Submission to the Productivity Commission Review of the National Access Regime

Michael B. Cunningham[1]

8 February 2013

[1] The views expressed in this paper are the personal views of the author and are not the views of his employer, the Essential Services Commission of Victoria.

1 Introduction

The purpose of this submission is to contribute a perspective on some of the issues being considered by the Productivity Commission (PC) in its current review of the national access regime.[2] Although the PC's review covers broader issues, including access regulation generally, progress on regulatory reforms and policies for more effective delivery of infrastructure services (PC 2012 p.1), this submission is focussed on Part IIIA of the *Competition and Consumer Act 2010* (CCA).

Most Australian access regimes are industry-specific regimes developed as part of a set of wider competition reforms, including structural reform and sometimes privatization. Because access regimes are usually introduced to complement other competition reforms, it is appropriate that they are usually formulated by policy-makers as industry specific regimes. Part IIIA has a residual role of addressing other access issues on a case-by-case basis as they arise, and this role is appropriate.

An important focus of the PC's review will be the aim of establishing "a simpler and consistent national approach to economic regulation of significant infrastructure" (CIRA, clause 2.1). The generic access regime in Part IIIA was originally expected to simplify access regulation and perhaps do away with industry-specific access regimes. That did not happen, and the inherent structure of Part IIIA, which is designed to deal with access issues on a piecemeal basis, would limit its ability to provide an effective substitute for industry-specific regimes.

Even so, the generic access regime provides benefits. It can and has been helpful in opening up competition, particularly where access to a market is inhibited by government-owned monopolies or where the owner of an essential monopoly facility seeks to monopolize a downstream market.

The main question addressed here is, assuming it continues in its present role of addressing residual access issues, what reforms are needed to Part IIIA that would assist to achieve a simpler and more consistent approach to access regulation. Various changes are proposed in this submission.

---

[2] The national access regime comprises Part IIIA of the *Competition and Consumer Act 2010*, clause 6 of COAG's Competition Principles Agreement (1995, amended in 2007) and COAG's 2006 Competition and Infrastructure Reform Agreement. (PC 2012, p.1)

2 The purposes of Part IIIA

The role of Part IIIA can best be understood in light of the market failures it seeks to address, and these are discussed in section 2.1. The statutory objects guide the use of Part IIIA, and are pertinent to the different views relating to the 'uneconomic to develop' criterion, insofar as those views reflect different perspectives of the intended application of Part IIIA. These are briefly discussed in section 2.2.

2.1 Market failures

Third-party access imposes a duty on the owner of a monopoly bottleneck facility—that is, an indispensable input for firms to be able to compete in a related market—to share the use of that facility with firms seeking to participate in the related upstream or downstream markets. If the facility owner is also a supplier in the related market it may have an incentive to refuse access or to provide access on disadvantageous or discriminatory terms to weaken the competitor in the related market. These actions are anti-competitive and in US and EU competition law they are dealt with under the general prohibitions relating to anti-competitive conduct.[3]

Even where the provider is not vertically integrated there can be concerns about discrimination between users that are competitors a related market.[4] However, in some jurisdictions, such as Europe, vertical integration is a prerequisite for using the 'essential facilities doctrine'. If the bottleneck owner does not participate in the related market there is no anti-competitive benefit from refusing access, and it is assumed there must be a reasonable business justification (Evrard 2004 p.17).

---

[3] Both jurisdictions have an 'essential facilities doctrine', which in the USA refers to a set of precedents under §2 of the Sherman Act (which prohibits monopolizing or attempting to monopolize) and in the EU to related actions under the general prohibition of abuse of dominance in Article 82 of the Treaty which prohibits, among other things, "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". There are differing views about the status of the essential facilities doctrine in US law because the US Supreme Court has not specifically endorsed it nor categorically rejected it (Cotter 2010).

[4] An interesting example is Sydney Airport Corporation Ltd, which changed its charges for Airside services from a maximum take-off weight basis to a per-passenger basis, to the detriment of low-cost carriers, "because Qantas preferred it":*Virgin Blue Airlines Pty Limited* [2005] ACompT 5, Summary, at [14].

In most of Australia's industry-specific regimes, third-party access was introduced alongside other competition reforms to liberalise and in some cases to create new competitive upstream and downstream markets (for example, the national electricity wholesale market). Development of new markets to improve resource allocation is also central to the Living Victoria Ministerial Advisory Council's (LVMAC) proposal to introduce third-party access into the Melbourne water industry (LVMAC 2012). In these contexts, access regimes ensure entrants can participate in the new markets and protect competition from pressures to reintegrate (Newbery 2000).

The situation is similar in the USA and Europe. In the USA, access to essential infrastructure services was mainly imposed by industry-specific regulatory agencies (Marshall 2004).[5] In Europe most third-party access regimes have been imposed by the European Commission (EC) by Directives relating to competition reforms in specific industries, which are supported by provisions relating to 'services of general economic interest' in the Treaty Establishing the European Community.[6]

The competition reforms undertaken to liberalise former monopolies and/or foster new markets are inevitably industry-specific because the impediments to competition and the pro-competitive opportunities differ between industries. Where access regimes are part of a set of competition reforms, it follows that they will also be industry-specific. Part IIIA would not be suitable because it deals with access issues in isolation, not as a complement to other competition reforms. It is also designed to deal reactively to specific access issues, rather than pro-actively implement industry-wide access arrangements. It has yet to be demonstrated that Part IIIA could be used to establish access frameworks which are compatible with a broader set of competition policy reforms for an industry.

[5] These include telecommunications, gas, railways and electricity.

[6] For example, Article 106(2) of the Treaty states that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition.

In summary, Part IIIA will rarely be a substitute for industry-specific access regimes. Part IIIA is suited to its present role of addressing *ad hoc* access claims, but there doesn't appear to be any compelling reason for widening its role.

2.2 Statutory purposes of Part IIIA

When applying Part IIIA, particularly with regard to declaration, it is important to read the specific statutory objectives of Part IIIA in the context of the over-arching objective of the CCA.[7] This emphasises reliance on competition as the preferred means to promote social welfare where possible, and the protection of competition and consumers from anticompetitive and unfair trading practices where necessary.

