

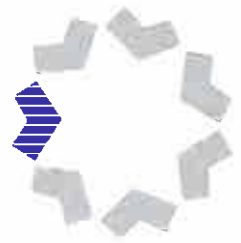
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11 November 2009

Wheat Export Marketing Arrangements
Productivity Commission
Locked Bag 2, Collins Street East
Melbourne VIC 8003

Dear Commissioners

Inquiry into Wheat Export Marketing Arrangements

The National Competition Council (Council) welcomes the opportunity to make a submission to the Productivity Commission's inquiry into Wheat Export Marketing Arrangements.

This submission provides an overview of the Council's role and responsibilities, a brief history of wheat export regulation through the period of the National Competition Policy (NCP) and the Council's views on the regulation of access to port terminal wheat export services. The submission also outlines the operation of the National Access Regime in Part IIIA of the *Trade Practices Act 1974* (TPA).

The Council's roles and responsibilities

The Council is responsible for considering applications for the declaration of services under the National Access Regime established by Part IIIA of the TPA. The National Access Regime provides a legal avenue through which an access seeker can gain access to the services provided by an infrastructure facility on commercial terms and conditions. In broad terms, the regime provides a means of promoting competition in markets where the ability to compete effectively depends on being able to use a monopoly infrastructure service. At the same time, the regime ensures that infrastructure owners receive a commercial return and that incentives for efficient investment are not affected. The operation of the regime and its possible application in relation to wheat export facilities is discussed further in a later part of this submission.

The Council is also responsible for considering applications from state and territory governments to have their access regimes certified as effective under Part IIIA of the TPA. Where a state or territory regime is certified, that regime will apply to the exclusion of other forms of access regulation. The certification process is designed to ensure state and territory access regimes embody the same principles that underpin the national approach and to allow state and territory regimes to take precedence where they are found to be effective.

In addition to these roles, the Council previously had responsibility for overseeing and assessing the progress of Australian governments in implementing the NCP and related reforms. The NCP was Australia's landmark microeconomic reform program based on the principle that competitive markets will generally best serve the interests of consumers and the wider community. The NCP and related reforms were specified in three agreements reached by all Australian governments in 1995—the Competition Principles Agreement, the Conduct Code Agreement and the Agreement to Implement the National Competition Policy and Related Reforms.

The Agreement to Implement the National Competition Policy and Related Reforms set out the reform commitments agreed to by governments, covering the NCP reforms, competitive national markets in electricity and gas, water reform and national road transport regulations. This agreement required the Council to assess the progress of all governments with implementing their reform commitments in 1997, 1999, 2001, and from 2002 to 2005 (inclusive).

The Competition Principles Agreement (CPA) sets out the principles agreed to by governments including on prices oversight, structural reform of public monopolies, review and reform of restrictive regulation, competitive neutrality and third party access to infrastructure services, and the application of these principles to local government. Clause 4 of the CPA sets out the obligations of governments when introducing competition to a market served by a public monopoly or before privatising a public monopoly and includes a requirement for a structural review prior to the introduction of such changes. Clause 5 obliges governments to ensure that legislation does not restrict competition unless it can be demonstrated that the benefits of the restriction to the public outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.

When the NCP program concluded in 2005-06, the Council of Australian Governments (COAG) endorsed the need to maintain reform momentum and agreed to the National Reform Agenda to continue competition and regulatory reform. It was decided that the Council would continue responsibility for third party access regulation and that the COAG Reform Council would supervise the implementation of the National Reform Agenda.

National Competition Policy – regulation of wheat export marketing arrangements

Wheat export marketing was one of the last areas of economic reform that governments addressed under the NCP program. In 2000 the Commonwealth Government commissioned an independent committee review of the *Wheat Marketing Act 1989 (Cth)* (WMA) against clauses 4 and 5 of the CPA and other policy principles.

The committee found that the wheat export single desk was inhibiting innovation in marketing and restricting cost savings in the grain supply chain, and that introducing more competition was more likely to achieve greater benefits for growers and the community than continuing the export controls. The committee recommended that the Government retain the single desk until the 2004 review required by the WMA and that the 2004 review incorporate the NCP principles, amongst other recommendations. The Government

responded by stating that it would retain the single desk but that the 2004 review would not be conducted under NCP principles.

The Council's assessment of the Commonwealth Government's progress in implementing the NCP from 2002 to 2005 was that the Government had not met its obligations under clause 5 of the CPA in relation to the WMA. The Council reached its conclusion on the basis that the Government had failed to demonstrate that restricting competition by retaining the wheat export single desk was in the public interest. Indeed, the review found that allowing competition was more likely to provide a net public benefit.

In 2008 the Government introduced the *Wheat Export Marketing Act 2008 (Cth)* (WEMA) which ended AWB International's monopoly on bulk wheat export. In addition to removing AWB International's single desk monopoly, the WEMA introduced an export accreditation scheme administered by a new regulator, Wheat Exports Australia. One of the requirements for accreditation is that exporters that own or operate port terminal services for wheat export must pass an access test for each of those services.

As of 1 October 2009, there are two means of satisfying the access test. The first is that an export marketer that provides port terminal services must have in place an access undertaking approved by the Australian Competition and Consumer Commission (ACCC). Alternatively, the WEMA allows export marketers to pass the access test where there is a state or territory access regime covering port terminal services which the Commonwealth Minister has certified as effective under Part IIIA of the TPA. South Australia and Queensland have access regimes for port terminal services (the Queensland regime applies to port terminal services for exporting coal).¹ Neither of these regimes was certified as effective when the WEMA came into force and no subsequent application for certification of either regime has been made. Accordingly, the only current means of satisfying the access test under the WEMA is the approved access undertaking route.

Access to port terminal services

Despite the perseverance of the regulation of the wheat export industry, it has never been clearly established that such regulation is warranted. By contrast, following NCP reviews of arrangements in other grain markets, governments have removed unwarranted restrictions on competition. For example, in 2001 Victoria deregulated its monopoly barley export marketing arrangements and in 2002 Queensland ended its monopoly wheat and barley export marketing arrangements. Western Australia partially deregulated its grain industry marketing arrangements in 2002 when it introduced a scheme under which grain exporters could obtain a licence to export prescribed grains (barley, lupins and canola) in competition with Grain Pool Pty Ltd, which led to a significant increase in the number of entities

¹ Victoria's access regime for export grain handling facilities, established under the *Grain Handling and Storage Act 1995 (Vic)*, ceased to apply to the ports of Geelong, Melbourne and Portland as of 1 October 2009.

providing export marketing services.² Following a review by the Economic Regulation Authority the Western Australian Government fully deregulated the grain export market on 23 October 2009.³ Similarly, South Australia introduced a barley export licensing scheme in July 2007 to facilitate a three year transition period prior to the full deregulation of the state's barley exporting arrangements. Since the introduction of the barley export licensing scheme, the Essential Services Commission of South Australia has issued barley export licences to 15 entities.⁴ As is the case with these other grain markets, the wheat export market is becoming increasingly diverse. This is evident from the increase in the number of wheat exporters from a single desk to 23 accredited wheat exporters within a period of 12 months.

In the Council's view, to date little if any evidence has been provided to establish that it is necessary to regulate access to port terminal services for bulk wheat export. The increasingly deregulated environment and the greater number of market participants militate against the exercise of monopoly market power by wheat marketers that own handling facilities. There is also a question as to whether some of the transport and handling facilities used to provide wheat export services, particularly up-country grain storage and handling facilities but also some port storage and handling facilities, have natural monopoly characteristics.

In such circumstances, the Council considers that it is undesirable and risky to continue imposing access regulation to port terminal services (or to introduce any additional access regulation other than where the processes and requirements of Part IIIA of the TPA are met). In the absence of clear evidence of a need for regulated access, unnecessary costs and regulatory burdens are likely to be imposed on wheat export marketers and other participants in wheat markets. In particular, inappropriate access regulation could restrict investment and innovation, and impede desirable change. In a period where the wheat industry is emerging from a period of regulated monopoly, it is important that the processes and structures which arose in that period are not cemented by unnecessary regulation that introduces rigidities and barriers to change.

In the event that access regulation is needed the Council's view is that access to port terminal services can be appropriately regulated under the National Access Regime.

