NATIONAL
COMPETITION
COUNCIL

Economic Regulation of Airport Services

Submission to Productivity Commission Inquiry

8 April 2011

Table of Contents

1 Introduction

1.1 The National Access Regime established in Part IIIA of the *Competition and Consumer Act 2010* (**CCA**) provides a legal avenue through which third parties can gain access to services provided by infrastructure facilities that cannot be economically duplicated. The Regime provides a means of promoting competition in markets where the ability to compete effectively depends on access to monopoly infrastructure services. At the same time, the Regime ensures that infrastructure owners receive a commercial return and that incentives for efficient investment are not adversely affected.

1.2 Within the National Access Regime the National Competition Council is responsible for considering applications by third parties for the declaration of services. The effect of a declaration is that access to the declared service must be provided on commercial terms and where an access seeker and the provider of the service are unable to agree on terms and conditions for access these may be determined through mandatory arbitration.

1.3 The National Access Regime applies to the services provided by airport facilities. Various services provided by airport facilities may be declared where the relevant criteria are met. Indeed, some cargo terminal services at Sydney and Melbourne airports and airside services provided by Sydney Airport have in the past been declared (see section 3 below), while applications in respect of other airport services have been declined.

1.4 In the Council's view the Productivity Commission (**PC**) should be cautious about recommending the by-passing of the declaration process that precedes regulation of access to services under the National Access Regime.

1.5 This submission seeks to assist the PC in its inquiry by:

(a) outlining the operation of the National Access Regime (section 2)

(b) summarising the application of the Regime to airport services in the *Australian Cargo Terminals* and *Virgin Blue* matters (section 3), and

(c) responding to the proposition that the threat of declaration as a constraint on airports' market power is limited by the cost, time and uncertainty associated with declaration as put by the ACCC in its submission (section 4).

2 The National Access Regime – Part IIIA of CCA

Background to Part IIIA

2.1 The National Access Regime is established by Part IIIA of the CCA. Its genesis lies in the consideration of third party access to significant infrastructure set out in the report by the committee of inquiry into competition policy chaired by Professor Fred Hilmer (**Hilmer Committee**).[1] After considering the 'essential facilities problem', the Hilmer Committee said that:

> [a]s a general rule, the law imposes no duty on one firm to do business with another. The efficient operation of a market economy relies on the general freedom of an owner of property and/or supplier of services to choose when and with whom to conduct business dealings and on what terms and conditions. This is an important and fundamental principle based on notions of private property and freedom to contract, and one not to be disturbed lightly.
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> The law has long recognised that this freedom may require qualification on public interest grounds in some circumstances, particularly where a form of monopoly is involved (Hilmer Report, p 242).

2.2 The circumstances where such freedom should be disturbed must be carefully limited to minimise the risk that incentives for investment will be undermined (Hilmer Report, p 248). The Hilmer Committee expressed the view that decisions about the creation of access rights, which rest on evaluation of important public interest considerations, should be made by a Minister. However, as a discretionary regime may create pressures on a Minister to make declaration decisions that advance private interests, the Hilmer Committee recommended that the Minister's discretion should be limited by explicit legislative criteria and that the Minister should be advised by an independent expert body (Hilmer Report, p 250).

2.3 The National Access Regime in Part IIIA substantially reflects the recommendations of the Hilmer Committee.[2]

2.4 Part IIIA initially did not have an objects clause, but in 2006 s 44AA was inserted into the CCA. Section 44AA provides:

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1 Frederick G Hilmer, Mark R Rayner & Geoffrey Q Taperell, *National Competition Policy Report by the Independent Committee of Inquiry* (25 August 1993) (**Hilmer Report**).

2 Notwithstanding that Part IIIA differs slightly from the committee's recommendations (see, eg: *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 (***Re Fortescue***),[567]), the Hilmer Report remains a key source of insight into the purpose and intended operation of Part IIIA (see: *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) ATPR 42-141, [39]; *Re Fortescue*, [552]-[585], [825]-[828] and [1170]; and *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2007) ATPR ¶42-142, [37]).

