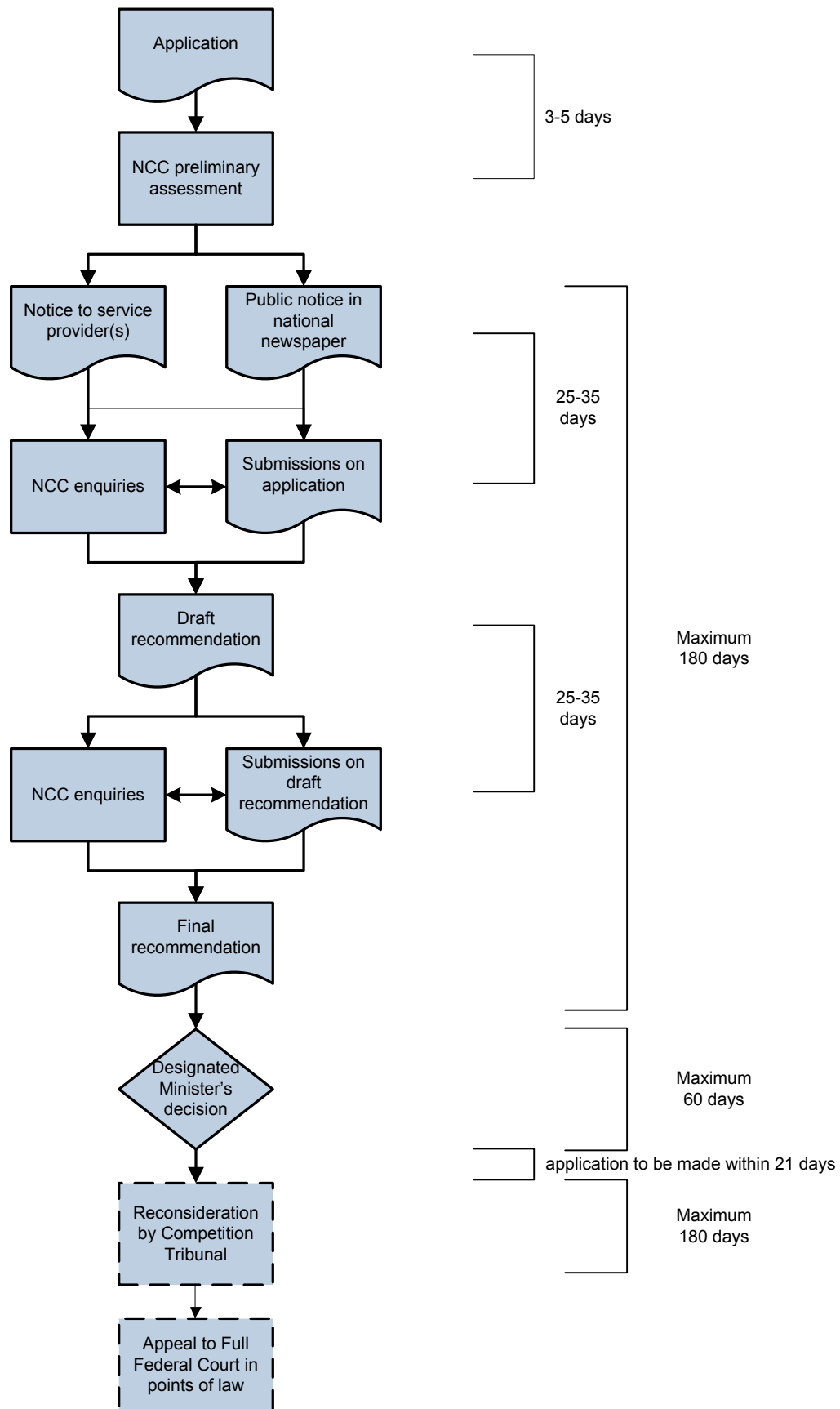
I would also draw your attention to the Council's website (www.ncc.gov.au). This contains a range of guidelines and similar material. In relation to applications for declaration, the website contains public versions of all applications (and applications for certification and applications made under the National Gas Law and the preceding Gas Code), submissions on these applications and the Council's draft and final recommendations along with any expert reports which were considered. Generally this website also provides links to relevant decisions of the Ministers, the Tribunal and the courts in relation to declaration and similar matters.

Timeliness of declaration decisions

The *Trade Practices Amendment (Infrastructure Access) Act 2010* introduced a statutory timeline for declaration matters. Within this timeline the Council is given 180 days to consider applications for declaration. In doing so the Council considers two rounds of public submissions and publishes a draft of its proposed recommendation before it makes its final recommendation to the designated Minister. The Council's consideration process and the timeframes for the various stages of the declaration process are summarised in Figure 1.

² *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36(*Pilbara Rail decision*).

Figure 1: Process and timeframes for consideration of declaration applications



The Council considers that the overall timeline is commercially realistic, bearing in mind the lifespan of nationally significant infrastructure, the planning an access seeker would be likely to undertake before utilising a declared service and the scale of investment involved for both access seekers and service providers. The Council accepts that some extensions to these times are available and that the Tribunal is yet to undertake a review of a declaration decision under the 2010 provisions. However, the Council believes that the CCA now provides a balance between the interests of access seekers and service providers and reasonable certainty as to the timeframe in which a declaration application will be determined. Since the 2010 amendments the Council has considered applications for the declaration of three services under Part IIIA. It has made its recommendations in respect of all of these services within the 180 day statutory period.

Some commentators suggest that the declaration process takes an excessive time, largely focusing on the experience of the various Pilbara Rail declaration applications. This has led to proposals to by-pass the declaration process in favour of ‘deeming’ particular services to be declared (presumably through use of some form of legislative instrument).