The National Access Regime – Part IIIA of the TPA

The National Access Regime is established by Part IIIA of the TPA, with the purpose of providing a mechanism for resolving disputes over access to infrastructure services where it

² Since the introduction of the scheme, the number of licences granted by Western Australia's Grain Licensing Authority increased from 11 in 2003-04 to 36 in 2008-09 (Grain Licensing Authority of Western Australia, <http://www.gla.wa.gov.au/statistics/statistics200809.htm>, accessed on 30 October 2009).

³ Economic Regulation Authority of Western Australia 2008, *Review of the Grain Marketing Act 2002*, Perth, p vii.

⁴ Essential Services Commission of South Australia, <http://www.escosa.sa.gov.au/barley-overview/licensing/licences-issued.aspx>, accessed on 4 November 2009.

is in Australia's national interest that such disputes be resolved. Regulation under the National Access Regime involves two stages.

The first is the declaration stage, in which the Council considers applications for declaration of services against the declaration criteria and other prescribed factors in Part IIIA of the TPA. The declaration criteria are set out in section 44G(2) of the TPA as follows:

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

The Council then makes a recommendation to the designated Minister who decides the application after considering a parallel set of criteria. The Council cannot recommend that a service be declared unless it is satisfied that all of the declaration criteria are met. Similarly, the designated Minister must also be satisfied that all the criteria are met before declaring a service. If a service is declared, it is brought within Part IIIA's negotiate-arbitrate arrangements.

The criteria for declaration are an essential element of Part IIIA and ensure access regulation is applied in situations where it is likely to enhance competition and economic efficiency. In particular criterion (b) seeks to confine regulatory intervention to services provided by facilities that exhibit natural monopoly characteristics such that the construction of multiple such facilities would be likely to waste national resources. It is not designed to capture services provided by facilities merely because they are costly. Criterion (a) is also designed to limit the scope of regulation. It requires that access promote competition in a dependent market – this criterion is concerned with the state of competition not the ability of particular parties to participate in a market. The Council has published a guide to declaration which

provides a more detailed explanation of the requirements for declaration under Part IIIA of the TPA.⁵ A copy of this guide is attached as part of this submission.

In the Council's view it is critically important that regulation of access is predicated on the declaration criteria being met. If not, there is no basis for confidence that such regulation is likely to enhance competition or efficiency.

The second stage is the negotiation and arbitration process which requires the service provider to enter into access negotiations with access seekers. This process is a light handed intervention designed to maximise opportunities for the commercial resolution of access issues, minimise regulatory intervention and protect the legitimate interests of service providers so as to ensure that incentives for efficient investment and operation are maintained. These arrangements are not limited to the party who applied for declaration and other access seekers can seek to use the declared service. Where the parties are unable to reach an agreement the ACCC is available to arbitrate access disputes at the request of any party seeking to use a declared service (not just the party which sought the declaration).

The ACCC is given broad powers to resolve or determine access disputes and in relation to the conduct of arbitrations. It may for example seek to deal with the specifics of the particular access dispute. Where appropriate the ACCC may also determine an access dispute on a broader basis. Section 44V(2) of the TPA allows for an access determination to include matters that were not the basis of the notification of the access dispute. In this way the ACCC could, where it considered it necessary, craft a determination that sought to address the source of a dispute to obviate the need to deal with a succession of similar disputes. The ACCC may also combine multiple access disputes where common matters arise. The ACCC's access arbitration guide explains in more detail the ACCC's arbitration powers in determining access disputes under Part IIIA of the TPA.⁶ A copy of the ACCC's access arbitration guide is attached as part of this submission.

The Council considers that the National Access Regime can adequately address issues in relation to access to port terminal services if the link to bulk wheat export accreditation is removed, to the extent that the declaration criteria are satisfied. Of course, it would be inappropriate for the Council to prejudge whether a particular port terminal service(s) would be declared under the National Access Regime in the absence of an actual application for declaration.

Whilst the Council's view is that the National Access Regime can appropriately regulate access to port terminal services in the event that regulation is required, it recognises that there may be two potential barriers to the effective application of Part IIIA. These are the

⁵ National Competition Council 2009, *Declaration of Services under Part IIIA of the Trade Practices Act: a guide*, Melbourne. Available at http://www.ncc.gov.au/images/uploads/Declaration_Guide.pdf

⁶ Australian Competition and Consumer Commission 2006, *Arbitrations – A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, Canberra.

'national significance' criterion in section 44G(2)(c) of the TPA and the potential time and costs associated with the declaration process.

The national significance criterion

The criterion in section 44G(2)(c) requires that the facility that provides the service be of national significance having regard to the size of the facility, the importance of the facility to constitutional trade or commerce, or the importance of the facility to the national economy.

The Council considers that the threshold for a facility to be of national significance is relatively low, such that there is the potential for a port terminal service(s) (or perhaps other facilities used to provide services in the wheat supply chain) to be declared under Part IIIA subject to the other declaration criteria being met. However, whether this criterion is met will depend on the circumstances of a particular case. The Council notes that if a particular facility does not meet the national significance criterion then it is unlikely to be appropriate that access be regulated, either under the National Access Regime or on some other basis.

Delays and costs associated with the declaration process

The Council acknowledges that the time and costs associated with pursuing declaration applications may deter access seekers from using Part IIIA and that it is important to improve the timeliness of decision-making under the National Access Regime. Timely decisions are a key to achieving the National Access Regime's objective of promoting the economically efficient use of, and investment in, infrastructure services to promote effective competition in upstream and downstream markets.

The Council recognises the risk that the experience with recent declaration applications may encourage infrastructure owners to believe that they can defer declaration indefinitely if they are prepared to endure the costs and deploy sufficient legal resources. In particular, the four applications for declaration of the services provided by various Pilbara iron ore railways operated by BHP Billiton Iron Ore Pty Ltd and Rio Tinto Iron Ore Pty Ltd are taking significant time.

However the risk of excessive costs and delays may arise irrespective of the type of service for which declaration is sought. They would not arise exclusively in relation to port terminal services were the requirement for bulk wheat export accreditation removed. The appropriate means of addressing such matters is to reform Part IIIA, rather than exclude port terminal services from the National Access Regime.

The Council previously recommended to the Government that it amend the TPA with the aim of reducing costs and delay and increasing regulatory certainty. Following this and other recommendations (including those from the Productivity Commission) the then Minister for Competition Policy and Consumer Affairs announced on 7 April 2009 a package of reforms to improve the operation of the National Access Regime. The reforms are to be implemented by the enactment of the *Trade Practices Amendment (Infrastructure Access) Bill 2009* (Infrastructure Access Bill) which was introduced into Parliament on 29 October 2009. The

Infrastructure Access Bill also reflects the reform commitments agreed to by COAG under the Competition and Infrastructure Reform Agreement in February 2006.

The Infrastructure Access Bill, when passed, will implement the following changes to Part IIIA.⁷

- Binding time limits of generally 180 days ('the expected period') will be imposed for recommendations by the Council and for decisions by the ACCC and the Tribunal. In calculating the time for making recommendations or decisions, certain periods of time are disregarded by 'clock stoppers'.
- The Council and the Tribunal may extend the expected period more than once in exceptional circumstances.
- If the ACCC does not make a decision within the expected period of 180 days, it is deemed to have:
 - preserved the status quo between the parties, in the case of arbitration of access disputes
 - rejected the undertaking or code, in the case of access undertakings and industry codes.
- A designated Minister must make a decision on a recommendation by the Council within 60 days. The Minister cannot extend the period for making a decision.
- If a designated Minister does not make a decision, the Minister will be deemed to have agreed with the Council's recommendation.
- Where merits review of decisions is available, the Tribunal may only consider the information submitted to the original decision-maker. The Tribunal may only seek additional information to clarify the information provided to the original decision-maker, or from the ACCC or the Council in their role of assisting the Tribunal.
- The Council will have the power to make decisions without meetings by circulation of a document for signature. A decision without a meeting must be a unanimous decision of all councillors.
- The Council will be able to approve reasonable amendments to declaration applications provided it will not cause undue delay or prejudice.
- The Tribunal will have the discretion to determine whether a declaration decision should be stayed pending the Tribunal's determination of a review application, rather than declaration decisions being automatically stayed.