> The objects of this Part are to:
>
> (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
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> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

2.5 By incorporating this affirmation that the National Access Regime is directed toward promoting efficiency, encouraging investment and fostering effective competition, Part IIIA explicitly reflects the balance that the Hilmer Committee identified would need to be struck between property rights, freedom of contract and investment incentives on the one hand and, on the other hand, the promotion of competition in markets upstream or downstream of bottleneck infrastructure.

Operation of Part IIIA

2.6 Access regulation by declaration under the National Access Regime involves two stages: first a declaration stage and then a negotiate/arbitrate process.

2.7 At the declaration stage, the Council considers applications for declaration of services before making a recommendation to the designated Minister.[3]

2.8 The Council cannot recommend that a service be declared unless (among other things) it is satisfied in respect of all of the declaration criteria set out in section 44G(2) of the CCA. The declaration criteria are:[4]

> (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
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> (b) that it would be uneconomical for anyone to develop another facility to provide the service;
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> (c) that the facility is of national significance, having regard to:
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> (i) the size of the facility; or

[3] The Council's approach to declaration is set out in some detail in its publication: *Declaration of Services: A guide to Declaration under Part IIIA of the Trade Practices Act 1974 (Cth),* August 2009 (available on the Council's website: www.ncc.gov.au). This guide is in the process of being updated to reflect the most recent legislative amendments and case law.

[4] Criterion (d), that access to the service can be provided without undue risk to human health or safety, was removed by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) which took effect on 14 July 2010.

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

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

(e) that access to the service is not already the subject of an access regime that has been certified as effective under section 44N of the TPA (unless the Council considers that there have been substantial modifications of that regime since it was certified under section 44N); and

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

2.9 In making its recommendation on an application for declaration the Council undertakes a process of public consultation. This involves:

- publishing the application and seeking initial submissions from the asset owners and other interested parties
- publishing a draft recommendation setting out the Council assessment of the application in terms of the declaration criteria and other relevant considerations
- seeking further submissions on the draft recommendation and
- preparing a final recommendation.

2.10 Upon receipt of the Council's recommendation, the designated Minister must decide whether or not to declare the service. He or she cannot declare a service unless satisfied in respect of the same declaration criteria (the Minister's criteria in s 44H(4) mirror those that apply to the Council in s 44G(2)). By creating jurisdictional requirements for Council recommendations and ministerial decisions, the declaration criteria ensure that access regulation is applied only in situations where it is likely to enhance competition and economic efficiency and is in the public interest.

2.11 Once a service is declared, the negotiation and arbitration 'stage' of the National Access Regime is enlivened. Declaration creates a right for any person seeking access to the service (not just the declaration applicant) to negotiate with the service provider. If commercial negotiations are unsuccessful, then the access dispute may be arbitrated by the ACCC. This 'light handed' regulatory approach is intended to encourage the commercial resolution of access issues, with minimal regulatory intervention. By incorporating protections for the legitimate interests of service providers, the process maintains incentives for efficient investment by service providers and facility owners.

3 Past application of the National Access Regime to airport services

3.1 The National Access Regime has previously been invoked to regulate third party access to airside services.

Australian Cargo Terminals

3.2 On 6 November 1996, Australian Cargo Terminal Operators Pty Ltd applied to the Council for declaration of the following services at Melbourne and Sydney international airports:

- use of freight aprons and hard stands for loading and unloading of international aircraft
- use of areas for storage of equipment used in the loading and unloading of international aircraft and to transfer freight from the loading equipment to and from trucks at each airport, and
- use of an area to construct a cargo terminal at each airport.

3.3 On 8 May 1997 the Council recommended that the first two services at each airport be declared and that the third service not be declared at either airport. In relation to criterion (a) the Council concluded that increased access could have positive effects on price, service quality and differentiation, and investment in new facilities which relieve congestion. The Council concluded that criterion (b) was also satisfied because Sydney and Melbourne international airports possessed features which gave them significant market power and natural monopoly characteristics, and would therefore be uneconomic to duplicate. However, the Council found that it was economic to duplicate the cargo terminals off-airport. As such the Council considered that the third category of services did not meet criterion (b).