The Council accepts that the time being taken to deal with the Pilbara Rail declaration applications is unacceptable. However the Pilbara Rail matters predate the 2010 amendments to the CCA (which were designed in part to reduce the scope for excessive delays) and the High Court’s recent *Pilbara Rail decision* that has narrowed the role of the Tribunal in reconsidering ministerial declaration decisions.³

Consideration of the Pilbara Rail matters also required overcoming a legal precedent which otherwise limited the Council’s ability to progress the applications. This legal matter was resolved only following appeals to the Full Federal Court and ultimately the High Court.

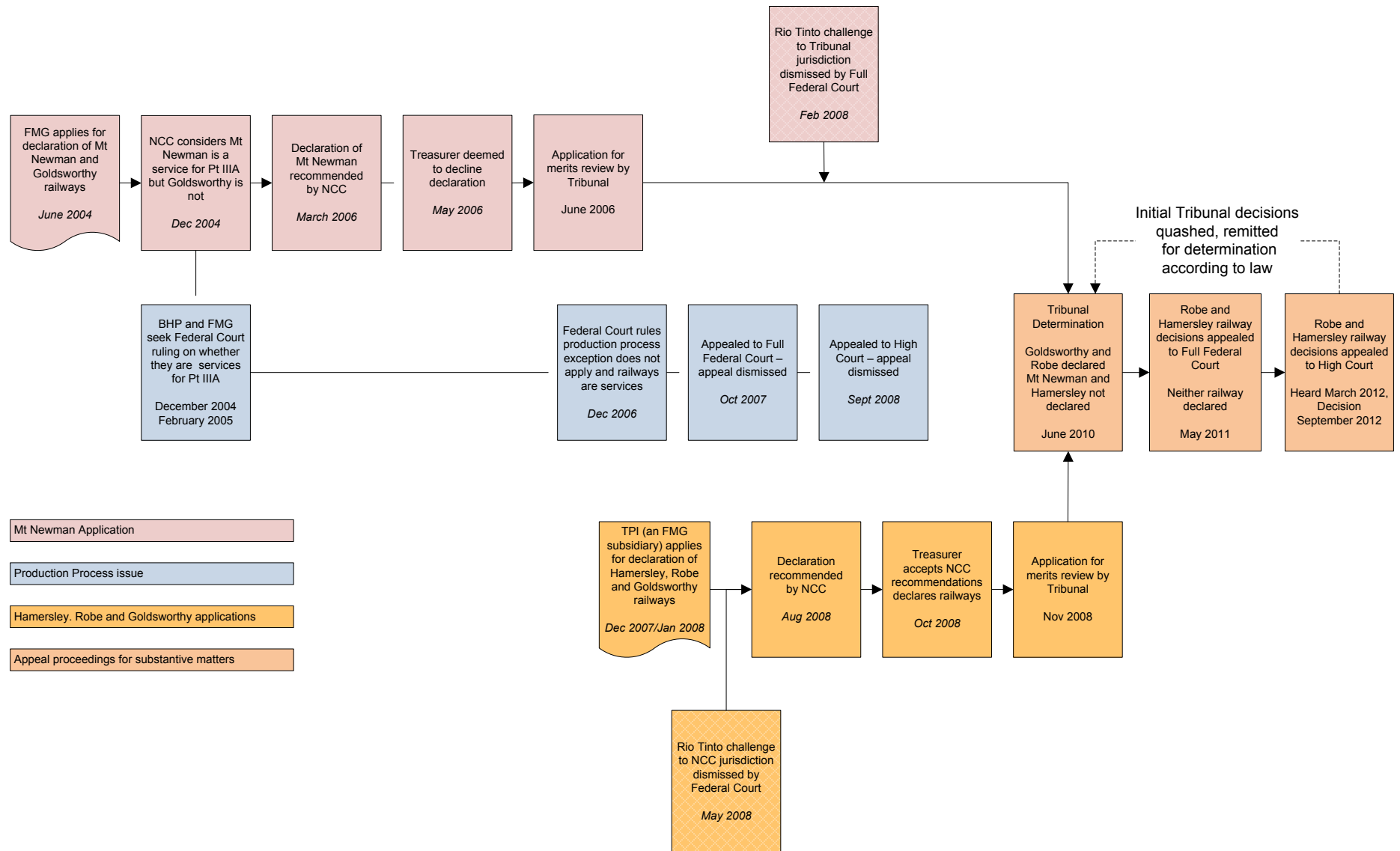
The outcome of the Pilbara Rail applications remains to be finalised. The High Court quashed the Tribunal’s determinations and directed that reconsideration of the Minister’s declaration of the Hamersley and Robe railways be remitted to the Tribunal for ‘determination according to law’. This will require the Tribunal to adopt a revised approach to its reconsideration of these decisions and the construction of criterion (b) specified by the High Court (see below).

Figure 2 illustrates the various stages and proceedings involved to date in considering the two sets of Pilbara Rail declaration applications. The figure shows the complexity of administrative and judicial processes and the multiple levels of appeal and review over many years. In the Council’s view it is unlikely that a future declaration application would follow a similar course to the Pilbara Rail matters or involve as many legal proceedings given the precedents established in the Pilbara Rail cases and legislative changes in 2010.⁴

³ See [48] and [65].

⁴ For example, an application for review of a declaration decision no longer automatically stays the effect of such a decision, new limits on the introduction of new material in the Tribunal have been enacted, and parties that attempt to frustrate proceedings now face the risk of sanctions in the Tribunal. A move away from merit reviews of declaration decisions would further streamline the declaration process.