The Council's view is that the reforms will significantly streamline, simplify and improve the efficiency, certainty and timeliness of the National Access Regime.

⁷ *Trade Practices Amendment (Infrastructure Access) Bill 2009* Explanatory Memorandum.

In the event that circumstances in the future warrant consideration of the regulation of access to port terminal wheat export services, the Council's view is that the National Access Regime in Part IIIA of the TPA provides an adequate mechanism.

Please do not hesitate to contact me on (03) 9285 7499 if you wish to discuss the Council's submission.

Yours sincerely

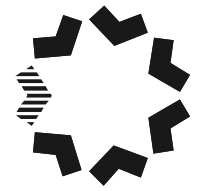


John Feil
Executive Director

Attachments: National Competition Council 2009, *Declaration of Services under Part IIIA of the Trade Practices Act: a guide*, Melbourne. Available at http://www.ncc.gov.au/images/uploads/Declaration_Guide.pdf

Australian Competition and Consumer Commission 2006, *Arbitrations – A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, Canberra.

NATIONAL
COMPETITION
COUNCIL



Declaration of Services

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



August 2009

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The National Competition Council

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

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

Foreword

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

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

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

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

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

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

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

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

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

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Glossary of terms and abbreviations

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

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

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

Version history

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

1 Overview

- 1.1 Australia's national regime for regulating third party access, enacted in 1995, is set out in Part IIIA of the [Trade Practices Act 1974 \(Cth\) \(TPA\)](#).
- 1.2 There are three alternative pathways under Part IIIA for a party seeking access to a service:
- declaration, which provides access seekers with a legal right to negotiate terms and conditions for access with the service provider of a declared service and recourse to mandatory dispute resolution is necessary
 - an effective access regime established by a state or territory (a service that is subject to an effective access regime under Part IIIA is immune from declaration)
 - a voluntary access undertaking made by a service provider and accepted by the Australian Competition and Consumer Commission (ACCC).
- 1.3 This Guide deals with the first pathway, being the declaration of a service provided by means of a facility of national significance which is uneconomical to duplicate.
- 1.4 If declaration occurs, access seekers acquire a legal right to:
- negotiate access to the service with the service provider, and
 - if necessary, have access disputes determined through arbitration by the ACCC.
- 1.5 In 2006 the Australian Government amended the [TPA](#) by, among other things, inserting an objects clause to explicitly set out the purpose of Part IIIA. Section 44AA of the [TPA](#) specifies that the objects of Part IIIA are to:
- promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets, and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.
- 1.6 Access regulation aims to promote effective competition in markets that depend on using the services of facilities that cannot be economically duplicated. The intended outcome is that competition in dependent markets is promoted and inefficient duplication of costly facilities avoided. At the same time, access regulation looks to maintain a facility owner's usage rights and provide an appropriate commercial return on an owner's investment. Such an approach retains appropriate incentives and rewards for infrastructure investment but prevents infrastructure owners from exploiting their power over dependent markets.

The declaration and arbitration process

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

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

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

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

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

The ACCC must take the following matters into account in making a final determination:

- (aa) the objects of Part IIIA, as set out in s 44AA;
- (a) the legitimate business interests of the provider, and the provider's investment in the facility;
- (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

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

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

- (c) the interests of all persons who have rights to use the service;
- (d) the direct costs of providing access to the service;
- (e) the value to the provider of extensions whose cost is borne by someone else;
- (ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (g) the economically efficient operation of the facility;
- (h) the pricing principles specified in section 44ZZCA.³

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

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

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

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

⁴ Section 44V(3) of the [TPA](#).

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

Services that can be declared

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

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

Services that cannot be declared

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

- (a) any service that is the subject of an access undertaking under s 44ZZA of the [TPA](#)
- (b) any service provided by means of a facility specified under s 44PA(2)(a) of the [TPA](#) (this relates to a facility that is owned by the Commonwealth, State or Territory where the ACCC has approved a tender process as a competitive tender process)
- (c) any service provided by means of a pipeline which is the subject of either a 15-year no-coverage determination or a price regulation exemption in force under Chapter 5 of the National Gas Law
- (d) any service supplied by Australia Post, as per s 32D of the [Australian Postal Corporation Act 1989 \(Cth\)](#)
- (e) the supply of a telecommunications service by a carrier or under a class licence as defined in s 235A of the [Telecommunications Act 1997 \(Cth\)](#).

The declaration criteria

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

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

⁵ Section 44ZP of the [TPA](#).

- (ii) the importance of the facility to constitutional trade or commerce; or
- (iii) the importance of the facility to the national economy;
- (d) that access to the service can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime; and
- (f) that access (or increased access) to the service would not be contrary to the public interest.

- 1.18 If the Council is not satisfied that one or more of the criteria are met, then it must recommend that the service not be declared. The designated Minister must also be satisfied that all the criteria are met before proceeding to declare a service (s 44H(4)).
- 1.19 The Council and the designated Minister must also consider whether it would be economical for anyone to develop another facility that could provide part of the service, as required by s 44F(4).
- 1.20 In interpreting the declaration criteria, the Council uses general principles of statutory interpretation. It therefore interprets the declaration criteria and other provisions of Part IIIA in a way that promotes the purpose and objects of Part IIIA specifically and the [TPA](#) more generally.
- 1.21 In addition, the Council has regard to relevant decisions of the Tribunal and Courts.⁶
- 1.22 The Council also has regard to the [Hilmer Report](#) for guidance, although the Council is aware that Part IIIA departs from the regime recommended by the Hilmer Committee in some significant respects. As discussed by the Tribunal in the [Sydney Airport decision](#):

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

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

- 1.23 The Tribunal in both the [Sydney Airport decision](#) and the [Duke EGP decision](#), however, had regard to the [Hilmer Report](#) for guidance on the policy underlying Part IIIA, bearing the above caution in mind.
- 1.24 The Federal Court also had regard to the [Hilmer Report](#) for guidance on Part IIIA. His Honour Justice Middleton noted in the [BHP Billiton Iron Ore v NCC](#) decision that:
- ... not all of the recommendations of the Hilmer Report were adopted by Parliament. Nevertheless, it provides an insight into the purpose of the access regime in Part IIIA of the Act. (at 39)
- 1.25 The Council has had particular regard to economic approaches to issues raised in previous applications for declaration considered by the Council and also applications for coverage, and revocation of coverage, of gas pipelines under the Gas Code.
- 1.26 Sections 2–8 of this Guide outline the Council’s approach to the declaration criteria as it has evolved through dealing with applications since 1996 and as it draws on relevant decisions by the Tribunal and the Courts. The Council, in accordance with good regulatory practice, values consistency in its consideration of applications for declaration. However, each application must be considered on its own merits and facts.
- 1.27 The following is a summary of the Council’s general approach to considering applications for declaration.
- (a) On receiving an application, the Council will check that the application meets the requirements of regulation 6A of the [Trade Practices Regulations 1974 \(Cth\)](#), and seeks access to a service within the definition of service in s 44B of the [TPA](#). The Council will also consider the definition of the service for which the declaration is sought, the identification of the facility and the provider of the service for which declaration is sought. This information will normally be provided by an applicant in its application. The Council recommends that potential applicants consult with the Council before lodging an application to ensure that all requirements are met.
 - (b) For the purposes of criterion (a), the Council will assess whether access to the service would improve the conditions or environment for competition and thereby promote a material increase in competition in a market other than the market for the service (known as a dependent market). As part of this evaluation, the Council usually defines the dependent markets, considers whether these are separate from the market for the service and then considers whether competition in the dependent markets would be materially increased by considering issues such as the factors affecting the ability and incentive to exercise market power to adversely affect competition in a dependent market(s). This is discussed in more detail in section 3 of this Guide.