3.4 The Council further concluded that airport facilities were nationally significant on a variety of measures and thus met criterion (c). It also found that criterion (d) could be met provided new entrants observed existing safety regulations. The Council was not satisfied that an adequate alternative access regime was in place and thus considered criterion (e) was met. The Council considered, and rejected, several public interest objections to declaration of the services in satisfaction of criterion (f).

3.5 In July 1997 the designated Minister decided, in accordance with the Council's recommendation, to declare the first two services at each airport and not declare the third service at either airport. The Federal Airports Corporation (which on 1 July 1998 was succeeded by Sydney Airports Corporation Limited (**SACL**) as manager of Sydney International Airport) applied to the Tribunal for review of the designated Minister's decision in respect of that airport.

3.6 The Tribunal handed down its decision in March 2000 (*Re Sydney International Airport* [2000] ACompT 1 (***Sydney Airport No 1***)) and upheld the decision of the designated Minister by declaring the following services from 1 March 2000 until 28 February 2005:

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

3.7 In its decision the Tribunal agreed that the declaration criteria were met. In particular, the Tribunal endorsed the view that declaration is primarily concerned with the services of natural monopoly infrastructure where access (or increased access) to those services would promote competition in another market and held that the 'promotion of competition' involves creating conditions or an environment for improving competition from what it would be otherwise

Virgin Blue

3.8 On 1 October 2002, Virgin Blue applied to the Council for a recommendation that the airside services at Sydney Airport provided by SACL be declared. The application sought declaration of:

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

3.9 Virgin Blue withdrew its application for declaration of the domestic terminal service on 6 December 2002 following a commercial agreement with SACL on terminal access.

3.10 On 30 June 2003 the Council issued a draft recommendation, for public comment, that the airside service should be declared. However, after considering the submissions received in response to the draft recommendation, the Council's final recommendation was that the airside service not be declared. The Council was not affirmatively satisfied that the application met declaration criteria (a) and (f). For criterion (a) to have been met, the Council needed to be satisfied that declaration would promote competition in the relevant passenger or freight domestic air transport markets. In particular, the Council considered that SACL's incentive to exercise market power by increasing prices for the airside service was likely to be constrained by SACL's desire to increase passenger traffic to maximise revenue from retail concessions and the threat of re-regulation. In addition, the Council considered airside service charges were only a small contributor to the overall costs of air travel and it was unclear that SACL's proposed charges would advantage some airlines over others so as to risk limiting downstream competition.

3.11 While SACL's ability and incentive to exercise market power would not be completely hindered, the Council was not satisfied that the impact of such a tempered exercise of market power on competition in the dependent markets would adversely affect competition to a material degree. For this reason, the Council considered that criterion (a) was not met. The Council found that criterion (f), which requires that declaration not be contrary to the public interest, was also not met because it could not be satisfied that the costs of declaration would be less than the resultant competitive benefits.

3.12 The Council provided its recommendation to the Parliamentary Secretary to the Treasurer, who was the decision maker in this matter, on 30 November 2003. On 29 January 2004 the Parliamentary Secretary to the Treasurer decided that the airside service should not be declared. The Parliamentary Secretary was not satisfied that declaration of the services would promote competition in at least one market other than the market for the services (criterion (a)) and he was not satisfied that access to the services would not be contrary to the public interest (criterion (f)).

3.13 On 18 February 2004, Virgin Blue sought review of the Minister's decision by the Tribunal. On 12 December 2005, the Tribunal handed down its decision to set aside the Minister's decision and to declare the services for five years from 9 December 2005 (*Re Virgin Blue Airlines Pty Limited* [2005] ACompT 5).

3.14 The Tribunal was satisfied that criteria (a) and (f) were met. Regarding criterion (a) it considered that SACL had misused its monopoly power in the past and that unless the airside service was declared, competition in the dependent market would continue to be affected. The Tribunal took the view that SACL had misused its monopoly power by the manner in which, and the reasons for which, it had changed the basis for its charge for providing the airside service from an aircraft's maximum take-off weight to a charge calculated on a per-passenger basis. (It noted that this change adversely affected low cost carriers such as Virgin Blue as against full cost carriers such as

Qantas.) Further, the evidence disclosed before the Tribunal indicated that SACL had chosen a passenger-based charge 'because Qantas preferred it' and that SACL knew that the charge would impact more adversely on Virgin Blue than on Qantas.