Figure 2: Pilbara Rail processes and proceedings



The Council considers, therefore, that proposals to by-pass the declaration process (on the ground that the process is overly time consuming) by subjecting services to access regulation without consideration of the declaration criteria in the context of a transparent and independent process cannot be justified.

The Council accepts there is scope for amendments to the CCA to further assist timely decision making and avoid procedural delays. However, such changes are more likely to involve relatively minor amendments to clarify existing provisions and remove remaining ambiguity. The Council will include its suggestions in this regard in a later submission to the inquiry.

Legal interpretation of the declaration criteria and possible implications of the High Court's Pilbara Rail decision

In order for the Council to recommend, and the Minister to decide, that a service be declared the Council or Minister must be affirmatively satisfied that each declaration criterion is met. The rationale for declaring a given service arises from the satisfaction of all of the five criteria.⁵

- Criterion (a) requires that there be a material promotion of competition in a dependent market from access (or increased access) to the service.
- Criterion (b) requires that the facility providing the service be uneconomic to duplicate.
- Criterion (c) requires the facility providing the service to be of national significance having regard to one of three particular measures concerning the facility's size or contribution to trade, commerce or GDP.
- Criterion (e) provides that where the service applied for is the subject of a certified access regime that regime prevails.
- Criterion (f) requires access (or increased access) not to be contrary to the public interest.⁶

The decision making Minister may not declare a service without having received a recommendation from the Council. The Minister is not bound to follow the Council's recommendation, although the recommendation will be influential.

In addition to the declaration criteria, the Council in making its recommendation, and the Minister in making a decision, must consider whether it is economical for anyone to develop a facility that could

⁵ Prior to the High Court's *Pilbara Rail decision*, it had been thought that Ministers had discretion not to declare a service even where all the declaration criteria were met. The High Court has determined that no such discretion exists and that where all the declaration criteria are met a Minister must declare the relevant service, see *Pilbara Rail decision* at [116].

⁶ Criterion (d) was removed by an amendment to the CCA in 2010. It had addressed issues of human health and safety which were more appropriately considered as part of arbitration of a specific access dispute or alternatively as part of the public interest considerations of criterion (f).

provide part of the service for which declaration is sought. The CCA is silent on the consequences of such a conclusion and it is unclear what value this requirement adds.⁷

In some cases the issues involved in considering the declaration criteria are interrelated. For example in a situation where criterion (a) is not satisfied, it is also likely that criterion (f) would also not be satisfied—this is because where criterion (a) is not satisfied access involves little or no benefit to competition, yet access regulation invariably carries some costs, meaning that declaration in such circumstances would likely involve greater cost than benefit and would thus be contrary to the public interest.

The criteria also recognise the trade-offs inherent in considering whether third party access should be subject to regulation.

The risk of inappropriately deterring infrastructure investment is recognised first in the narrow scope of the declaration power in Part IIIA and also in the safeguard provisions and pricing policies⁸ that apply to ACCC access arbitrations. Where appropriate such a trade-off may also be considered when examining criterion (f).

The trade-offs associated with vertical integration are also considered in assessing the declaration criteria. Criterion (a) may be more readily satisfied where the provider of a service for which declaration is sought also operates in a related upstream or downstream market. Any costs of constraining vertical relationships can then be addressed in considering criterion (f).⁹

The declaration criteria have been the subject of a number of court judgements relating to how these provisions should be interpreted by the Council, Minister and the Tribunal. The interpretation by the courts of the declaration criteria (and other provisions of Part IIIA) is critical to the operation of the National Access Regime and its effectiveness. Where policy makers disagree with an interpretation adopted by a court, the Parliament can amend the relevant provisions of the CCA. In doing so it is important that the purpose of the amendment is clearly spelt out because courts will look to the underlying explanations in various extrinsic materials when interpreting the amended provisions. Conversely where a court has considered how a provision should be interpreted and the interpretation is considered to be appropriate, considerable care should be exercised before amending that provision for want of disturbing the appropriately settled interpretation.

In relation to criterion (b) the High Court in its *Pilbara Rail decision* upheld a decision of the Full Federal Court that had overturned previous decisions linking satisfaction of that criterion to the presence of natural monopoly characteristics in the supply of the service for which declaration was sought, such that it was uneconomic from the perspective of the Australian economy for the facility

⁷ Possible consequences include non-declaration or declaration notwithstanding the possibility of part of the service being provided by another facility. However, declaration of only part of the service is not an option, because, unlike the situation that arises in respect of natural gas pipelines, there is no provision enabling the Council to make a recommendation, or the Minister a decision, to declare part of the service for which declaration is sought.

⁸ See CCA, ss 44W, 44X and 44ZZCA.

⁹ Declaration and the operation of Part IIIA more generally does not prohibit continued vertical integration or provide a means for breaking up a vertically integrated business.

providing the service to be duplicated. Instead the High Court held that satisfaction of criterion (b) involves a test of economic feasibility and that:

[107] If the Minister is satisfied that it would be uneconomical (in the sense of not profitable) for anyone to develop an alternative facility, criterion (b) is met.

The High Court's construction of criterion (b) determines this matter. The construction is binding on the Council when considering recommendations on declaration applications and on decision-making Ministers, the Tribunal and lower courts.

With respect, the Council considers the High Court's construction to be unsatisfactory. In the Council's view the approach allows for the duplication of a facility in circumstances that are wasteful of societal resources and which reduce productivity by requiring multiple facilities be developed when a single facility could have provided sufficient services at a lesser cost.