The Dawson inquiry discussed the objects of the CCA, observing that while economic efficiency is the ultimate aim, maximising competition is the preferred means to achieve this aim. Competition is a mechanism for achieving greater efficiency by providing the incentives and disciplines for continual improvement (Dawson 2003 pp.30,32). Where competition is feasible, even if monopoly were more efficient in a static sense, the dynamic efficiency gains generated through competition and the associated greater incentives for ongoing improvement need to be taken into account.[8] Although the objects of Part IIIA are silent about the promotion of competition in infrastructure services, the objective of the CCA suggests that competition of this kind should be promoted wherever feasible in preference to regulation.

3 Coverage

The necessary conditions for declaration of services/facilities have been clarified by recent decisions of the High Court and the Full Federal Court, with the meaning of the 'uneconomic to develop' criterion satisfactorily resolved. It is submitted that no amendments should be made to ss 44H(4)(a) & (b) of the CCA, to avoid the risk of losing valuable precedents. That said, given that the debate about the meaning of 'uneconomic to develop' is not over, the issues are discussed briefly in section 3.1.

---

[7] CCA, ss 44AA & 2 respectively.

[8] See: *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal etc* [2012] HCA 36 (13 September 2012) at 92.

This submission makes several suggested changes to other necessary conditions for declaration.[9] These issues are discussed in sections 3.2 to 3.5.

3.1 Uneconomic to duplicate

Since recent debate has focussed especially on the interpretation of the 'uneconomic to duplicate' criterion, it seems necessary to touch on this topic. Economists have long held different views about the interpretation of this criterion. NECG suggested the criterion should be interpreted as:

> a test of whether a firm has such substantial market power over the supply of a service as to confer the capacity to act as a bottleneck to effective competition in dependent markets – that is, markets in which firms can only compete if they have access to that service. (NECG 2001 p.7)

That would be consistent with the private profitability test. King had a different interpretation:

> access to an essential input is only a cause for specific regulatory intervention if it is either highly unlikely that competition will develop in the upstream market in the longer term *or if such competition is itself undesirable*. In general, this means that the upstream production process involves a natural monopoly technology. … The requirement that it is uneconomic for anyone to develop another facility to provide the service may be thought of as a natural monopoly test. (King 2001 pp.5,9 emphasis added)

It can be privately profitable for a firm to duplicate a facility even though it is a natural monopoly. For example where 'an incumbent and potential access seeker occupy infra-marginal positions in a related market' (*Fortesque Metals* 2010 at 816). Entry on a smaller scale than the size of the market may sometimes be profitable even in a natural monopoly (Ordover & Lehr from NCC 2009b). In each case, although it may be privately profitable for a second facility to be built, a natural monopoly test may find 'it would be more efficient to share an existing facility' (*Fortesque Metals* 2010 at 816).

[9] The necessary conditions include: (a) whether the service corresponds to the definition of 'services'; (b) whether the services meet the declaration criteria; and (c) whether there is already an exemption, access holiday, undertaking, certified access regime or approved competitive tender process.

Since there may be more than one supplier even in a natural monopoly, this would not test whether the firm has market power associated with control of an indispensable input, so it differs from the NECG interpretation. However, King also observed that "if there are two potential providers of the essential input, then the need for intrusive regulation through declaration is significantly diminished" (King 2001 p.11), which raises a question as to whether criterion (b) should be seeking to isolate natural monopolies.[10]

Although there have been some differences in their interpretations, the Tribunal and the NCC have generally adopted a natural monopoly test. In its *Sydney Airports* decision in 2000, the Tribunal adopted a social cost benefit test, preferring this to a test based on private commercial interests.[11] In *Fortescue Metals Group* in 2010, the Tribunal changed its views, deciding that criterion (b) should be a natural monopoly test, while criterion (f) (the public interest) should take into account the costs and benefits of declaration.[12] The NCC does not distinguish between the

---

[10] Although natural monopoly is the most typical reason for a facility/service to be a 'monopoly bottleneck', it is neither a necessary nor a sufficient condition. It is not necessary because a facility can be a bottleneck for other reasons. It may be infeasible to duplicate a port because of limited available locations to build another facility (eg, due to environmental, urban development or geological reasons) and a more distant alternative location may involve high land transport costs. A railway may be uneconomic to duplicate due to lack of rail corridors and the high cost of acquiring corridors in built-up areas (Whish 2009, p.694). Natural monopoly is not a sufficient condition because there may be other technologies available to provide a similar service that can operate efficiently at small scales. For example, a bridge with adequate capacity may, once built, be a natural monopoly because overall cost would be minimised (in a static sense) if all traffic used the bridge. However, car ferries can sometimes effectively compete against established toll bridges.

[11] *Re Sydney International Airport* [2000] ACompT 1 (1 March 2000), at 204. The Tribunal's reasons were not explained well and are difficult to follow. Especially confusing was the juxtaposition of the following findings: (i) if criterion (b) was a private profitability test, the incumbent "might frustrate the underlying intent of the Act" by developing another facility and restricting access (at 205); (ii) the reference to 'anyone' in criterion (b) should be taken to mean 'anyone else' (at 201), so if the access provider duplicated its own facility that would not count as a duplication for the purposes of criterion (b); and (iii) "the very powerful economies of scale and scope of Sydney International Airport … preclude anyone, *even the incumbent owner and operator*, from developing another facility" (at 202, emphasis added).

[12] *In the matter of Fortesque Metals Group Limited* [2010] ACompT 2 ('*Fortesque Metals*'), at 836-839. The natural monopoly test is a test of whether the production costs of the service would be lower with a single facility, compared to with two facilities, using the available technology.

social cost-benefit test and the natural monopoly test: "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" (NCC 2009b p.48).

These interpretations were rejected by the Full Federal Court and the High Court which found that 'uneconomic to duplicate' means that no one in the marketplace would find it privately profitable to develop another facility.[13] If it were privately profitable for a business to duplicate the facility, in whole or in part, access to the facility would not be *essential* to compete in an upstream or downstream market. (*Pilbara Infrastructure* 2011 at 68)

This interpretation of the Act is within the meaning of Hilmer and is similar to the US essential facilities doctrine (which influenced Hilmer) and European practice. If it were privately profitable to bypass a facility subject to a declaration application, then absent declaration it would be bypassed, and declaration does not add to competition in an upstream or downstream market. Criterion (a) would not be satisfied in these circumstances. Precedents suggest that when there is an alternative service/facility available, there is no longer any incentive for the former monopolist to pursue a strategy of refusing supply.[14] Declaration under these circumstances could only benefit competitors, but would not benefit competition.