3.15 The Tribunal also referred to issues relating to the manner in which SACL was contemplating imposing further charges upon airlines, noting that these issues were likely to be resolved by SACL exercising monopoly power to achieve a level of revenue growth that would not be available in a competitive environment. While these matters were unresolved, the Tribunal noted that the absence of independent arbitration and determination left the opportunity for SACL to impose higher and additional charges upon the airlines, which would be unlikely to be accepted in a competitive environment. The Tribunal considered similar outcomes were likely regarding non-price terms and conditions for the use of facilities and related services at Sydney Airport.

3.16 On 6 January 2006 SACL applied for judicial review of the Tribunal's decision in the Full Court of the Federal Court. Broadly, SACL claimed that the Tribunal had erred in its consideration of declaration criterion (a), specifically the meaning of the words "access (or increased access)" contained in that section, and that therefore the Tribunal's decision should be set aside.

3.17 The Full Court of the Federal Court upheld the Tribunal's declaration of the services (*Sydney Airport Corporation Ltd v Australian Competition Tribunal* [2006] FCAFC 146 (***Sydney Airport No 2***)). The Court did not accept SACL's submission that in considering criterion (a) it was necessary to analyse whether the supply of the service had been restricted or denied.

3.18 Furthermore, the Court rejected the established approach of both the Council and the Tribunal to assessing criterion (a) which involved (1) a consideration of the impact of regulated access (that is, declaration) under Part IIIA and (2) the factual/counterfactual analysis, being a consideration of the future with and the future without declaration. In effect, prior to the Full Court's decision, "access" had been interpreted as referring to the right to negotiate access to a declared service under Part IIIA. In rejecting this approach, the Court agreed with Virgin Blue and found that access should be given its ordinary meaning and, as such, is not synonymous with declaration. The Court held that the appropriate criterion (a) enquiry involves comparing:

- access and no access with limited access and increased access (at [81]), and
- the future state of competition in the dependent market with a right or ability to use the service and the future state of competition in the dependent market with no right or ability or a restricted right or ability to use the service (at [83]).

3.19 SACL unsuccessfully sought special leave to appeal the decision to the High Court.

3.20 The declaration of airside services at Sydney Airport expired on 8 December 2010. During the period of declaration one access dispute was raised with the ACCC, although this was resolved commercially and no arbitration was required. No inquiries or applications were received by the Council in relation to declaration of the services for a further period.

4 Timeliness of declaration under Part IIIA of the CCA

4.1 The ACCC submits that 'the threat of declaration ... as a constraint on the airports' market power is limited by the considerable costs, time and uncertainty associated with seeking declaration' (ACCC submission, p 20). The ACCC quotes the Tribunal from *Re Fortescue* that there may be as many as 9 steps in the Part IIIA declaration process, meaning a complex case would take at least 4-5 years. The ACCC then gives the example of the Virgin Blue matter, which took 5 years to proceed from application to the rejection of the application for leave to appeal to the High Court. The two matters cited (ie the Pilbara rail matters that were the subject of *Re Fortescue* and the Virgin Blue matter) are not typical. The ACCC's submission also gives insufficient credit to administrative and legislative changes specifically designed to improve the timeliness and certainty in the operation of the National Access Regime.

4.2 In addition to raising issues of great economic complexity and importance, the Pilbara Rail and Virgin Blue matters have involved fundamental issues going to the jurisdiction of the Council and the interpretation of Part IIIA. It should be borne in mind that Part IIIA was only introduced in 1995. In the absence of an existing body of case law on the interpretation and application of Part IIIA, it is unsurprising that interested parties have had recourse to the courts. Proceedings before the courts and the Tribunal have now largely settled a number of issues:

- The meaning of the phrase 'production process' in the exception in sub-paragraph (f) of the definition of 'service' in s 44B of the CCA, particularly as it applied to the use of a railway facility, was initially litigated in 1998 (*Hamersley Iron Pty Ltd v National Competition Council* (1999) 164 ALR 203). This question was re-litigated in 2006 (*BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2007] ATPR 42-141) with subsequent appeals to the Full Federal Court (*BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234) and the High Court (*BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145). The High Court unanimously upheld the finding that neither of BHP Billiton's railways in the Pilbara is a production process and therefore the services provided by those railways are capable of being the subject of a declaration application under Part IIIA.
- The Full Federal Court in *Sydney Airport No 2* clarified that 'access' in criterion (a) means access in the plain sense of the word, not 'declaration' or 'access under Part IIIA' (*Sydney Airport No 2*, [82]-[83]). The Tribunal elaborated on the Full Court's interpretation, finding that 'access' means 'access on reasonable terms' (*Re Fortescue*, [1066]). The Tribunal has also found that the Full Court's construction of 'access' in criterion (a) extends to the use of that word in criterion (f) (*Re Fortescue* (1164] – [1166].
- The interpretation and application of declaration criteria (a), (b) and (f) and the scope of the Ministerial discretion to declare a service if all of the

declaration criteria are satisfied were considered and clarified by the Tribunal in *Re Fortescue*.[5] The Council considers that the Tribunal's decision provides an additional level of certainty about the potential application of Part IIIA to monopoly infrastructure services.

4.3 The impending decision of the Full Court in relation to various judicial review proceedings arising from the Tribunal's Pilbara Rail matters will further develop the law in several critical areas.

4.4 As the interpretation of the provisions of Part IIIA become more settled, the incidence of such disputes and the need to resort to litigation should diminish. In fact, the majority of declaration decisions have not been reviewed. The Council recently outlined the incidence of reviews of access decisions since Part IIIA was enacted. In the December 2010 issue of its bimonthly newsletter *Accessible*,[6] the Council said:

> Nineteen applications for declaration have resulted in decisions being made (including deemed decisions). Of those, nine were the subject of merits review by the Tribunal. Five reviews resulted in the Ministerial decision being varied or set aside and four resulted in the decision being affirmed. The Tribunal's decision to declare the airside services at Sydney Airport was subject to judicial review in [*Sydney Airport No 2*]. The Full Federal Court upheld the declaration of the services.
>
> Judicial review proceedings of the Tribunal's decisions regarding the Robe and Hamersley railway services in the Pilbara were commenced on 13 August 2010 and are due to be heard by the Federal Court in early 2011.[7] In addition, the threshold jurisdictional question of whether the use of a railway facility owned and operated by a vertically integrated mining company was the use of a production process (and therefore not subject to Part IIIA) has been litigated twice (National Competition Council, *Accessible*, December 2010, p 2; footnote added and references omitted).

4.5 Further, the two examples used by the ACCC in its submission arose prior to the recent amendments to Part IIIA that imposed binding time limits on the Council and limitations on the material to be considered by the Tribunal upon review.

4.6 The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) (**Amendment Act**) amended Part IIIA of the CCA so that, with effect from 14 July 2010:

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[5] Among other things, the Tribunal's findings in relation to the proper construction of criterion (b), what costs are relevant to consideration of criteria (b) and (f) at the declaration stage and the existence of a power for the ACCC to order expansion of a facility (as opposed to extension) were the subject of judicial review proceedings in the Full Federal Court (VID616, VID686 and VID687 of 2010). The hearing concluded on 25 February 2011. Judgment has been reserved.

[6] Available on the Council's website: www.ncc.gov.au.

[7] See note 5 above.