The Council's view in this regard is largely unchanged since the early days of Part IIIA. In its initial draft guide on Part IIIA, the Council expressed the view that the 'policy intent underlying the access regime is to focus mainly on what economists call "natural monopoly" situations'.¹⁰ This reflects the observation in the Hilmer Report that:

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 (Hilmer Report, p 239).

In its 27 November 1997 recommendation in respect of the application by Specialized Container Transport for declaration of the services provided by Westrail, the Council accepted a submission that the commercial viability of another facility was a factor relevant to criterion (b). In that matter the Council considered that duplication of the facilities would not have been commercially viable because of the facilities' natural monopoly characteristics. The Council confirmed its position on the construction of criterion (b) in the first edition of its guide to declaration, where—citing the Tribunal's test from the Duke EGP decision—it said that a facility would be uneconomical to duplicate where provision of the service is a natural monopoly.

The Council's view is that criterion (b) should be amended. The criterion should be concerned with the costs to the overall Australian economy if duplication of facilities that exhibit natural monopoly characteristics is required for competition to occur in markets which are dependent on access to such facilities.

The High Court in its *Pilbara Rail decision* also considered the appropriate approach to consideration of criterion (f)—whether access (or increased access) is not contrary to the public interest—and held that the range of matters to which the Minister may have regard in considering criterion (f) is "very wide indeed" ([42]); and noted that "the [Competition] Tribunal would not lightly depart from a ministerial conclusion about whether access would be in the public interest" ([112]). Furthermore,

¹⁰ NCC, *The National Access Regime: A draft guide to Part IIIA of the Trade Practices Act*, August 1996, 22.

the High Court held that where all the declaration criteria are satisfied the Minister must declare a service and has not residual discretion not to declare a service in such circumstances.

The Council is comfortable with the High Court's finding that there is no residual discretion not to declare a service where all the declaration criteria are satisfied. In the Council's view the breadth of issues that may be considered under criterion (f) is such that all relevant considerations that might give rise to a decision not to declare a service (even where the other declaration criteria are met) can be addressed in that context.

The nature of the declaration decision and consequences for review

Unlike decisions made within a regulatory scheme—such as the determination of a parameter such as the weighted average cost of capital—decisions about declaration go to the scope of regulation. They are akin to decisions taken by the Parliament or the Government to regulate specific industries, and hinge on an assessment of whether declaration/coverage is in the public interest and whether the benefits from a regulated access outweigh the costs. They require the decision-maker to balance the potentially conflicting goals of promoting competition in related markets and ensuring appropriate investment incentives, and to consider the likely effectiveness of regulation and its costs. The Council considers that the power to make a decision to subject a service to the National Access Regime appropriately rests with a politically accountable minister acting on (but not bound to follow) independent expert advice.¹¹ This was also the view of the Hilmer Committee, which concluded that:

As the decision to provide a right of access rests on an evaluation of important public interest considerations, the ultimate decision on this issue should be one for Government, rather than a court, tribunal or other unelected body. (Hilmer Report, p 250).

For such decisions, the Council questions whether merits review is the appropriate form of review. The Council considers judicial review is the preferable approach: judicial review ensures that Ministers' decisions on declaration applications are made fairly and in accord with law without putting the Tribunal in a position where its opinions on a range of public interest and other issues arising in the declaration process potentially override those of a politically accountable ministerial decision-maker.

Further, the merits review regime has in the Council's view increased uncertainty and extended delays in the declaration process. While the 2010 amendments and the approach required of the Tribunal following the High Court's *Pilbara Rail decision*¹² should expedite the process, the Council

¹¹ See: ARC, *What decisions should be subject to merits review?* at <http://www.arc.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>

¹² In this decision, the High Court took issue with the approach to reconsideration of declaration decisions adopted by the Tribunal for a number of years. The Court held that it is the Tribunal's task to review the Minister's decision on the basis of the information that was before the Minister (perhaps augmented by additional information sought by the Tribunal from the Council). The High Court held that it was not for the Tribunal to conduct a quasi-curial trial to decide afresh on a new body of evidence whether a service should be declared. The approach mandated by the High Court is arguably a narrower review than that available

considers that judicial review of declaration decisions would provide a more streamlined (as well as more appropriate) mechanism. The Council discussed the appropriateness of merits review of declaration decisions in its annual reports for 2010-11 and 2011-12 and in its submission to the review of limited merits review under the national electricity and gas laws currently being undertaken under the auspices of the ministerial Standing Committee on Energy and Resources (**SCER**) (see: www.scer.gov.au).

Declaration, coverage and other decisions under Part IIIA or the national energy laws are decisions under an enactment for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (**ADJRA**) and are subject to review under that Act. The Council is of the view that s 5 of the ADJRA provides appropriate and sufficient scope for review of a designated Minister's decision under s 44H of the CCA.

Further, the Council considers that it is neither a necessary nor an efficient use of resources to provide two levels of inquiry and fact finding in declaration matters. At a practical level, the courts have shown a willingness to review fact finding where the process or outcome can be characterised as irrational, illogical or unreasonable, even outside the auspices of the ADJRA.¹³

The Council looks forward to engaging with the Commission in relation to the Commission's Inquiry into the National Access Regime. If I can provide any additional information or you would like to discuss the Council's preliminary comments, please contact the Council's Executive Director, John Feil at john.feil@ncc.gov.au or on (03) 9981 1600.

Yours sincerely



David Crawford
President

under judicial review and it certainly precludes extensive new evidence and arguments being made to the Tribunal.