The Court's interpretation of 'uneconomic to duplicate' is congruent with criterion (a). The private profitability test implies that where competitive bypass is feasible it should be permitted to impose a constraint on the pricing power of the incumbent in preference to access regulation being used for that purpose. The High Court also noted the difficulty in testing for natural monopoly and hence the high risk of false positives, which needs to be taken into account when recommending declaration. It also emphasised that:

---

[13] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58 ('*Pilbara Infrastructure*'); *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (etc) [2012] HCA 36 (14 September 2012) ('*The Pilbara Infrastructure*')

[14] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 83 ALR 577; *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399, at [179].

> … dynamic and allocative costs are best minimised, and dynamic and allocative benefits are best enhanced, by competition. And it would follow that development of another facility to provide the service (if competing with the existing facility) would best minimise those costs and enhance those benefits. (*The Pilbara Infrastructure*, 2012 at 92)

3.2 'Essential' facilities & services

The Hilmer report proposed the national access regime as an Australian counterpart to the US essential facilities doctrine.

> The general rules proposed are intended to cover essential facilities, irrespective of ownership, where certain public interest and other criteria are met. (Hilmer et al. 1993 p.250)

Examples of the kinds of facilities to be potentially covered under the proposed national access regime included electricity grids, gas or other pipelines, telecommunications networks, railways, ports or airports (Hilmer et al. 1993 p.240). There were some concerns that enacting Part IIIA, while also retaining industry-specific regimes, would proliferate regulatory arrangements with adverse effects on economic growth and international competitiveness.[15] This has not happened to-date, but there remain concerns about the potential scope of Part IIIA (Pengilley 2007).

Areeda (1990) has argued that the US essential facilities doctrine lacks a limiting principle. The US and EU cases employing essential facilities doctrines have addressed a broad range of matters including compulsory licensing of intellectual property, access to computerised airline reservation systems, securities clearing and settlements, payment systems and premium TV content (Areeda 1990 p.693; Whish 2009 pp.698-699). Unsuccessful cases have included access to a competitor's wholesale product distribution network or retail sales force. In important respects Australia's national access regime is much narrower than those of the EU and US

[15] House of Representatives Australia, *Gas Pipelines Access (Commonwealth) Bill 1997*: *Explanatory Memorandum* (1998), paras 32–3.

because it is confined to the use of infrastructure.[16] Although 'infrastructure' is potentially a broad term, its use is consistent with some of the responses to Areeda's critique in the US which have sought to develop an 'infrastructure-based essential facilities doctrine' (Frischmann & Waller 2006; Waller 2008). But its potential breadth is indicated by NCC horizon studies in areas such as financial settlement services (NCC 2012a).

There is another possible limiting principle that might be considered, which draws on a different meaning of the term 'essential'. In the 'essential facilities doctrine', the term 'essential' refers to the indispensability of use of the facility for a party to be able compete in a related market. The term 'essential' also refers in a different way to the kinds of industries that Hilmer suggested the national access regime might apply to, which all involve the use of infrastructure in the provision of 'essential' commodities or services, such as water, electricity, transportation or communication.[17] Historically these services have been provided to the public in general by businesses, whether privately or publicly owned, often referred to as public utilities.[18]

Public utilities have traditionally been subject to regulation and/or ownership by state or federal governments. In those industries where access regulation has been introduced so far, it has largely supplanted previous forms of public utility regulation. As mentioned, this has generally been accompanied by competition reforms designed to facilitate competition and develop new markets for the

---

[16] The Oxford dictionary defines 'infrastructure' as the basic physical and organizational structures and facilities (e.g. buildings, roads, power supplies) needed for the operation of a society or enterprise.

[17] 'Essential services' usually refers to services such as telecommunications, electricity, water, sewerage, reticulated natural gas, telecommunications, domestic waste collection and so forth. It commonly extends to public infrastructure provision for roads, railway lines, ports, and airports (etc) that facilitate the movement of passengers and freight. Here it is used in this broad sense to include all such services. However, there is another use of the term, particularly in legislation to restrict industrial action in certain circumstances, in which 'essential services' may refer to emergency services, police, medical services etc.

[18] A public utility can be defined as a business that supplies everyday necessities to the public, such as water, electricity, natural gas, telephone services, and other essentials, whether or not the business is publicly or privately owned.

services in those industries that are contestable. Part IIIA has an important role in stimulating competition reforms in essential services that have yet to be exposed to major competition reforms and where new markets and greater use of private capital are feasible. But there is a question as to whether it was intended to extend beyond these contexts. Views differ on whether that is desirable or not.

If it should have a more restricted application, one consideration is whether the application of Part IIIA should be limited to infrastructure services that are 'essential' in *both* of the meanings noted above. This would be consistent with a view expressed by the Federal Court (when considering the application of the essential facilities doctrine within the context of s.46 of the CCA), which stated:

> we have some difficulty, at least in cases where a monopoly of electric power, transport, communications or some other "essential service" is not involved, in seeing the limits of the concept of "essential facility" … [19]

In summary, consideration should be given to whether a further limiting principle is needed for the application of Part IIIA or whether its scope should extend to any context in which the defined market failures are present. If a further limiting principle is considered necessary, then one option is to define the term 'infrastructure' to include only the types of infrastructure used to provide 'essential services' (suitably defined).

3.3 Denial of access & legitimate business reasons

When comparing the Australian national access framework with its equivalents overseas two aspects stand out as being particularly inconsistent. In the USA and EU, the denial of access is a necessary prerequisite to imposing access obligations (Areeda 1990 p.846; Evrard 2004 p.10). This includes constructive refusal such as charging unreasonable prices, discriminating against the customer, or imposing unfair trading conditions (Whish 2009 p.688). Furthermore, the facility owner has a defence if it had a legitimate business justification for refusing access to the facility (Evrard 2004 p.10; Hilmer et al. 1993 p.244). For example, when sharing may result

[19] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*, Federal Court of Australia — Queensland District Registry — General Division, Bowen CJ, Morling, Gummow JJ, QLD G173 of 1987.

in a reduction in the quality of the owner's product, or result in insufficient capacity so that the owner's ability to serve its own clients adequately might be compromised.