- The Council is able to approve reasonable amendments to declaration applications provided it will not cause undue delay or prejudice. This reduces the ability of parties to litigate procedural points in Court and allows the Council to accept amendments without potentially being required to restart the declaration process.
- The Council is under a binding time limit of 180 days from receipt of an application (with provision to stop the clock on this period in certain circumstances) for recommendations to the designated Minister. The Council expects that most matters which commence with a fulsome application can be dealt with within the 180 day period, thereby improving the timeliness of outcomes for access seekers and service providers. Immediately prior to the amendments, the Council was required to use its 'best endeavours' to make a recommendation on a declaration application within four months. Earlier still (including at the time of the Sydney Airport matter) there were no time limits associated with the declaration process. Then it was also common for declaration applications to be intertwined with consideration of other policy issues. The progress of a declaration application could be hostage to a broader agenda.
- While not a change from the previous position, Part IIIA provides that if the designated Minister does not make and publish a decision within 60 days of receiving the Council's recommendation, the designated Minister is deemed to have decided not to declare the service. This provides the parties with a definitive timeframe for receiving a decision (or deemed decision).
- Parties with standing to seek merits review of Ministerial declaration decisions must make an application for review within 21 days after publication of the Minister's decision. This provides certainty that if an application is not lodged within that time the Minister's decision will stand and is highly unlikely to be the subject of review.
- The Tribunal has 180 days to make its decision (with provision to stop the clock and extend this period in certain circumstances). While the Tribunal has expressed some reservations about the ability of the amendments to improve the timeliness of decisions (*Re Fortescue,* [1350]), the Council notes that the Tribunal reached this view before it has considered any matters under the new provisions. The Council anticipates that the review of future declaration decisions will occur in a much more timely fashion as Parliament intends. The Tribunal is under a clear legislative direction to deal with reviews of declaration applications in a far timelier manner than before. It is reasonable to expect the Tribunal will adapt its procedures and practices to achieve this.
- The material to be considered by the Tribunal in a review of a declaration decision is limited to the material that was before the designated Minister or, in the case of deemed decisions, the material before the Council, unless

additional information is requested by the Tribunal. (Prior to the commencement of the Amendment Act the ability of parties to present new evidence to the Tribunal was not restricted and the introduction of new evidence and arguments was commonplace.) This amendment seeks to reduce new material being introduced at the Tribunal stage and minimises the scope for gaming, especially by service providers.

- Prior to the Amendment Act declaration decisions were automatically stayed when a review application was made. As a result of the amendments, Part IIIA now provides that a declaration is not affected by an application for review by the Tribunal unless the Tribunal makes an order staying its effect. While a party to the review proceedings may apply to the Tribunal for an order staying the declaration and the Tribunal has a discretion whether or not to grant the order for a stay, in many cases the negotiate/arbitrate stage of gaining access should be able to commence in parallel with consideration of any review by the Tribunal. In the Council's view this reduces the incentive for reviews to be taken simply to defer the application of a declaration.

4.7 The timeline below sets out the time limits provided in Part IIIA for each stage of the declaration process.

4.8 On the basis of this timetable, an application for declaration should be determined within eight months in the first instance. Any review proceeding should not extend this period by more than six months except in exceptional circumstances.

4.9 The statement by the Tribunal quoted in the ACCC submission that the new time and evidentiary limits 'will reduce the time a little, but will not address the core problem',[8] may be true (assuming that having a number of stages in the declaration decision making process is in fact a problem). If the statement is correct, this is a matter going to the further streamlining of the declaration process in general. It is not an argument for doing away with the declaration process altogether in respect of any particular industry by deeming a service within that industry to be declared.

4.10 It is in the public interest that access decisions are made in a timely manner. However, given the significant consequences of access decisions for applicants, access

[8] *Re Fortescue*, [1350], quoted in ACCC submission, p 20.

seekers, service providers and the broader economy, expediting the decision making process must not be at the cost of consistent, independent and rigorous regulatory assessment. Doing away with the declaration process on an ad hoc basis risks raising perceptions of increased regulatory risk with attendant economic costs.

5 Additional regulation of airport/aeronautical services

5.1 The Council considers that the views of the Hilmer Committee, extracted and considered at paragraphs 2.1-2.5 above, are as persuasive now as they were in 1993. It is critically important that regulation of access is predicated on an objective decision maker being satisfied that the declaration criteria are met. If it is not, there is no basis for confidence either that such regulation is likely to enhance competition and efficiency or that access decisions will be made consistently, fairly and with minimal risk of error.

5.2 The Council's public consultation process through which declaration applications are assessed against the declaration criteria seeks to ensure that all interested parties are heard. This in turn ensures that all issues arising from a declaration application are aired so that declaration decisions accord with the public interest. By removing the public consultation process and independent assessment against the declaration criteria, deemed declaration undermines Part IIIA's built-in protections against the advancement of private interests over the public interest.