¹³ For example, in *Da Costa v R* (1968) 118 CLR 186, 194, Windeyer J acknowledged potential judicial manipulation of the fact-law distinction 'according to whether the judge wanted to intervene'. Aronson, Dyer and Groves in their 3rd edition (at p 249), acknowledging that their interpretation may not be universally accepted, say the High Court in *S20* rejected the argument that judicial review requires error of law or jurisdictional fact error. They then opine that 'even Finkelstein J (whose dissenting judgment [in *Gamaethige v MIMA* [2001] FCA 565] was eventually vindicated [in *S20*]) still achieves fact review circuitously, behind the unconvincing façade of "failing to take account of a relevant consideration"' (footnote in original refers to *M190/2002 v MIMIA* [2003] FCA 1362).

Appendix 1: Declaration matters

	Application date	Applicant	Service	Council recommendation	Minister's decision	Review	Ultimate outcome
1.	27-Sep-2011	Board of Airline Representatives of Australia Inc	Caltex jet fuel pipeline services at Sydney Airport	Not to declare	Not to declare	None	Not declared
2.	27-Sep-2011	Board of Airline Representatives of Australia Inc	JUHI services at Sydney Airport	Not to declare	Not to declare	None	Not declared
3.	19-May-2010	Pacific National Pty Ltd	Blackwater coal railway facility	N/A	N/A	N/A	No decision—application withdrawn
4.	19-May-2010	Pacific National Pty Ltd	Goonyella coal railway facility	N/A	N/A	N/A	No decision—application withdrawn
5.	19-May-2010	Pacific National Pty Ltd	Moura coal railway facility	N/A	N/A	N/A	No decision—application withdrawn
6.	19-May-2010	Pacific National Pty Ltd	Newlands coal railway facility	N/A	N/A	N/A	No decision—application withdrawn
7.	22-Mar-2010	North Queensland Bio-Energy Corporation Ltd	Herbert River district cane tram network	Service provide by Herbert River cane railway not be declared (July 2010)	Deemed decision not to declare (September 2010)	None	Not declared
8.	18-Jan-08	The Pilbara Infrastructure Pty Ltd (a subsidiary of Fortescue Metals Group Ltd)	Robe Railway track access service (owned and operated by Rio Tinto Ltd)	To declare (August 2008)	To declare for 20 years (October 2008)	<p>Treasurer's decision varied by Tribunal: period limited to 10 years from 19 November 2008.</p> <p>Tribunal's decision judicially reviewed in Federal Court. The Court dismissed Fortescue's appeal seeking reinstatement of the 20-year period and granted Rio Tinto's appeal seeking overturning of the declaration.</p> <p>Appeal to High Court by Fortescue heard 6-8 March 2012. Judgment 16 September 2012 quashed Tribunal decision and remitted for determination according to law.</p>	Pending

	Application date	Applicant	Service	Council recommendation	Minister's decision	Review	Ultimate outcome
9.	17-Nov-07	The Pilbara Infrastructure Pty Ltd (a subsidiary of Fortescue Metals Group Ltd)	Hammersley Railway track access service (owned and operated by Rio Tinto Ltd)	To declare (August 2008)	To declare for 20 years (October 2008)	Treasurer's decision to declare was set aside by Tribunal. Tribunal's decision judicially reviewed in the Federal Court. The Court dismissed Fortescue's appeal seeking reinstatement of the declaration. Appeal to High Court by Fortescue heard 6-8 March 2012. Judgment 16 September 2012, quashed Tribunal decision and remitted for determination according to law.	Pending
10.	16-Nov-07	The Pilbara Infrastructure Pty Ltd (a subsidiary of Fortescue Metals Group Ltd)	Goldsworthy Railway track access service (owned and operated by BHP Billiton Iron Ore Pty Ltd)	To declare (August 2008)	To declare for 20 years from 19 November 2008	Tribunal affirmed Treasurer's decision	Declared until November 2028
11.	02-May-07	Tasmanian Department of Infrastructure, Energy and Resources - Rail Unit	Use of rail tracks and associated infrastructure on certain segments of the Tasmanian rail network	To declare (August 2007)	To declare for 10 years from 23 October 2007	None	Declared until October 2017
12.	8-Oct-04	Lakes R Us Pty Ltd	Water storage and transport service provided by Snowy Hydro using the Snowy Mountains Hydro-Electric Scheme	Not to declare (November 2005)	Not to declare (January 2006)	Lakes R Us applied to Tribunal for review later withdrew	Not declared
13.	8-Oct-04	Lakes R Us Pty Ltd	Water storage and transport service provided by State Water using the Blowering Dam and Burrinjuck Dam facility	As above	As above	As above	As above

	Application date	Applicant	Service	Council recommendation	Minister's decision	Review	Ultimate outcome
14.	15-Jun-04	Fortescue Metals Group Ltd	Use of part of the Mt Newman Railway line from near Mindy Mindy to Port Hedland, and part of the Goldsworthy Railway from where it crosses the Mt Newman Railway to Port Hedland.	Council decided it had jurisdiction to consider Mt Newman Railway but not Goldsworthy Railway as that was part of a production process. Council recommended declaration of Mt Newman Railway for 20 years (March 2006)	Deemed decision not to declare (May 2006)	<u>Jurisdiction</u> Both Fortescue and BHPBIO challenged the Council's jurisdictional decisions in the Federal Court. Court held that neither railway was part of a production process so both were subject to Pt IIIA. BHPBIO unsuccessfully appealed to the Full Federal Court and the High Court. <u>Declaration</u> Tribunal affirmed Minister's deemed decision not to declare.	Not declared
15.	3-Mar-04	Services Sydney Pty Ltd	Transportation of sewage by the North Head Reticulation Network	To declare for 50 years (December 2004).	Deemed decision not to declare (February 2005)	Tribunal declared service for 50 years from 21 December 2005	Declaration (by Tribunal) revoked on Council's recommendation after NSW Government subsequently enacted the <i>Water Industry Competition Act 2006</i> (NSW) which was certified as effective
16.	3-Mar-04	Services Sydney Pty Ltd	Connection of new sewers to the North Head Reticulation Network	As above	As above	As above	As above
17.	3-Mar-04	Services Sydney Pty Ltd	Transportation of sewage by the Bondi Reticulation Network	As above	As above	As above	As above
18.	3-Mar-04	Services Sydney Pty Ltd	Connection of new sewers to the Bondi Reticulation Network	As above	As above	As above	As above
19.	3-Mar-04	Services Sydney Pty Ltd	Transportation of sewage by the Malabar Reticulation Network	As above	As above	As above	As above
20.	3-Mar-04	Services Sydney Pty Ltd	Connection of new sewers to the Malabar Reticulation Network	As above	As above	As above	As above