The grounds for declaration under Part IIIA do not require a denial of access to have occurred, nor specifically provide for a defence that denial of access was justified in the circumstances. Declaration involves only a structural test without any offending conduct needed to precipitate its use. It is broader than counterparts in the USA and Europe. A potential shortcoming is that declaration can be used even when a firm is already providing access on fair and reasonable terms, with the associated social costs of unnecessarily imposing regulation. On the other hand, Hilmer was concerned about the difficulty of establishing a proscribed purpose under s 46 (Hilmer et al. 1993 p.243).

One issue for consideration is whether denial of access (including constructive denial by offering unfair terms and conditions) should be a prerequisite for seeking declaration under Part IIIA. This issue returns in section 6 (Institutions and processes).

3.4 Public interest test

'Criterion (f)' requires that access (or increased access) to the service, via declaration, would *not* be *contrary* to the public interest. Expressed in double negative form, this appears to presume that access is in the public interest unless demonstrated otherwise. The Tribunal has said:

> 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.[20]

Furthermore, 'public interest' is a broad and subjective notion. The High Court has explained its meaning as follows:

> It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgement to be made by reference to undefined factual matters. … And conferring the power to *decide* on the Minister (as distinct

[20] *Re Services Sydney Pty Limited* [2005] ACompT 7 (21 December 2005) at 192.

> from giving the NCC a power to *recommend*) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest …[21]

There are questions as to whether the public interest criterion is too broad in this context, and whether the double negative formulation creates a low threshold. It may be desirable to replace or supplement this test with a more specific and explicit requirement to demonstrate that the benefits of declaration outweigh the costs.[22] This would seem to be more consistent with national competition policy principles where: (a) there is a presumption against regulatory intervention in markets, and (b) the onus is on the proponent of a regulatory intervention to demonstrate that the social benefits of intervention outweigh the social costs (NSW Better Regulation Office 2008).

3.5 Competitive tender processes for government owned facilities

Where a State, Territory or Commonwealth government undertakes a tender process "for the construction and operation of a facility" that is to be owned by that government, the responsible Minister of the relevant jurisdiction can apply to the ACCC for the tender process to be approved as a 'competitive tender process' (Division 2B). The purpose of this is:

> … to grant immunity from declaration under the National Access Regime where construction and operation of a government-owned facility is the subject of a competitive tendering process designed to secure reasonable terms and conditions of access. (Minister for Competition Policy and Consumer Affairs 2010 p.1)

Before it can approve a tender process, the ACCC must be satisfied that the tender process meets the requirements prescribed by the regulations and will result in

---

[21] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal etc* [2012] HCA 36 (13 September 2012) at 42.

[22] A social cost-benefit test of this kind is different to the social cost-benefit test discussed in relation to criterion (b), which is a test of whether there would be a net social benefit if the alleged bottleneck facility were duplicated, rather than whether declaration would have a net social benefit (see: *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal etc* [2012] HCA 36 (13 September 2012) at 75, 86). In *Services Sydney*, the Tribunal concluded that the public interest criterion "enables the consideration of the overall costs and benefits likely to result from declaration" in addition to other public interest issues (at 192).

reasonable terms and conditions of access. This requires that the tenderers include in their tenders the terms and conditions on which they will provide access to the service or services proposed to be provided by means of the facility.[23] The criteria for selecting the winning bidder must ensure that the terms and conditions are consistent with principles in Part IIIA and the CPA. After the tender has been conducted, the ACCC will satisfy itself that the tender has been conducted according to the regulations and the conditions of approval. If all of these requirements are satisfied, the services provided by means of that facility can't be declared under Part IIIA.

This framework appears to be narrow, and would not seem to encompass all of the formats through which competition-for-the-market could be given effect. Firstly, it does not seem to apply when a government conducts a tender for the operation of an existing facility, even though the tender may establish the terms and conditions of access (eg, a franchise to operate a metropolitan rail network). Second, it may not apply to some concessions of the Build, Own, Operate & Transfer (BOOT) form, for example, if assets are to be transferred to another franchisee at the end of the concession period. Third, it would not apply to concessions for vertically integrated services, where the tender establishes fair and reasonable final prices (eg, jointly operating a railway line and providing a freight service on it).

If competition-for-the-market processes are used to establish efficient prices, then they should also benefit from a similar protection from declaration. The scope of Division 2B should be reassessed to ensure that it caters for all valid forms through which competition-for-the-market could be given effect.

4 Negotiate/arbitrate framework

Although declaration under Part IIIA is, and should be, "a distinctly exceptional occurrence",[24] it is important that the regulation framework is fully effective when it is applied. Effectiveness refers to its consistency with the principles in the CPA and the objects of Part IIIA, and its overall ability to adequately address the

[23] *Competition and Consumer Regulations 2010*, reg 6FB(3)(b).

[24] *Pilbara Infrastructure*, at 87.

imbalance of market power between the provider and user of access services (NCC 2009a pp.31-32). This section considers the effectiveness of the negotiate/arbitrate framework in Part IIIA, and makes a number of observations and suggestions for improvement.

4.1 Reasonable endeavours to accommodate the access seeker

Declaration under Part IIIA provides an access seeker with the right to negotiate with the service provider, and failing agreement either party can resort to the access dispute resolution process.[25] It does not impose any specific obligation on the access provider with regard to its conduct in providing access. It only creates a right to resort to arbitration by the regulator (NCC 2009b p.12). This is inconsistent with the requirement of an effective access regime in clause 6(e)(5) the CPA,[26] which states that: "the owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access."

Since Part IIIA does not impose the reasonable endeavours obligation on the access provider, it is ineffective in the sense that it doesn't conform to the standards stipulated in the CPA. The requirement in clause 6(e)(5) of the CPA should be incorporated into Part IIIA.

4.2 Information provision

Hilmer emphasised that an access provider should be required to provide certain information to an access seeker, so that it can be adequately informed in the negotiation process.

> To facilitate negotiation of appropriate access agreements once a facility has been declared, the owner of the facility should be required to provide relevant cost and other data to the party entitled to seek access and, if need be, to the arbitrator. (Hilmer et al. 1993 p.256)

---

[25] CCA s44S.