5.3 Deemed declaration increases the risk of regulatory error. The service provider, access seekers and users of services are generally best placed to know how a declaration would affect them and in many cases have the best understanding of what is necessary for effective access. The declaration process in the National Access Regime is essential to ensuring that declaration decision-making is as well informed as possible. For example, a key aspect of the assessment of an application for declaration is the identification of the 'facility' by which a service is provided.[9] The Tribunal, in *Sydney Airport No 1*, said the relevant facility for the purposes of declaration is 'the minimum bundle of assets required to provide the relevant services subject to declaration' (*Sydney Airport No 1*, [192]).[10] The Tribunal said that identifying the minimum bundle of assets is a 'key issue' in determining whether criterion (b) is satisfied, and

> [t]he more comprehensive the definition of the set of physical assets … the less likely it is that anyone … would find it economical to develop 'another facility' within a meaningful time scale. Conversely, the narrower the definition of facility, the lower the investment hurdle and inhibition on development (*Sydney Airport No 1*, [192]).

5.4 In relation to its proposition that aeronautical services be deemed to be declared, the ACCC suggests that the definition of services

[9] The declaration criteria in ss 44G(2) and 44H(4) and the definition of service in s 44B refer to the facility that provides a service. The CCA does not define 'facility' but s 44B gives examples including roads and railway lines.

[10] See also: NCC, *Declaration of Services: A guide to Declaration under Part IIIA of the Trade Practices Act 1974 (Cth)*, August 2009, p 24.

> could be [the services] provided by an airport, that are being used for the operation and maintenance of civil aviation services [including all aircraft-related and passenger-related services and facilities within the boundary of the airport (as described in tables 1 and 2 of reg. 7.02A of the Airports Regulations 1997)] (ACCC Submission, p 21 (incorporating footnote)).

5.5 Leaving aside the distinction between a service and the facility by which a service is provided, the definition suggested by the ACCC may describe the 'minimum bundle of assets required to provide the relevant services'[11] or it may be under- or over-inclusive. Adopting a definition developed for one purpose and applying it in a different context does not provide a basis for confidence. Defining the minimum bundle of assets necessary to provide a service is commonly a matter of some debate in submissions to the Council or before the Tribunal.[12] A deemed declaration has a greater risk of regulatory error because it limits the ability of interested parties to inform the declaration process.

5.6 If there are concerns about the operation of the Part IIIA declaration process, such as uncertainty of outcome or delay (which the Council considers are unlikely to be justified in light of the recent amendments), then these concerns apply to all industries and all potentially declared services. It is not apparent to the Council why aeronautical services constitute a special case. Indeed, if aeronautical services would not satisfy the declaration criteria, then it is hard to see how a deemed declaration would not amount to the promotion of particular interests rather than the promotion of effective competition which is, after all, the fundamental object of Part IIIA as explicitly stated in s 44AA. If a service would not satisfy the declaration criteria, then it should not be regulated under Part IIIA. To so impose regulation by legislative fiat is inconsistent with s 44AA and reduces confidence in the integrity of the National Access Regime.

5.7 Further, if the Government is concerned that increased competition at Australian airports requires declaration, it is not necessary to wait for an access seeker to apply for declaration. The designated Minister is specifically empowered to commence an application for declaration and ask the Council to make a recommendation that a service be declared (CCA s 44F(1)). On receiving the Council's recommendation, the Minister must make a decision to declare, having regard to the declaration criteria, but is not bound to follow the recommendation. Deemed declaration appears expedient in that it circumvents the consideration of the declaration criteria and the merits review and judicial review processes that have so extended the Pilbara rail

[11] The Tribunal in *Sydney Airport No 1* found that, in practical terms, the whole of the airport constituted the relevant facility within the meaning of Part IIIA (*Sydney Airport No 1*, p 99).

[12] See eg: NCC, *Herbert River cane railway: Application for declaration of a service under section 44F of the Trade Practices Act 1974 (Cth), Final Recommendation*, 16 July 2010; and *Re Services Sydney Pty Limited* [2005] ACompT 7; *Sydney Airport No 1*.

matters. However, those criteria and review rights exist for good reason. They are the means by which the National Access Regime pursues the objects of Part IIIA.