- (c) For the purposes of criterion (b), the Council examines whether it is economic to develop another facility to provide the service. Criterion (b) seeks to ensure that declaration is confined to services provided by facilities that are uneconomical to duplicate. In doing so the Council applies a social cost-benefit test that considers this issue in terms of Australia's national interest. This criterion is discussed in more detail in section 4 of this Guide.
- (d) For the purposes of criterion (c), the Council assesses whether the facility is of national significance, having regard to the size of the facility, the importance of the facility to trade or commerce, or the importance of the facility to the national economy. In assessing whether a facility is of national significance on the basis of its size, the Council considers relevant indicators to include the facility's physical dimensions, the facility's physical capacity and the throughput of goods and services using the facility. This is discussed in more detail in section 5 of this Guide.
- (e) For the purposes of criterion (d), the Council assesses whether access to the service can be provided safely. The existence of relevant safety regulations which apply to the facility may suffice to satisfy criterion (d) where the regulations deal appropriately with any safety issues arising from access to the service provided by means of the facility. Another relevant consideration is whether the terms and conditions of access can adequately address any safety issues. This is discussed in more detail in section 6 of this Guide.
- (f) For the purposes of criterion (e), the Council assesses whether access to the service is already the subject of an effective access regime. This may be an easy assessment, for example, a State or Territory access regime may have been certified an effective access regime for the service through a decision by the Commonwealth Minister under s 44N of the [TPA](#). Generally the Council must follow such a decision.⁷ Alternatively, there may be no certified State or Territory access regime in place in relation to the service, but an uncertified State or Territory access regime may exist. In these situations it will be necessary for the Council to assess the State or Territory access regime against the principles set out in the Competition Principles Agreement in order to determine whether the regime should be regarded as effective. This is discussed in more detail in section 7 of this Guide.

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

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

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

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

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

Application process

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

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

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

- 1.32 The Council must use its best endeavours to make its recommendation on an application within four months of the day it received the application (s 44GA). The Council can extend that four month period by providing notice to the applicant and the provider and publishing a notice in a national newspaper. The Council may extend the standard period more than once (s 44GA(4)).
- 1.33 In the above process, is desirable for applicants, and parties making submissions in response to an application, to raise all relevant issues in the application or the submissions in response to the application as this maximises opportunities for information and arguments to be considered in an informed and transparent way.⁹
- 1.34 The Council notes that it expects submission deadlines to be complied with. Late submissions may not be able to be taken into account, especially where they canvass a broad range of issues or contain new detailed factual material. In cases where a submission is made at a later stage which raises novel issues which were not raised with the Council prior to it issuing the draft recommendation, the Council may have limited opportunity to test relevant assertions or information. Where this is so, the Council may have to give such information less weight as a result or extend its processes to allow for such matters to be exposed for comment by other interested parties.
- 1.35 The Council consults openly on all applications received. Following receipt of an application the Council will set a timeframe for receipt of submissions and has regard to those submissions in developing its recommendation. It also publishes a draft recommendation and provides a further opportunity for submissions on the basis of the draft recommendation. It is usual practice for the Council to allow 14 days for preparation of written submissions in response to a draft recommendation (s 44GB).
- 1.36 The Council informs the applicant and the service provider when it has provided its final recommendation to the designated Minister. As soon as practicable after the designated Minister makes his or her decision the Council publishes its final recommendation and the designated Minister's decision on the Council's website (www.ncc.gov.au) and provides a hardcopy of the final recommendation to the applicant and the service provider (s 44GC).
- 1.37 The designated Minister must publish by electronic or other means his or her decision on a declaration recommendation and his or her reasons for the decision (s 44HA). If the designated Minister does not publish his or her decision on a declaration recommendation within 60 days of receiving the Council's declaration recommendation, the designated Minister is taken to have decided not to declare the service and to have published that decision not to declare the service (s 44H(9)).

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

2 Identifying the service, the facility and the provider

The service

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

2.2 The term 'service' is defined in s 44B of the [TPA](#):

'service' means a service provided by means of a facility and includes:

- (a) the use of an infrastructure facility such as a road or railway line;
- (b) handling or transporting things such as goods or people;
- (c) a communications service or similar service;

but does not include:

- (d) the supply of goods; or
- (e) the use of intellectual property; or
- (f) the use of a production process;

except to the extent that it is an integral but subsidiary part of the service.

Defining the service

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

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

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

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

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

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

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

- 2.7 The delineation of service should not be confused with the quite separate analysis that may occur for identifying relevant dependent markets.
- 2.8 A facility may provide a number of instances or occasions of the same kind of service. In the [Hamersley Iron decision](#) (at 36), the Federal Court found that the service provided by Hamersley Iron to itself by means of its railway line and the service sought by the access seeker, Robe River Iron Associates, were different instances of the same type of service.
- 2.9 In characterising the service provided by means of a facility it may be necessary to specify the purpose for which access to the service is sought. In particular, it may be necessary to incorporate the purpose for which the service is provided, to ensure the right to negotiate access to the service following declaration is suitably limited by a reference to that purpose. Further, incorporating the purpose of the service provision in the delineation of that service may help to determine the relevant dependent markets for the assessment of criterion (a).
- 2.10 In the [Sydney Airport decision](#), for example, the Tribunal found that the service provided by the Sydney Airport Corporation Limited (SACL) was:

... the provision, or making available by SACL, of the use of the freight aprons, hard stands, areas where equipment may be stored and areas where freight can be transferred from loading/unloading equipment to/from trucks at the airport.
... The point can be tested by asking what services are provided by SACL? It provides or makes available the use of freight aprons, hard stands and equipment storage areas and freight transfer areas to a variety of organisations, such as ramp handlers but it does not provide or make available the service of loading and unloading international aircraft and transferring freight at the airport. (at 17)
- 2.11 In that case, in the assessment of criterion (a), defining the service by referring to the purpose of its provision was necessary to distinguish the dependent markets from the market for the service to which access was sought.
- 2.12 The process of referring to the purpose for which the service is provided should, however, be distinguished from the process of characterising a service by referring to the identity of particular users or, more significantly, the particular activity an access seeker intends to undertake if access to a service is available. A service is the same service irrespective of the identity of the access seeker or the particular operational ends an access seeker intends to use the service for. In other words, a distinct service is not identified by reference to each user of the service or by the different operational ends to which the service may be used. Defining a service in terms of use by a particular access seeker would be contrary to the intention of Part IIIA that once a service is declared access may be available to a range of users not just the applicant.

2.13 The Tribunal recognised this in the [Services Sydney decision](#) where it stated:

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

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

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

Services excluded from the s 44B definition of service

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

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

'the supply of goods'

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

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

‘the use of intellectual property’

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

‘the use of a production process’

- 2.19 Paragraph (f) of the definition of "service" in s 44B excludes the use of a production process, except to the extent that it is an integral but subsidiary part of the service.
- 2.20 The expression "a production process" in paragraph (f) has what in the [Hamersley Iron decision](#) was identified as its ordinary meaning of "the creation or manufacture by a series of operations of some marketable commodity".¹²
- 2.21 The service in question is the service that is the subject of an application for declaration by an access seeker under s 44F(1) of the [TPA](#), which is provided by means of a facility.
- 2.22 The production process in question is the series of operations used by the service provider to create or manufacture a marketable commodity. The content of the production process is a matter of fact to be determined having regard to the circumstances of the particular declaration application.
- 2.23 As the High Court found in [BHP Billiton Iron Ore Pty Ltd v National Competition Council](#) (at 41), having identified the relevant service and the production process, the issue is whether the use of the service for which declaration is sought also answers the description of the use by the access seeker of a service provider's production process. In that case, the answer was found to be in the negative.
- 2.24 The fact that the service provider's production process uses integers¹³ which the access seeker wants to use for its own purposes does not necessarily mean that a service using those integers will be excluded from the definition of service in s 44B.¹⁴
- 2.25 The Council must consider the use the access seeker intends to make of the service and whether that use 'answers the description' of the service provider's production process. If it does, the service falls within the exception created by paragraph (f) and declaration is not available. For example, were an access seeker to apply for

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

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

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

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

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

The facility

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

- 2.28 In the [Australian Union of Students decision](#), the Tribunal stated:

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

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

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

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

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

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

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

The Service Provider

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

- (a) When an application for declaration is received, the Council must inform the provider
- (b) If the designated Minister declares the service, then the provider may apply to the Tribunal for review of the decision, and
- (c) The provider is required to negotiate access if a service is declared, and may be bound by an ACCC arbitration of an access dispute.