[26] The numbering used here is that used in the version on the COAG website:
Minister for Competition Policy and Consumer Affairs 2010, 'Explanatory Statement: Select Legislative Instrument 2010 No. 124, Issued by the authority of the Minister for Competition Policy and Consumer Affairs'.

Part IIIA doesn't impose an obligation of this kind on the access provider, but most industry-specific access regimes impose some information disclosure obligations. An obligation to disclose certain information to the access seeker should also be incorporated into Part IIIA.

4.3 Confidential access seeker/user information

Some industry-specific access regimes impose statutory obligations on access providers and access seekers with respect to confidential information exchanged in the process of negotiation or access use. As an example, the Victorian Rail Access Regime (VRAR) requires that with regard to confidential access seeker information, the access provider must only use that information for a relevant purpose and not disclose it without written consent from the information provider.[27] The access seeker has the same obligations with regard to the confidential information of the access provider. Given the likely importance of these provisions for commercial parties, there may be merit in introducing such obligations into Part IIIA.

4.4 Interconnection

Interconnection of facilities is a feature of networks, and is an important matter in some contexts in which access is applied. In its 2001 review, the PC recommended changes to clarify the obligations in relation to interconnection, which led to some amendments (PC 2001a pp.224-226). However, there still could be greater clarity.

In some industry-specific access regimes, declaration carries with it certain interconnection obligations. For example, in telecommunications a provider must "if requested to do so by a service provider … permit interconnection of [its] facilities with the facilities of the service provider."[28] The Victorian rail access regime requires that if a party seeks to connect its railway track or siding with the access provider's rail network, the latter "must do all things reasonably necessary to enable the access seeker to connect the railway track or railway siding".[29] This kind of obligation would not be relevant to all circumstances where the generic

[27] *Rail Management Act 1996 (Vic)*, Part 2A, Division 7.

[28] CCA, s 152AR(5)(c).

[29] *Rail Management Act 1996 (Vic)*, s 38ZT.

access regime is imposed. Rather, the merits of interconnection issues should be considered on a case-by-case basis.

Part IIIA explicitly allows for interconnection issues to be addressed in arbitrations. In an arbitration decision, the ACCC "may require the provider to permit interconnection to the facility by the third party,[30] but it must not require the provider to bear "some or all of the costs of interconnections to the facility or maintaining interconnections to the facility".[31] However, it seems to be assumed that a party seeking interconnection will also be an access seeker wanting to use the provider's declared infrastructure. Section 44S provides for notification of access disputes by third parties seeking access to a declared service who are unable to agree with the provider in relation to the terms and conditions of access, but does not provide for notification of access disputes by third parties seeking an interconnection to the declared facility.

In practice, interconnection is often treated as a distinct service to be declared (for example, in the case of the Sydney sewerage networks), which ensures that a dispute over interconnection can be treated as an access dispute. However, there must be some uncertainty as to whether constructing an interconnection amounts to 'use of infrastructure', or whether merely permitting another party to construct the interconnection at its own cost amounts to a service. This uncertainty could be resolved by amending s 44S to explicitly provide for the notification of disputes by third parties seeking interconnection.

4.5 Arbitration

In effective access regimes, the parties to an access dispute must be required to appoint and fund an independent arbitrator.[32] With regard to the independence of the arbitrator the NCC suggests it:

> … should be independent of service providers, current users, access seekers and governments. Another consideration is independence from related regulatory bodies (NCC 2009a p.44)

---

[30] CCA, s 44V(2)(da).

[31] CCA, s 44W(1)(f).

[32] CPA cl. 6(4)(g).

The NCC does not argue that the arbitrator should necessarily be independent of the regulator, especially where the regulator does not have another price setting role. However, it does favour the inclusion of at least some features which promote independence, such as: (a) ring-fencing the regulator's arbitration functions from its regulatory functions; (b) enabling any party to a dispute to require the regulator to appoint an independent arbitrator other than the regulator; and (c) an independent (administrative) appeals process to address questions of arbitrator bias or independence (NCC 2009a p.45).

The NCC also notes the following approaches

> An alternative approach is for the access regime to provide for an independent person to appoint an independent arbitrator (perhaps from a panel of arbitrators). Under the Western Australian Rail Access Regime, for example, the regulator appoints an arbitrator from a panel that is pre-selected by the regulator and the Chairman of the Western Australian Chapter of the Australian Institute of Arbitrators. Similarly, the South Australian Ports Access Regime provides that a dispute may first be referred to ESCOSA for conciliation. If the dispute is not resolved through conciliation or within 6 months of referral then ESCOSA may refer the dispute to arbitration, to be arbitrated by a person or persons who is independent of the disputing parties and not subject to control or direction of the South Australian Government. (NCC 2009a p.44)

The arbitration process in Part IIIA doesn't provide most of these features.[33] The ACCC must determine an access dispute.[34] It has no power to appoint another arbitrator and the parties to the dispute do not have the option of having another arbitrator appointed.[35] Provisions of the kind suggested by the NCC could usefully be introduced into Part IIIA to improve its effectiveness.

4.6 Effectiveness of the negotiate-arbitrate model

The use of the negotiate-arbitrate process as the default regulatory mechanism in Part IIIA is consistent with the CIRA and the CPA, which state that in the first

---

[33] Parties can appeal against the ACCC's determination to the Australian Competition Tribunal.

[34] CCA, s 44V.

[35] See: CCA ss 44W, 44X & 44XA.

instance and wherever feasible, the terms and conditions of access should be commercially agreed between the parties.[36] While *ex post* regulation of this kind is desirable when it can be applied effectively, in some contexts such as where there are persistent disputes, more structure may needed around the negotiation process, such as procedures for access applications, negotiation timeframes, information exchange, preliminary alternative dispute resolution steps and so on, as commonly found in access undertakings. The negotiate-arbitrate model will not be appropriate in all contexts. NERA has suggested "it is likely to be less effective where access is required for a large number of parties" (NERA 2004 p.21).