	Application date	Applicant	Service	Council recommendation	Minister's decision	Review	Ultimate outcome
21.	Oct-02	Virgin Blue Airlines Pty Ltd	The use of runways, taxiways, parking aprons and other associated facilities (airside service) at Sydney airport	Not to declare (November 2003)	Not to declare (January 2004)	Tribunal overturned Minister's decision and declared the service for five years expiring 8 December 2010. Federal Court upheld the Tribunal's determination. SACL was refused leave to appeal to the High Court	Declared—declaration has expired
22.	Sept-01	Aulron Energy Limited	Rail track services provided through the Wirrida–Tarcoola rail track	To declare (July 2002)	To declare (September 2002)	Tribunal set aside Minister's decision on the basis that no probative material to be affirmatively satisfied about criteria	Not declared
23.	Aug-01	Portman Iron Ore Limited	Rail track services provided through the Koolyanobbing–Esperance rail track	N/A	N/A	N/A	No decision—application withdrawn
24.	May-01	Freight Australia	Rail track services provided through Victoria's intrastate rail network	Not to declare (December 2001)	Not to declare (February 2002)	Freight Australia applied for review by the Tribunal but withdrew the application	Not declared
25.	Jan-01	Normandy Power Pty Ltd, NP Kalgoorlie Pty Ltd and Normandy Golden Grove Operations Pty Ltd (Normandy)	Electricity services provided through Western Power's south west electricity networks	N/A	N/A	N/A	Application withdrawn and court proceedings seeking to prevent the NCC from considering Normandy's application were discontinued
26.	Aug-98	Robe River	Hamersley rail track services	N/A	N/A	N/A	No decision—application withdrawn; Federal Court held that the service was not within Part IIIA (June 1999). An appeal to the Full Federal Court was initiated, but Robe River withdrew the application and the appeal to the Full Court was stayed.
27.	Jul-97	Specialized Container Transport	Kalgoorlie to Perth rail track service	To declare (November 1997)	Not to declare (January 1998)	Specialized Container Transport applied for review by Tribunal but withdrew following successful negotiations	Not declared
28.	Jul-97	Specialized Container Transport	Arriving/departing services at Forrestfield	As above	As above	As above	As above

	Application date	Applicant	Service	Council recommendation	Minister's decision	Review	Ultimate outcome
29.	Jul-97	Specialized Container Transport	Marshalling/shunting service at Forrestfield and Welshpool	As above	As above	As above	As above
30.	Jul-97	Specialized Container Transport	Marshalling/shunting access at Forrestfield and Welshpool	As above	As above	As above	As above
31.	Jul-97	Specialized Container Transport	Fuelling service at and between Kalgoorlie and Perth and within metropolitan Perth	Not to declare (November 1997)	As above	As above	As above
32.	Apr-97	New South Wales Minerals Council	New South Wales rail track services in the Hunter Valley	To declare (September 1997)	Deemed decision not to declare (November 1997)	The New South Wales Minerals Council applied to the Tribunal for a review of the Minister's decision but withdrew the application following the certification of the New South Wales Rail Access Regime	Not declared
33.	Feb-97	Specialized Container Transport	Sydney to Broken Hill rail track services	To declare (June 1997)	Deemed decision not to declare (August 1997)	Specialized Container Transport applied to Tribunal for review but withdrew following successful access negotiations	Not declared
34.	Dec-96	Carpentaria Transport	Queensland rail services, including above-rail services	Not to declare (June 1997)	Not to declare (August 1997)	Carpentaria applied to Tribunal for review but withdrew	Not declared
35.	Nov-96	Australian Cargo Terminal Operators	Qantas ramp and cargo terminal services at Melbourne international airport	N/A	N/A	N/A	No decision—application withdrawn
36.	Nov-96	Australian Cargo Terminal Operators	Qantas ramp and cargo terminal services at Sydney international airport	N/A	N/A	N/A	No decision—application withdrawn
37.	Nov-96	Australian Cargo Terminal Operators	Ansett ramp and cargo terminal services at Melbourne international airport	N/A	N/A	N/A	No decision—application withdrawn