- 2.34 Section 44B of the [TPA](#) provides the following definition:

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

- 2.35 In effect, the provider is the entity that controls the use of a facility and has the legal power to determine whether—and on what terms—access is provided.
- 2.36 At law, a person generally cannot assign an interest greater than the one they possess. The provider must therefore be capable of negotiating an access contract (or similar arrangement) consequent on declaration or, if negotiation fails, implementing an ACCC arbitration determination.
- 2.37 A number of the provisions of the [TPA](#) such as ss 44S, 44U and 44V cannot operate unless the provider is, out of the owner and the operator, the entity with the legal power to determine whether—and on what terms—access is provided. In particular, s 44V(2)(a) (which states that the ACCC may require the provider to provide a third party with access to a service) presupposes that the provider controls access to the relevant service. Where an operator controls access to a service, an order directing the owner of the facility to provide a third party with access to that service may be

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

- 2.38 It should be noted that a partnership or joint venture that consists of two or more corporations can be treated as a single 'provider' under s 44C of the [TPA](#).
- 2.39 More generally the rules of statutory interpretation and the [Acts Interpretation Act 1901](#) (Cth) provide that words expressed in the singular include the plural. Therefore the word "provider" can if necessary extend to more than one party including the owner, the operator and any person(s) that has control over the provision of the service or the use of the facility.
- 2.40 Where the owner and the operator of a facility are not the same entity, the identification of the provider depends on an assessment of the entity that controls the use of a facility. It is the Council's practice to include as the provider(s) of a service the owner(s), operator(s) and any other parties with control over its use.

3 Promotion of competition (criterion (a))

Introduction

- 3.1 Section 44G(2)(a) of the [TPA](#) (criterion (a)) provides that the Council cannot recommend that a service be declared unless it is satisfied that access (or increased access) to the service would promote a material increase in competition in at least one market other than the market for the service.¹⁵
- 3.2 The markets in which competition might be promoted are commonly referred to as 'dependent markets'. The issue is whether access would improve the opportunities and environment for competition in a dependent market(s) such as to promote materially more competitive outcomes.
- 3.3 The purpose of criterion (a) is to limit declaration to circumstances where access is likely to materially enhance the environment for competition in at least one dependent market.
- 3.4 In assessing whether criterion (a) is satisfied, the Council:
- identifies the relevant dependent (upstream or downstream) markets (see paragraphs 3.5 to 3.18)
 - considers whether the identified dependent market(s) is separate from the market for the service to which access is sought (paragraphs 3.20 to 3.27), and
 - assesses whether access (or increased access) would be likely to promote a materially more competitive environment in the dependent market(s) (paragraphs 3.34 to 3.82).

Identifying dependent markets

- 3.5 Section 4E of the [TPA](#) provides that:

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

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

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

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

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

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

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

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

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

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

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

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- 3.11 The **geographic dimension** of a market identifies the area within which substitution in demand and supply is sufficient for the product(s)/service(s) traded at different locations to be considered in the same market.
- 3.12 Defining the relevant geographic market requires the identification of the area(s) that are supplied, or could be supplied, with the relevant product and to which consumers can practically turn. National, intrastate or regional markets, for example, may be defined. The reference to 'other markets' in criterion (a) includes markets outside Australia.¹⁸
- 3.13 The collective effect of substitution in demand and supply determines what is in and out of the relevant product and geographic market dimensions. The process of market definition begins with the narrowest feasible product and geographic market boundaries. If consumers would respond to an increase in price by switching to alternative products or services, then the market must be expanded and the process continues until the market boundaries include all those sources and potential sources of close substitutes, so as to identify the smallest area over which it would be profit maximising for a hypothetical monopolist to impose a small but significant and non-transitory increase in price.
- 3.14 Substitution possibilities can be gauged through cross-price elasticity assessments. However, it is often difficult to obtain sufficient data on the relevant cross-price elasticities to calculate these in order to define market boundaries and so other more qualitative, judgement-based assessments are often undertaken in defining markets.
- 3.15 Where products or services pass through a number of levels in a supply chain, it is also useful to describe the market in terms of the function being considered. The **functional dimension** identifies which of a set of vertically related markets is being considered. Defining the relevant functional market requires distinguishing between different vertical stages of production and/or distribution and identifying those that comprise the field of competition in a particular case.
- 3.16 In the context of considering applications for declaration the functional dimension of market definition often overlaps with consideration of whether a dependent market is separate from the market for the service for which declaration is sought (see paragraphs 3.20 to 3.27).

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

- 3.17 In its consideration of criterion (a) the Council will seek to identify one or more dependent markets where competition appears likely to be significantly affected by the availability of access to the service for which declaration is sought. Often these markets will be vertically related to the market for the service for which declaration is sought. That is, they are upstream or downstream of that market in a supply chain.
- 3.18 The Council will identify dependent markets in terms of the dimensions set out above. The Council considers, however, that an assessment of criterion (a) may not always require a precise delineation of the boundaries of the market for the service. What must be determined is whether the market(s) in which competition is said to be promoted (the dependent market(s)) are distinct from the market for the service and the effect access will have on the conditions for competition in that dependent market(s).
- 3.19 It may also be unnecessary to consider all possible dependent markets. Criterion (a) is satisfied if access will materially promote competition in one or more dependent markets. In practice, it is unlikely that the Council will examine more than the two most likely dependent markets in relation to an application for declaration.

Separate market(s) from the market for the service

- 3.20 For the purposes of criterion (a), the Council needs to be satisfied access (or increased access) would promote a material increase in competition in 'at least one market ... other than the market for the service'. This means that dependent markets must be functionally distinct from the market for the service for which declaration is sought.
- 3.21 Although it is possible that criterion (a) may be satisfied where the service provider is not vertically integrated into a dependent market(s), criterion (a) will most commonly be satisfied where the service provider is vertically integrated into the dependent market(s). The Federal Court stated in [BHP Billiton Iron Ore v NCC](#) that:

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

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

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

- 3.23 In the [Services Sydney decision](#) the Tribunal was also concerned with economic separability and relevantly stated:

One approach to assessing efficiencies of vertical integration is to posit that where the transaction costs of market coordination between vertical stages of supply exceed those of administrative coordination within the firm, there will be no separate market for the service(s). However, a literal interpretation of that test could prevent the very benefits of competition in dependent markets, which Pt IIIA is designed to achieve, from being realised. It is not difficult to imagine a situation where the coordination costs within a vertically integrated firm are less than the costs of market transactions for a particular service; but where there exists a more cost efficient potential entrant to an upstream or downstream dependent stage of the supply chain, who can more than offset the additional transaction costs with their superior efficiency. Entry of such a firm would be pro-competitive and economically efficient, yet a narrow view of the test would have the consequence that no market for the service would be defined and hence there would possibly be no declaration and no entry. The community would be denied the very kind of benefits arising from competition that were envisaged by the report of the Independent Committee of Inquiry into Competition Policy in Australia on National Competition Policy (the Hilmer Report) and which underpin the access regime principles in Pt IIIA.

A broader approach, which asks whether the complementarities of vertical integration are such as to dictate vertical integration, would not preclude declaration and competition in these circumstances. This approach was generally adopted in the NCC's Final Report and is consistent with that adopted by the Tribunal in *Re Sydney International Airport*:

...

An alternative, more precise, test could involve looking at some combination of both transaction costs and service delivery costs. If there was a demand for the service at a price which covered these combined costs, then a market could be said to exist. (at 116-118)

- 3.24 Economic separability is thus at least a necessary condition for different functional layers to constitute distinct functional markets and for a dependent market to be separate from a market for a declared service.
- 3.25 Services may be provided in functionally distinct markets even though there is a one-for-one relationship—ie, perfect supply side and demand side complementarity—between those services. This will be the case where those complementarities do not give rise to economies of joint consumption or joint production that dictate that the services must be performed in the same economic entity. In the [Sydney Airport decision](#) the Tribunal acknowledged “the strong supply side and demand side complementarity between other airport services and the declared services and the underlying facilities”. Nonetheless, the Tribunal found that the one-for-one relationship between airport aprons at Sydney International Airport and ramp handling services did not mean that these two services were in the same functional

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

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

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

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

Access (or increased access) to the service

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

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

3.29 As the Tribunal noted in the [Sydney Airport decision](#):

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

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

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

3.31 The Tribunal rejected this argument in the following terms:

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

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

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

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

Material promotion of competition

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

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

¹⁹ at 76.