Part IIIA has no process to reassess the effectiveness of the default negotiate-arbitrate model in a particular application, or 'circuit breaker' if it becomes ineffective. Some process of this kind would seem to be appropriate. One option would enable the arbitrator of an access dispute to call for an independent review of the effectiveness of the framework if, during the course of a dispute resolution, he/she concludes that the negotiation-arbitration process is not working effectively. If the reviewing body found that the negotiate-arbitrate framework was ineffective in that specific case, it would be reasonable for it to be able to require the access provider to submit an undertaking for approval by the ACCC.

5 Processes

This section discusses the processes of declaration, revocation of declaration and certification. It also considers how certain agreements in the CIRA can be given effect through these processes.

5.1 The declaration process

The various steps of the declaration process in Part IIIA—namely the NCC's initial consideration and recommendation, the Minister's decision, scope for review by the Tribunal, and possibly judicial review—are designed to minimise the risk of inappropriate declaration. The Tribunal's review role has been narrowed by amendments to the CCA in 2010 and the High Court's recent clarification of its

[36] CPA, 6(e)(1); CIRA, cl 2.2.

obligations.[37] This may help reduce the length and cost of declaration processes, but there is some debate as to whether they are adequate.

In its submission, the NCC proposed removing the ability of a party to have the Minister's decision reviewed by the Tribunal (NCC 2012b pp.9-10). It regarded this as unnecessary given the ability to seek judicial review under administrative law. By contrast, Hill has argued that the reduced role of the Tribunal has significantly increased the risk of incorrect declaration decisions (Hill 2010 p.198). Therefore, removing the Tribunal's role altogether would further increase this risk. He suggested (following Baxt) that the roles of the NCC and the Minister may not be needed and declaration applications could go straight to the Tribunal (Hill 2010 pp.200-201). This reflected a perception that the Tribunal's processes are more rigorous and court-like (Hill 2010 p.197). A third view would be to favour the *status quo* because there has been insufficient time to evaluate the effects of the 2010 amendments.

This submission does not attempt to form a view on this issue. It is assumed there will be an administrative process for seeking declaration. But for several processes in the CCA there is an alternative judicial process, and parties can "vote with their feet" by choosing whether to use the judicial or administrative process. The remainder of this section explores what would be needed to introduce a satisfactory judicial process by enabling s 46 of the CCA to be used effectively for declaring services/facilities.

As mentioned, in both the USA and the EU, the essential facilities doctrines are given effect through the general principles of competition law relating to prohibited monopolisation or abuse of dominance. There is no administrative process for imposing access obligations piecemeal like that in Part IIIA. The Australian counterpart to the general principles employed in the USA and Europe is s 46, which prohibits a firm that has substantial market power in a market from taking advantage of its market power in that or any other market for a proscribed purpose, such as: eliminating or substantially damaging a competitor; preventing entry; or deterring or preventing a firm engaging in competitive conduct.

---

[37] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal etc* [2012] HCA 36 (13 September 2012) at 129-155.

The Hilmer Committee considered it unlikely that s 46 could be used to import the US essential facilities doctrine. This underpinned its recommended generic access regime with its explicit declaration process. Hilmer relied on the outcomes of the *Queensland Wire* case in drawing this conclusion, although that case concerned the sale of 'Y bar' used for rural fencing, and was not related to the kinds of infrastructure services to which Part IIIA was directed. More is now known about the operation of s 46 from several High Court decisions (Pengilley 2007).

The most relevant case is the High Court's 2004 *NT Power* decision.[38] Northern Territory government-owned Power and Water Authority (PAWA) refused to allow competing generator NT Power access to deliver electricity through its distribution system. The High Court found that, by refusing access, it was taking advantage of market power for a prohibited purpose, namely, preventing NT Power's entry into the electricity retail market, and advantaging its own position in that market.[39] The High Court observed:

> s 46 can be used to create access regimes … [and] in cases where there is a contravention of s 46, it is possible that curial relief, sought speedily, might be obtained before completion of the somewhat elaborate arbitral, review and appellate procedures provided for in Part IIIA.[40]

There remains uncertainty about the remedies that would be available under s 46 and whether a court could effectively administer them.[41] In these kinds of cases "the orders sought from the court are likely to require the setting of the price for access" (Hay & Smith 2007 p.1124), which a court would not be suited to doing. Furthermore, a court would not be "an effective day-to-day enforcer" of sharing obligations.[42] In US essential facilities cases, courts have been reluctant to play the role of a regulator. In some instances they have delegated determination of access terms and conditions to a regulatory body, or determined the price where some

---

[38] *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48.

[39] *NT Power* at [64].

[40] *NT Power* at [85] & [86].

[41] In the *NT Power* case, although in principle the judgment could have established an access obligation, by that time it was no longer a remedy sought by the applicant. Its purpose was to obtain financial compensation.

[42] Supreme Court of the United States, *Verizon Communications v Trinko*, 540 U. S. (2004), p.15.

prior history of dealing or comparable market price is available, or require only that access to be provided on non-discriminatory terms (Marshall 2004 pp.75-76).

These limitations on the use of the courts need not arise if the orders that could be sought from the court included declaration of the service under Part IIIA.[43] The court would only need to apply the declaration criteria, and they clearly can do so effectively. A declaration does not determine the terms and conditions of access. It provides recourse to binding arbitration, and this submission proposes that it should also impose an obligation on the facility owner to use reasonable endeavours to meet the requirements of access seekers.

Empowering the courts to declare a service as a remedy for a breach of s 46, if the service meets the Part IIIA declaration criteria, may provide a workable alternative route for imposing access obligations. However, this method would have some different features to the administrative process for declaration under Part IIIA. Firstly, applications for declaration could only be made if there had been a denial (or constructive denial) of access. Second, anti-competitive purpose will be an important factor in s 46 cases, in addition to anti-competitive effects, whereas only the latter are relevant to the administrative process. Third, the services declared in a judicial process may be limited to those services to which the claimant seeks access. However, under the declaration process (at least as interpreted by the NCC and the Tribunal) a set of services broader than those directly required by the party seeking declaration can be declared in order to accommodate other access seekers using different entry plans.[44] Lastly, the court would presumably have the discretion to apply other remedies instead of declaration. Under the administrative process, if the services/facilities subject to the declaration application meet the criteria, then they must be declared.[45]

As to whether the Part IIIA declaration process would be needed if access regimes can be created via s 46, the foregoing comparisons suggest the Part IIIA process

---

[43] Presumably, the court can already enjoin a party to submit an undertaking to the ACCC, but this may detract from the timeliness of access.