	Application date	Applicant	Service	Council recommendation	Minister's decision	Review	Ultimate outcome
38.	Nov-96	Australian Cargo Terminal Operators	Ansett ramp and cargo terminal services at Sydney international airport	N/A	N/A	N/A	No decision—application withdrawn
39.	Nov-96	Australian Cargo Terminal Operators	Use of freight aprons and hard stands to load and unload international aircraft at Sydney International Airport	To declare for five years (May 1997)	To declare for five years until 31 July 2001 (July 1997)	Tribunal declared the service for five years from 1 March 2000	Declared—declaration expired
40.	Nov-96	Australian Cargo Terminal Operators	Use of area to store equipment used to load and unload aircraft and transfer freight at Sydney International Airport	As above	As above	As above	As above
41.	Nov-96	Australian Cargo Terminal Operators	Use of area to construct a cargo terminal at Sydney International Airport	Not to declare (May 1997)	Not to declare (July 1997)	None	Not declared
42.	Nov-96	Australian Cargo Terminal Operators	Use of freight aprons and hard stands to load and unload international aircraft at Melbourne International Airport	To declare for 12 months (May 1997)	To declare for 12 months (July 1997)	None	Declared—declaration expired: declared until 9 June 1998 and were then subject to access provisions of the <i>Airports Act 1996</i> until repealed in 2003
43.	Nov-96	Australian Cargo Terminal Operators	Use of area to store equipment used to load and unload aircraft and to transfer freight at Melbourne International Airport	As above	As above	As above	As above
44.	Nov-96	Australian Cargo Terminal Operators	Use of area to construct a cargo terminal at Melbourne International Airport	Not to declare (May 1997)	Not to declare (July 1997)	None	Declared—declaration expired: declared until 9 June 1998 and were then subject to access provisions of the <i>Airports Act 1996</i> until repealed in 2003

	Application date	Applicant	Service	Council recommendation	Minister's decision	Review	Ultimate outcome
45.	Aug-96	Futuris Corporation	Western Australian gas distribution service	N/A	N/A	N/A	No decision—application withdrawn
46.	Apr-96	Australian Union of Students	Austudy payroll deduction service provided by the Department of Education, Employment, Training and Youth Affairs computer system	Not to declare (June 1996)	Not to declare (June 1996)	Tribunal on review did not declare the service (July 1997)	Not declared

Appendix 2: Satisfaction of Declaration Criteria

Application date	Applicant	Service		Satisfaction of declaration criteria						Ultimate outcome
				a	b	c	d	e	f	
27-Sep-11	Board of Airline Representatives of Australia Inc.	Caltex jet fuel pipeline services at Sydney Airport	NCC/Minister	✗	✓	✓	n/a	✓	✗	Not declared
27-Sep-11	Board of Airline Representatives of Australia Inc.	JUHI services at Sydney Airport	NCC/Minister	✗	✓	✓	n/a	✓	✗	Not declared
22-Mar-10	North Queensland Bio-Energy Corporation Ltd	Herbert River district cane tram network	NCC	✓	✓	✗	n/a	✓	✗	Recommend not declared
			Minister	decision period expired						Deemed not declared
18-Jan-08	The Pilbara Infrastructure Pty Ltd (a subsidiary of Fortescue Metals Group Ltd)	Robe Railway track access service (owned and operated by Rio Tinto Ltd)	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister	✓	✓	✓	✓	✓	✓	Declared for 20 year period
			Tribunal	✓	✓	✓	✓	✓	✓	Declared for 10 year period
			Full Court		✗					Not declared
			High Court							Remitted to Tribunal
17-Nov-07	The Pilbara Infrastructure Pty Ltd (a subsidiary of Fortescue Metals Group Ltd)	Hamersley Railway track access service (owned and operated by Rio Tinto Ltd)	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister	✓	✓	✓	✓	✓	✓	Declared
			Tribunal	✓	✓	✓	✓	✓	✗	Declaration overturned
			Full Court		✗					Not declared
			High Court							Remitted to Tribunal
16-Nov-07	The Pilbara Infrastructure Pty Ltd (a subsidiary of Fortescue Metals Group Ltd)	Goldsworthy Railway track access service (owned and operated by BHP Billiton Iron Ore Pty Ltd)	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister	✓	✓	✓	✓	✓	✓	Declared
			Tribunal	✓	✓	✓	✓	✓	✓	Declared until November 2028

2-May-07	Tasmanian Department of Infrastructure, Energy and Resources - Rail Unit	Use of rail tracks and associated infrastructure on certain segments of the Tasmanian rail network	NCC/Minister*	✓	✓	✓	✓	✓	✓	Declared until October 2017
8-Oct-04	Lakes R Us Pty Ltd	Water storage and transport service provided by Snowy Hydro using the Snowy Mountains Hydro-Electric Scheme	NCC/Minister*	✗	✓	✓	✓	✓	✗	Not declared
8-Oct-04	Lakes R Us Pty Ltd	Water storage and transport service provided by State Water using the Blowering Dam and Burrinjuck Dam facility	NCC/Minister*	✗	✓	✓	✓	✓	✗	Not declared
15-Jun-04	Fortescue Metals Group Ltd	Use of part of the Mt Newman Railway from near Mindy Mindy to Port Hedland, and part of the Goldsworthy Railway from where it crosses the Mt Newman Railway to Port Hedland.	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister	decision period expired						Deemed not declared
			Tribunal	✗	✗	✓	✓	✓	✗	Not declared
3-Mar-04	Services Sydney Pty Ltd	Transportation of sewage by the North Head Reticulation Network	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister*	decision period expired						Deemed not declared
			Tribunal	✓	✓	✓	✓	✓	✓	Declared (for 50 years), subsequently revoked
4-Mar-04	Services Sydney Pty Ltd	Connection of new sewers to the North Head Reticulation Network	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister*	decision period expired						Deemed not declared
			Tribunal	✓	✓	✓	✓	✓	✓	Declared (for 50 years), subsequently revoked
5-Mar-04	Services Sydney Pty Ltd	Transportation of sewage by the Bondi Reticulation Network	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister*	decision period expired						Deemed not declared
			Tribunal	✓	✓	✓	✓	✓	✓	Declared (for 50 years), subsequently revoked
6-Mar-04	Services Sydney Pty Ltd	Connection of new sewers to the Bondi Reticulation Network	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister*	decision period expired						Deemed not declared
			Tribunal	✓	✓	✓	✓	✓	✓	Declared (for 50 years), subsequently revoked