3.36 In the [Sydney Airport decision](#), the Tribunal stated:

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

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

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

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

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

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

²⁰ at 83.

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

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

In some markets the introduction of effective competition requires competitors to have access to facilities which exhibit natural monopoly characteristics, and hence cannot be duplicated economically. ... Facilities of this kind are referred to as 'essential facilities'.

An 'essential facility' is, by definition, a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole. ([Hilmer Report](#), p. 239)

- 3.41 The [Hilmer Report](#) proposed that access to a facility should be regulated by Part IIIA only where:

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

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

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

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

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

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

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

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

- 3.45 Barriers to entry are a primary determinant of the existence of market power. Only in the presence of significant barriers to entry can a firm sustainably raise prices above economic costs without new entry taking away customers in due course.
- 3.46 The ability and incentive for a service provider to exercise market power to adversely affect competition in a dependent market is a necessary (although not sufficient) condition for access to promote competition. Prima facie, regulation of the terms and conditions of the provision of the service by the service provider in these circumstances is likely to promote competition.
- 3.47 In addition, a finding that the service provider has the ability and incentive to exercise market power to adversely affect competition in a dependent market is likely to mean that the barriers to entry in that market result from the natural monopoly characteristics of the facility and its bottleneck position. In the usual case, this finding would mean that access would reduce barriers to entry and promote competition in that dependent market.
- 3.48 By contrast, the service provider may not have the ability or incentive to exercise market power to adversely affect competition in the dependent market(s) where:
- the facility does not occupy a bottleneck position in the supply chain for the service
 - the service provider is constrained from exercising market power in the dependent market(s), perhaps by competitive conditions in the dependent market(s) and/or the market power of other participants in the market(s), or
 - the incentives faced by the service provider are such that its optimal strategy is to maximise competition in the dependent market(s). It may be profit maximising, for example, for a service provider to promote increased competition in the dependent market(s) and maximise demand for the services provided by its facility.
- 3.49 Access is unlikely to materially promote competition in the dependent market(s) if the service provider does not have the ability and incentive to exercise market power to adversely affect competition in the dependent market(s).
- 3.50 Finally, the Council observes that the Tribunal has made it clear that promotion of competition should not be gauged in terms of either:

- (a) the effect of access on particular competitors, such as a particular applicant seeking to have a service declared, or
- (b) the delivery of efficient outcomes.

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

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

3.52 It further stated:

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

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

Ability and incentive to exercise market power

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Leveraging market power

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

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

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

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

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

3.66 Scherer and Ross conclude:

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

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

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

- 3.68 In addition, a distinction must be drawn between situations where a service provider seeks to advantage its vertically related affiliates so as to achieve the transaction cost efficiencies from vertical integration and the situation where a service provider seeks to advantage its affiliates so as to capture monopoly rents. The former behaviour is likely to enhance efficiency while the latter is harmful to effective competition.
- 3.69 Generally, the Council considers that criterion (a) is satisfied if access (or increased access) would lessen the opportunities for differential treatment of vertically related entities. Criterion (a) is satisfied where the provider has an incentive and ability to engage in vertical leveraging to adversely affect competition in a dependent market(s). Ordover and Lehr articulated this in respect of the application of the then Gas Code coverage criterion (a) to the Moomba–Sydney Pipeline:

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

Charging monopoly prices

- 3.70 In the 'without access' situation, a service provider may be able to set prices for the service/s that substantially exceed its forward looking, long run economic costs—that is, the level of prices that should prevail in the presence of effective competition.
- 3.71 If the service provider priced the services provided by the facility above the competitive level, then it would be likely that this would also have the effect of increasing the price of products in the downstream market above competitive levels, thus suppressing demand in a dependent market. In addition, where participants in a dependent market do not pass through the full above-competitive prices for the service, the lower margins in the market may reduce incentives to invest in the dependent market and thus could have an adverse effect on competition in those dependent markets.
- 3.72 The ability of the service provider to profitably raise price above a competitive price depends on:
- the elasticity of demand in the downstream market and the proportion of proper economic costs of production in that market that comprises the cost of the service
 - the elasticity of demand for the service subject to declaration. For example, Ordover and Lehr (2001, p. 19) state that where the elasticity of demand for delivered natural gas is low and transportation costs represent only a small proportion of the delivered cost of natural gas, it does not necessarily follow that the demand elasticity facing a particular pipeline is also low

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

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

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

The MSP's ability to monopoly price is potentially constrained by competition in upstream or downstream markets. Regarding the upstream markets, if gas producers can sell their gas to other retail markets via other pipelines, they will refuse to sell gas to MSP unless they earn the same return on the marginal unit of gas shipped to Sydney (or ACT) as they earn on shipments to other locales. This type of competition will constrain MSP's ability to set transport prices substantially above economic costs, even if MSP remains a monopolist with respect to transport between Cooper Basin and the markets in NSW/ACT. Regarding the downstream markets, if there are other sources of natural gas supply to the retail markets in NSW/ACT then MSP cannot overprice transport since this would render the gas shipped over it uneconomic. As noted, this ability of consumers to switch to gas from other sources also constrains the MSP's ability to set transport prices substantially above economic costs.

Source and/or destination competition is an effective constraint on MSP, if there is sufficient independent capacity to absorb gas output on pipelines going to other destinations and if there is sufficient volume of gas output from other sources to which consumers can divert their demand in the face of elevation in price of the gas delivered over MSP. If these conditions are met, a substantial price increase above the competitive level will likely be unprofitable. This is so, despite the fact that the pipeline (here the MSP) is actually a natural monopoly over transport from the Cooper Basin to NSW and ACT. (2001, p. 13)

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

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

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

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

AGL argued that the extant competition was not efficient competition because the downstream and upstream markets were not fully competitive, and there was no evidence presented that the prices being charged by EGP were prices that would result from the operation of efficient competition. ... [T]he AGL argument was that a tariff set under the Code represents the price which would be produced by efficient competition because that is what the Code requires in s 8.1; it then follows that a difference between the Duke tariff and one determined under the Code is evidence that there is not efficient competition even when there is competition in the marketplace.

This argument does not take sufficient account of the fact that regulation is a second best option to competition. The complex nature of the tariff-setting process, the number of assumptions it relies on, and the fact that the reference tariff is a publicly available price which may be varied by negotiation between the pipeline owner and user depending on the user's requirements and conditions in the marketplace, all point to the fact that the reference price is not necessarily the price which would result from competition. Indeed, ACCC in its Draft Decision on MSP tariffs pointed out that if the EGP did not exist the reference tariff for the MSP would be lower as it would be transporting more gas. This is not what one would expect in a competitive market (Draft Decision at 97). (at 109–110)

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

Explicit or implicit price collusion

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

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

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

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

We have not undertaken an independent inquiry as to whether collusion among the pipelines is either likely or feasible. However, we note that the number of pipelines serving the NSW/ACT retail markets is small and is likely to remain so for the foreseeable future. ...

It is critical to note that the ability to sustain a collusive outcome does not depend solely on the number of competing pipelines. Indeed, there are many markets with a small number of participants that are effectively competitive. Other market characteristics also impinge on the ability of firms to charge prices that significantly exceed competitive levels. For example, if each of the pipelines has excess capacity and if it is relatively easy to price discriminate so as to offer deals to potential customers that are unlikely to be observed by the competitor pipeline then price coordination may not be sustainable. Long-term contracts and large-scale purchases are also thought to hinder cooperation. (2001, p. 14)

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

Time horizon for assessment

- 3.83 A consideration of whether access would promote a material increase in competition in a dependent market must be considered in association with a time horizon. The Council recognises that a conclusion as to whether access would improve the environment for competition in a dependent market may change over time due to changes in technology or market evolution.
- 3.84 An example is provided by the [AGL Cooper Basin Natural Gas Supply Arrangements decision](#), in which the Tribunal recognised that substitution possibilities and market boundaries are changing over time, given the dynamic quality of gas markets and the emerging competition between gas and electricity due to technological change. The Tribunal defined the relevant market at three points in time for the purpose of assessing the competition effects of the long term supply contract between

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

We have concluded, as canvassed with counsel in the course of the hearing, that the appropriate approach in this matter is to think in terms of a market expanding over time — i.e. an expanding market definition. Such an approach is consistent both with commercial reality and the traditional methodology of market definition, and is apt to expose the issues in this matter.