[44] *Re Services Sydney Pty Limited* [2005] ACompT 7 (21 December 2005) at 17-23.

[45] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal etc* [2012] HCA 36 (13 September 2012) at 119.

may retain some advantages compared to s 46. Further, a process of establishing effective access obligations under s 46 remains to be developed and tested. It is not suggested that the administrative process for declaration be replaced, at least in the short term, but rather supplemented by the ability of courts to use declaration as a remedy in appropriate circumstances in s 46 cases. The need for an administrative process could then be reviewed at a later date.

5.2 Revoking declaration & facilitating competition

To-date declarations have generally been for periods of between five and fifty years. Part IIIA allows the provider to apply for revocation of a declaration, which follows a similar process to declaration applications.[46] The NCC may also, under its 'own motion', inquire into whether a declaration should be revoked and it can recommend revocation to the designated Minister.[47] This latter power has not been used to date.[48]

This power to inquire into and make recommendations on whether declarations should be revoked could be usefully widened to cover some Commonwealth industry-specific access regimes such as telecommunications. In that regime the ACCC is empowered to inquire into and decide whether services will be declared or declaration revoked.[49] This seems to be inconsistent with most access regimes, where decision-making relating to declaration or revocation is usually independent of the regulator. Confidence in the effectiveness of the telecommunications access regime would be enhanced if an independent body were responsible for inquiring into telecommunications declaration and revocation questions, with the relevant Commonwealth Minister deciding.

---

[46] CCA, s 44J.

[47] CCA s 44J(1). Note: If the designated Minister decides not to revoke, he/she must give reasons for the decision to the provider of the declared service when the designated Minister publishes the decision. If reasons are not provided within 60 days, the declaration is taken to be revoked. The designated Minister cannot revoke a declaration without receiving a revocation recommendation.

[48] At present the only declared services/facilities are the Tasmanian rail network and the Goldsworthy railway in the Pilbara (NCC, 2012).

[49] CCA, Part XIC Division 2.

Similarly, the NCC's power to initiate inquiries into revocation might usefully be widened further to include declarations under Part VIIA (Prices Surveillance). The PC has previously found that the process for revoking declarations under Part VIIA is lacking (PC 2001b p.68). If there were to be closer links between Parts IIIA and VIIA, as discussed below, then inquiries into revocation under Part VIIA may need to use a similar process.

5.3 Price monitoring within the generic access regime

Clause 2.3 of the CIRA is a commitment to make greater use of price monitoring in the context of access regulation, either as a supplementary form of regulation to aid transparency, or as a transitional form of regulation when phasing into or out of more intrusive forms of regulation. There is a question as to whether this relates to Part IIIA, given that the negotiate-arbitrate model may not represent one of more intrusive forms of regulation referred to. However, if it is to be implemented for Part IIIA, then this will presumably involve establishing some links with Part VIIA (Prices Surveillance).

Whenever a decision is made about declaration under Part IIIA, a decision may need to be made as to whether the service in question should be declared under Part VIIA in addition to, or as an alternative to, Part IIIA declaration. Similarly, decisions relating to the revocation of a Part IIIA declaration may involve consideration as to whether the service should be declared under Part VIIA, as a transitional measure. If the service were already declared under Part VIIA, then the revocation of that declaration would also be at issue (see: PC 2001b pp.94-95). In giving effect to this type of framework, the ability for Part VIIA declarations to be extended administratively should be removed, and recommendations regarding declaration under Part VIIA should be independent of the regulator (PC 2001b p.68).

5.4 Simplicity, consistency & certification

While some of the CIRA principles were incorporated into the CPA, particularly clauses 2.4 and 2.6, there are other elements of the agreement not reflected in either the CPA or Part IIIA. These include the objective of achieving simpler and more

nationally consistent access regulation (clause 2.1),[50] and the specific agreements in regard to rail regulation, to be modelled on the Australian Rail Track Corporation (ARTC) undertaking. The following process was adopted to give effect to these objectives:

> The Parties agree that, to advance the objective of a simpler and consistent national approach to regulation, all state and territory access regimes for services provided by means of significant infrastructure facilities will be submitted for certification in accordance with the *Trade Practices Act 1974* and the Competition Principles Agreement. (Cl. 2.9, emphasis added)

The notion that a simpler and more consistent approach to access regulation can be given effect through the certification process ignores the fact that the NCC is limited to making its assessment having regard to the principles in the CPA and the objects of Part IIIA.[51] The CPA specifically directs the NCC to accept diversity, so long as the principles are met:

> There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).[52]

For these reasons, the certification process is not designed to achieve a simpler and nationally consistent approach to regulation. To do that, the NCC would need to be required to have regard to the CIRA when certifying access regimes. But there would still remain the difficult issue of balancing the need to permit States to meet the CPA principles in the way they prefer, against the aims of national consistency. The aims of greater simplicity and national consistency would require some more specifically targeted reviews to be conducted under the auspices of COAG.

---

[50] Part IIIA has a more limited objective of promoting consistency of regulation within industries.

[51] When making a recommendation or deciding on certification of a state-based access regime, the NCC and the Minister must have regard to the principles set out in the CPA, which have the status of guidelines rather than a binding rules (CCA, ss 44(4)(a) & 44DA(1)). The NCC and Minister must not have regard to any matters other than the CPA and the objects of Part IIIA (ss 44(4)(b)).

[52] CPA cl. 6(c)(3).

6 Conclusions

This section summarises the main points of this submission under headings from the issues paper.

6.1 Why have an access regime?

This submission has argued that the purpose of Part IIIA is to handle residual access issues that are not addressed by industry-specific regimes. The benefit of retaining Part IIIA is that it can open up competition, particularly where it is inhibited by government-owned monopolies or when the owner of an essential monopoly facility seeks to monopolize a downstream market. However, it is not well suited to provide a substitute for industry-specific access regimes. Its appropriate role is to deal with residual access issues.

6.2 Declaration criteria

The following suggestions have been made with regard to the potential coverage of Part IIIA.