7-Mar-04	Services Sydney Pty Ltd	Transportation of sewage by the Malabar Reticulation Network	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister*	decision period expired						Deemed not declared
			Tribunal	✓	✓	✓	✓	✓	✓	Declared (for 50 years), subsequently revoked
8-Mar-04	Services Sydney Pty Ltd	Connection of new sewers to the Malabar Reticulation Network	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister*	decision period expired						Deemed not declared
			Tribunal	✓	✓	✓	✓	✓	✓	Declared (for 50 years), subsequently revoked
Oct-02	Virgin Blue Airlines Pty Ltd	The use of runways, taxiways, parking aprons and other associated facilities (airside service) at Sydney Airport	NCC/Minister	✗	✓	✓	✓	✓	✗	Not declared
			Tribunal	✓	✓	✓	✓	✓	✓	Declared
			Full Court	✓	✓	✓	✓	✓	✓	Declared—declaration has expired
Sep-01	Aulron Energy Limited	Rail track services provided through the Wirrida–Tarcoola rail track	NCC/Minister	✓	✓	✓	✓	✓	✓	Declared
			Tribunal							Not declared - APT applied for a review of the Minister's decision. The Tribunal set aside the Minister's decision on the procedural basis that there was no probative material before it that it could affirmatively satisfy the matters in s44H(4) of the then TPA
May-01	Freight Australia	Rail track services provided through Victoria's intrastate rail network	NCC/Minister	✗	✓	✓	✓	✓	✗	Not declared
Jul-97	Specialized Container Transport	Kalgoorlie to Perth rail track service	NCC	✓	✓	✓	✓	✓	✓	Recommend declaration
			Minister*	✓	✓	✓	✓	✗	✓	Not declared
Jul-97	Specialized Container Transport	Arriving/departing services at Forrestfield Yard	NCC	✗	✗	✗	✓	✓	✗	Not declared
			Minister*	✓	✓	✓	✓	✗	✓	
Jul-97	Specialized Container Transport	Marshalling/shunting service at Forrestfield and Welshpool	NCC	✗	✗	✗	✓	✓	✗	Not declared
			Minister*	✓	✓	✓	✓	✗	✓	

Jul-97	Specialized Container Transport	Marshalling/shunting access at Forrestfield and Welshpool	NCC	✗	✗	✗	✓	✓	✗	Not declared
			Minister*	✓	✓	✓	✓	✗	✓	
Jul-97	Specialized Container Transport	Fuelling service at and between Kalgoorlie and Perth and within metropolitan Perth	NCC	✗	✗	✗	✓	✓	✗	Not declared
			Minister*	✓	✓	✓	✓	✗	✓	
Apr-97	New South Wales Minerals Council	New South Wales rail track services in the Hunter Valley	NCC	✓	✓	✓	✓	✓	✓	
			Minister*	decision period expired						Deemed not declared
Feb-97	Specialized Container Transport	Sydney to Broken Hill rail track services	NCC	✓	✓	✓	✓	✓	✓	
			Minister*	decision period expired						Deemed not declared
Dec-96	Carpentaria Transport	Queensland rail services, including above-rail services	NCC/Minister*	✓	✓	✗	✓	✓	✓	Not declared
Nov-96	Australian Cargo Terminal Operators	Use of freight aprons and hard stands to load and unload international aircraft at Sydney International Airport	NCC/Minister	✓	✓	✓	✓	✓	✓	Declared—declaration now expired
			Tribunal	✓	✓	✓	✓	✓	✓	
Nov-96	Australian Cargo Terminal Operators	Use of an area at the airport to store equipment used to load/unload international aircraft; and to transfer freight from the equipment to/from trucks at Sydney International Airport	NCC/Minister	✓	✓	✓	✓	✓	✓	Declared – declaration now expired
			Tribunal	✓	✓	✓	✓	✓	✓	
Nov-96	Australian Cargo Terminal Operators	Use of an area to construct a cargo terminal at Sydney International Airport	NCC/Minister	✓	✗	✓	✓	✓	✗	Not declared
Nov-96	Australian Cargo Terminal Operators	Use of the freight aprons and hard stands to load and unload international aircraft at Melbourne International Airport	NCC/Minister	✓	✓	✓	✓	✓	✓	Declared—declaration expired: declared until 9 June 1998 and were then subject to access provisions of the <i>Airports Act 1996</i> until repealed in 2003.
			Tribunal	✓	✓	✓	✓	✓	✓	

Nov-96	Australian Cargo Terminal Operators	Use of an area at the airport to: store equipment used to load/unload international aircraft; and to transfer freight from the equipment to/from trucks at Melbourne International Airport	NCC/Minister	✓	✓	✓	✓	✓	✓	Declared—declaration expired: declared until 9 June 1998 and were then subject to access provisions of the <i>Airports Act 1996</i> until repealed in 2003.
Nov-96	Australian Cargo Terminal Operators	Use of an area to construct a cargo terminal at Melbourne International Airport	NCC/Minister	✓	✗	✓	✓	✓	✗	Not declared
Apr-96	Australian Union of Students	Austudy payroll deduction service provided by the Department of Education, Employment, Training and Youth Affairs computer system	NCC/Minister	✓	✗	✗	✓	✓	✗	Not declared
			Tribunal	✓	✗	✗	✓	✓	✗	

* indicates declaration decisions that were the responsibility of a designated State or Territory Minister, see CCA s 44D. In all other cases the decision making minister was the designated Commonwealth Minister.