In considering this expanding market, we specify three dated markets of interest: the market in 1986, the market today, and the market in ‘the future’ — perhaps ten or fifteen years hence. Quite obviously the geographic market is expanding over this time period, and the product market is also expanding, as we explain below. (at 12–15)

- 3.85 Accordingly, in assessing whether access would promote a material increase in competition in a dependent market, the Council may appropriately define that market at different points in time, to account for changes in technology and/or market conditions.
- 3.86 Alternatively, changes in market conditions may not result in a changing definition of a dependent market, but may nonetheless have implications for the competitive conditions in the dependent market and thus have an impact on the criterion (a) assessment. Planned new entry or capital investment in expanded capacity, for example, may increase the alternatives to the use of the service in a dependent market and thus change conditions for competition in that market. These changes may have an impact on the ability of, and incentive for, the service provider to exercise market power to adversely affect competition in the market.
- 3.87 The time horizon adopted by the Council for the criterion (a) assessment will vary from case to case. In its assessment, the Council will account for foreseeable changes in technology and/or market conditions, having regard to the timing and probability of those changes. The Council is less likely to conclude that criterion (a) is satisfied where:
- there are foreseeable changes in conditions such that criterion (a) would no longer be satisfied, and
 - there is a high probability of these changes occurring in the not too distant future.
- 3.88 While there is a time horizon to the assessment of both criteria (a) and (b), the time horizon over which the Council accounts for relevant changes for the two assessments may not necessarily be the same. (The time horizon for the assessment of criterion (b) is discussed at paragraphs 4.50–4.51.)

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

Introduction

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

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

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

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

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

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

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

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

- 4.6 The Council considers that nothing rests on the variation between ‘uneconomical’ in declaration criterion (b) and ‘uneconomic’ in coverage criterion (b). In the [Duke EGP decision](#) (at 58), the Tribunal adopted the reasoning that it used in the [Sydney Airport decision](#) with respect to the meaning of ‘uneconomical’ in declaration criterion (b), in interpreting the term ‘uneconomic’ in the Gas Code’s criterion (b) and stated in relation to the Gas Code that “nothing turns upon this difference in language”²⁴.
- 4.7 The use of the word ‘pipeline’ in the then Gas Code’s coverage criterion (b) (and similarly in s 15(b) of the now National Gas Law) precludes the Council from considering whether a facility other than a pipeline could provide the services provided by the pipeline that is the subject of the application for coverage. In the context of the Gas Code and the National Gas Law, the Council cannot examine, for example, whether liquefying natural gas and then transportation by ship may provide the service of gas transportation provided by the pipeline that is the subject of the application.²⁵ The declaration provisions in s 44G of the [TPA](#) are broader in that they contemplate a consideration of whether other types of facilities could provide the service provided by the facility that is the subject of the application for declaration. In this sense, criterion (b) is technology neutral.

‘uneconomical’

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

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

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

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

²⁴ At 58.

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

- 4.10 In the [Sydney Airport decision](#), the Tribunal confirmed that ‘uneconomical’ should be construed in a social cost-benefit sense rather than in terms of private or commercial interests:

... The Tribunal considers ... that the uneconomical to develop test should be construed in terms of the associated costs and benefits of development for society as a whole. Such an interpretation is consistent with the underlying intent of the legislation, as expressed in the second reading speech of the Competition Policy Reform Bill, which is directed to securing access to ‘certain essential facilities of national significance’. This language and these concepts are repeated in the statute. This language does not suggest that the intention is only to consider a narrow accounting view of ‘uneconomic’ or simply issues of profitability.

... If ‘uneconomical’ is interpreted in a private sense than the practical effect would often be to frustrate the underlying intent of the Act. This is because economies of scope may allow an incumbent, seeking to deny access to a potential entrant, to develop another facility whilst raising an insuperable barrier to entry to new players (a defining feature of a bottleneck). The use of the calculus of social cost benefit, however, ameliorates this problem by ensuring the total costs and benefits of developing another facility are brought to account. ... (at 204 - 205).

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

Natural monopoly

- 4.12 As acknowledged in the [Hilmer Report](#), it can be difficult to define a ‘natural monopoly’ with any precision. For the purposes of criterion (b), defining a test for natural monopoly that can be applied to all (or at least most) cases to produce accurate results, without introducing unnecessary technicality and complexity, is fraught with difficulty. This is the challenge faced by the Council and other parties responsible for considering criterion (b).
- 4.13 The traditional approach to natural monopoly was to classify certain industries, particularly public utilities, as being natural monopolies without particular regard to a theory of natural monopoly. The defining characteristic of such ‘natural monopoly’ industries was thought to be decreasing long run unit costs of production—that is, economies of scale. Whether an industry was a natural monopoly was considered self-evident, given the relatively easily observed presence or absence of scale economies in an industry.
- 4.14 The technical definition of natural monopoly, indicates that a natural monopoly will exist if, over the relevant range of output, any division of each and every level of

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

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

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

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

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

Conditions for the existence of natural monopoly

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

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

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

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

- (a) the size of the initial or start-up investment
- (b) the cost structure of operating the service
- (c) the existence of any other existing facilities that provide the defined service

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

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

- (d) the nature of demand for the service, particularly the dynamic aspects such as growth or otherwise in demand
- (e) the current and maximum potential capacity of the facility
- (f) the particular technology employed to supply a service
- (g) the rate of technological innovation in the industry, and
- (h) the existence of any environmental, planning or other regulations that prevent anyone else from building their own facility.

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

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

- (a) pervasive **economies of scale**, whereby average costs per unit of output decrease as output rises. These may occur if a facility requires large up-front investment, but has relatively low operating costs that vary little as more of the facility's capacity is brought on line. Building and activating a gas or electricity distribution network, for example, involves substantial fixed costs, but the variable costs of sending more gas or current around a network once it is operating are relatively small. Unit costs thus decrease because the initial capital costs are spread over each additional unit of output. Rather than making a competitor develop a second network to compete with the existing network, it makes more economic sense to give that competitor access to the existing network so further economies of scale can be captured.
- (b) **economies of scope**, whereby a facility is able to provide a range of different but complementary products at a lower total cost than that of separate assets providing the products. These may occur in the case of network externalities — that is, where the benefits to consumers of being linked to a network depend on the number of other consumers linked to the network. Airlines, for example, prefer to locate at a single airport in a particular destination to "gain commercial benefits from interconnecting with other services and airlines" ([Sydney Airport decision](#), at 85).
- (c) **incumbency advantages**, natural, economic or technological advantages associated with the initial establishment of a facility.

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

Sustainability of natural monopoly

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

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

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

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

- 4.26 As previously discussed, criterion (b) requires a broad social construction (rather than a commercial view) of 'uneconomical'. While social considerations and private considerations are likely to lead to similar results in many cases, private considerations can sometimes make it commercially viable for another facility to be built even though this would be inefficient if all social costs were considered. Declaration and the application of Part IIIA generally does not prevent these situations. What these provisions seek is to make available the socially optimal sharing alternative.
- 4.27 In these circumstances, it is possible to envisage a case where criterion (b) is satisfied even though competing services exist. Criterion (b) is a test of whether a facility can serve the range of foreseeable demand for the services provided by the facility at less cost than that of two or more facilities. The status of a facility against this test does not change merely because another facility is inefficiently developed.
- 4.28 The extent to which the inefficient development of another facility to provide the same service as provided by the facility subject to declaration constrains the behaviour of the service provider in the dependent markets is a matter relevant to the assessment of criterion (a), not criterion (b). Criterion (b) is concerned only with whether the facility exhibits natural monopoly characteristics, whereas criterion (a) assesses whether access will promote a material increase in competition. Criterion (a) is unlikely to be satisfied where a second inefficient facility has been developed, having a direct impact on the market power of an incumbent and has effectively made the dependent markets competitive.