- Sections 44H(4)(a) & (b) of the CCA are now sufficiently clear and should not be amended.
- Consideration ought to be given to whether a further limiting principle is needed for the application of Part IIIA, or whether its potential scope should extend to any context in which the defined market failures are present. This question goes to the economic role that Part IIIA is intended to play. If a further limiting principle is considered necessary, one option may be to define the term 'infrastructure' to include only the types of infrastructure used to provide 'essential services'.
- Another issue for consideration is whether denial of access (including constructive denial by offering unfair terms and conditions) should be a prerequisite for seeking declaration under Part IIIA. This would be more consistent with corresponding regimes in the USA and EU, and would necessarily be the case in any judicial process.
- The public interest test in s 44H(4)(f) ought to be replaced or supplemented with a requirement that an applicant demonstrate the benefits of declaration

outweigh the costs. This would be more consistent with national competition policy principles in which there is a presumption against regulatory intervention in markets, and the onus is on the proponent of a regulatory intervention to demonstrate that the social benefits of intervention outweigh the social costs.

- The framework for excluding competitive tender processes for government owned facilities appears to be narrow and consideration should be given to whether it satisfactorily addresses all of the relevant formats through which competition-for-the-market could be given effect, where they promote efficiency. Otherwise the Part IIIA access regime could constrain the ability of governments to efficiently use competition-for-the-market as an alternative to regulation in natural monopoly settings.

6.3 The negotiate-arbitrate framework

A number of changes are suggested to the negotiate-arbitrate framework to make it more effective, if and when it is applied. These include:

- incorporating the requirement in clause 6(e)(5) of the CPA that the access provider must use reasonable endeavours to meet the requirements of the access seeker
- requiring the owner of the declared service/facility to provide certain information to access seekers
- requiring that any confidential information exchanged between the provider and access seeker must only used for a relevant purpose and not disclosed without written consent of the information provider
- amending s 44S to explicitly provide for the notification of disputes by third parties seeking interconnection
- giving the ACCC the power to appoint another arbitrator and giving the parties to the dispute the option of having another arbitrator appointed
- enabling the arbitrator of an access dispute to call for an independent review of the effectiveness of the negotiate-arbitrate framework applying to a particular service/facility if, during the course of an arbitration, he/she finds it is not working effectively. If the independent review confirms that

the negotiate-arbitrate framework is ineffective in that specific context, it should be able to require the access provider to submit an undertaking for approval by the ACCC.

6.4 Institutions & processes

Suggestions made relating to the institutions and processes under Part IIIA are as follows.

- The avenue of seeking to create access regimes via s 46 of the CCA should be improved by specifically empowering the courts to declare a service as a remedy for a relevant breach of s 46, if the service meets the Part IIIA declaration criteria. This may enable the judicial route to creating access regimes via s 46 to be fully effective. The need for an administrative process could then be reviewed at a later date.
- The NCC's power to initiate inquiries into revocation might usefully be widened further to include some Commonwealth industry-specific access regimes, such as telecommunications, and also declarations under Part VIIA (Prices Surveillance).
- The CIRA agreement that price monitoring can be used as a complement or substitute to access regulation will require certain links between Part IIIA and Part VIIA. For example, a declaration or revocation decision under Part IIIA may also require consideration as to whether a Part VIIIA declaration would be a suitable as a transitional arrangement.
- The CIRA objective of a simpler and nationally consistent approach to regulation will presumably be addressed by the PC in its current review, and may require some more specifically targeted reviews to be conducted under the auspices of COAG.

7 References

Areeda, P. 1990, 'Essential Facilities: An Epithet in Need of Limiting Principles', *Antitrust Law Journal*, vol. 58.

Dawson 2003, 'Review of the Competition Provisions of the Trade Practices Act'.

Evrard, S. 2004, 'Essential Facilites in the European Union: Bronner and Beyond', *Columbia Journal of European Law*, vol. 10, pp. 1-35.

Frischmann, B. & Waller, S. 2006, 'Essential Facilities, Infrastructure, and Open Access', Working Draft for DOJ/FTC.

Hay, G. & Smith, R. 2007, ''Why Can't a Woman be More Like a Man?' - American and Australian Approaches to Exclusionary Conduct', *Melbourne University Law Review*, vol. 31, pp. 1099-134.

Hill, T. 2010, 'The 2010 Amendments to Part IIIA: Have we got the balance right?', *Competition & Consumer Law Journal*, vol. 18.

Hilmer, F., Rayney, M. & Taperell, G. 1993, 'National Competition Policy: Report by the Independent Committee of Inquiry'.

King, S. 2001, 'Access – what where and how: submission to the Review of the National Access Regime'.

LVMAC 2012, 'Living Melbourne, Living Victoria Implementation Plan'.

Marshall, B. 2004, Regulating Access to Essential Facilities in Australia: Review and Reform of Part IIIA of the Trade Practices Act.

Minister for Competition Policy and Consumer Affairs 2010, 'Explanatory Statement: Select Legislative Instrument 2010 No. 124, Issued by the authority of the Minister for Competition Policy and Consumer Affairs'.

NCC 2009a, 'Certification of State and Territory Access Regmes: A Guide to Certification Under PartIIIA of the Competition and Consumer Act 2010 (Cth)'.

NCC 2009b, 'A guide to Declaration under Part IIIA of the Trade Practices Act 1974 (Cth)'.

NCC 2012a, 'Annual Report 2011-12'.

NCC 2012b, 'Submission to the Inquiry into the National Access Regime'.

NECG 2001, 'The "uneconomic to develop" criterion after Duke'.

NERA 2004, 'Alternative Approaches to 'Light-Handed' Regulation: A Report for the Essential Services Commission Victoria'.

Newbery, D. 2000, *Privatization, Restructuring, and Regulation of Network Utilities*, MIT.

NSW Better Regulation Office 2008, 'Assessment Against the Competition Test'.

PC 2001a, 'Review of the National Access Regime: Inquiry Report', Canberra.

PC 2001b, 'Review of the Prices Surveillance Act 1983, Inquiry Report'.

PC 2012, 'National Access Regime: Issues Paper'.

Pengilley, W. 2007, 'Misuse of market power and the Part IIIA access regime', *Commercial Law Quarterly*, no. Sept-Nov.

Waller, S. 2008, 'Areeda, Epithets and Essential Facilities', *Wisconsin Law Review*, vol. 2, pp. 359-86.

Whish, R. 2009, *Competition Law*, 6th edn.