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

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

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

'another facility to provide the service'

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

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

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

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

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

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

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

- 4.34 The assessment of criterion (b) under the natural monopoly facility approach depends on the economic characteristics of the facility.
- 4.35 To determine whether a facility is a natural monopoly it generally suffices to compare reasonably foreseeable demand for the service for which declaration is sought with the capacity of the facility (where the relevant information is available). If the capacity of the facility is sufficient to meet reasonably foreseeable demand for the service subject to declaration, then the facility is a natural monopoly facility and uneconomical to duplicate, and criterion (b) is satisfied.
- 4.36 If the facility does not have sufficient capacity to meet reasonably foreseeable demand for the service subject to declaration, but would have sufficient capacity following relatively low cost modifications, then the facility is again likely to be a natural monopoly facility and uneconomical to duplicate.
- 4.37 By contrast, if the reasonably foreseeable demand for the service outstrips both the existing capacity and maximum achievable capacity of the facility, then it will likely be economical to develop another facility to provide the service, with the result that criterion (b) will not be satisfied.
- 4.38 Similarly, if another existing facility could be modified at lower cost to meet the additional demand for the service subject to declaration, then it may be economical to develop that other facility to provide the service subject to declaration, with the result that criterion (b) may not be satisfied. The Council’s approach to taking account of other existing facilities in the criterion (b) assessment is discussed at paragraphs 4.40 to 4.47.
- 4.39 In cases where reasonable estimates of demand and capacity are unavailable or are unable to be reliably or accurately determined, then the assessment of criterion (b) must turn to identifying whether the economic characteristics that underpin a natural

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

- 4.40 In assessing whether it is uneconomic to ‘develop’ another facility, it is appropriate to consider the scope to adapt other facilities that already exist. In the [Duke EGP decision](#), the Tribunal stated:

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

- 4.41 The term ‘develop’ is sufficiently broad to encompass modifications or enhancements to existing facilities. If an existing facility does not provide the services provided by the facility subject to declaration, but could economically be modified or expanded to do so, this must be considered in assessing criterion (b).
- 4.42 In assessing criterion (b), therefore, the Council must consider whether it would be uneconomic to develop either new or existing facilities to provide the services of the facility subject to declaration.
- 4.43 Where, however, an existing facility already provides (or could provide with only minor modifications or enhancements) the services provided by the facility subject to declaration, it does not necessarily follow that criterion (b) will not be satisfied. A facility can have natural monopoly characteristics whether or not it is the only one. Private commercial considerations can make it commercially viable to build an additional facility even where an existing facility can service all likely demand and building the additional facility is inefficient and wasteful in terms of the social test to be applied in assessing criterion (b). The existence of another facility that provides (or could provide with modifications or enhancements) the service subject to declaration must be considered in two ways when assessing likely demand for the service for which declaration is sought.
- 4.44 First, a consideration of other existing facilities that could be developed to provide the service subject to declaration may be critical to the outcome of the criterion (b) assessment where the facility subject to declaration would be unable to serve the reasonably foreseeable demand for that service without some modification or augmentation. In these circumstances, the Council would need to consider whether the additional demand for the service could be served at lower cost by modification or augmentation of the other existing facility or by modification or augmentation of the facility subject to declaration. If the former holds, then criterion (b) may not be satisfied.
- 4.45 In the [Duke EGP decision](#), the Tribunal applied criterion (b) in circumstances where foreseeable demand for the services of the pipeline subject to coverage—namely, the Eastern Gas Pipeline—was expected to exceed the current capacity of that pipeline. As a result, the Tribunal considered whether other existing pipelines—namely, the

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

- 4.46 A case-by-case assessment is required to determine whether criterion (b) is satisfied in circumstances where additional demand can be served at lowest cost by modification or augmentation of an existing facility other than the facility subject to declaration. Care must be taken to ensure the assessment does not involve an implicit assumption that the construction of the other existing facility was efficient.
- 4.47 Second, the existence of another facility that provides the service subject to declaration will be relevant to the identification of the reasonably foreseeable range of demand for that service. In these circumstances, the reasonably foreseeable demand for the service subject to declaration is that arising from both the demand that facility for which declaration is sought would serve and the demand the competing facility would be likely to serve.

Meaning of ‘anyone’

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

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

- 4.49 Where it is economical for any party to develop an alternative facility criterion (b) is not met. However, criterion (b) will likely be satisfied if:
- (a) there are overwhelming economies of joint production between the facility subject to declaration and the second facility such that it would only be economical for the provider of the facility subject to declaration to develop the second facility, or

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

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

Time horizon for assessment

- 4.50 Consideration of whether it would be uneconomical for someone to develop another facility to provide the service has temporal elements. The Council recognises that a conclusion that it would be uneconomical for anyone to develop another facility to provide the service may change over time as a result of changes in demand and changes in supply conditions, such as those due to technological change.²⁹
- 4.51 The Council may elect not to recommend declaration of a service if, as a result of predicted and likely changes in demand and supply conditions, criterion (b) would no longer be satisfied during the time horizon for the criterion (b) assessment. The time horizon over which criterion (b) must be satisfied varies from case to case, and is determined with regard to the timing and probability of the foreseeable changes in demand and supply conditions. Where, for example, the service subject to declaration is expected to become contestable in the future as a result of changes in demand and supply conditions, the Council may consider such matters as the investment timetable for competing investment in determining whether contestability will be introduced in the time horizon for the criterion (b) assessment. The Council may determine, therefore, that criterion (b) is not satisfied by reason of a foreseeable change in demand and supply conditions where there is a significant probability of these changes occurring in the not too distant future.

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

5 National significance (criterion (c))

Introduction

- 5.1 Section 44G(2)(c) of the [TPA](#) (criterion (c)) requires that the Council be satisfied that the facility providing the service for which declaration is sought is nationally significant.
- 5.2 The section also provides that national significance is to be determined having regard to:
- (i) the size of the facility, or
 - (ii) the importance of the facility to constitutional trade or commerce, or
 - (iii) the importance of the facility to the national economy.
- 5.3 Criterion (c) is designed to ensure that only those facilities that play a significant role in the national economy fall within the scope of Part IIIA. The Council notes that while declaration is concerned with access to services rather than facilities, criterion (c) relates national significance to the facility providing the service.

Tests of national significance

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

Size

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

Constitutional trade or commerce

- 5.6 Section 44B of the [TPA](#) defines 'constitutional trade or commerce' to mean trade or commerce:
- (a) among the States
 - (b) between Australia and places outside Australia, or
 - (c) between a State and a Territory or between two Territories.

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

Importance to the national economy

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

Examples of national significance assessment

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

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

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

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

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

The Tribunal stated further in the [Virgin Blue decision](#) in regard to Sydney Airport that:

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

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

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

6 Health and safety (criterion (d))

- 6.1 Section 44G(2)(d) of the [TPA](#) (criterion (d)) provides that in order to be declared access to a service must be able to be provided without undue risk to human health or safety.
- 6.2 Under this criterion the Council must be satisfied that access to the service can be provided without undue risk to human health and safety. In considering criterion (d) the Council considers, among other relevant matters, the following issues:
 - (a) whether there is a statutory scheme which will apply to the service in circumstances where access is granted to third parties, and
 - (b) whether the terms and conditions of access can adequately deal with any safety issues.
- 6.3 The rationale for criterion (d) is that declaration should not occur where access or increased access to a service provided by a facility may pose a legitimate risk to human health or safety.
- 6.4 Some facilities require a degree of spare capacity to provide appropriate safety margins (then an appropriate level of spare capacity will need to be maintained and the facility expanded, if necessary, to allow for this). In addition, access to facilities may need to be governed by conduct codes and operational guidelines. For a service to be declared, access must be possible without compromising system and operational integrity, and safe scheduling or timetabling must be feasible.
- 6.5 Criterion (d) does not refer to increased access specifically, but to access generally. If access is being provided, then this should not be automatically construed as evidence that access is being provided safely. The Council must still be satisfied that access or increased access can be provided without undue risk to human health or safety ([Sydney Airport decision](#), at 210–211).
- 6.6 The existence of relevant safety regulations may satisfy criterion (d) where these regulations deal appropriately with any safety issues arising from access to the service provided by the facility.
- 6.7 Alternatively, criterion (d) may be satisfied where the terms and conditions on which access is provided could address any safety concerns raised by access to the service. In considering criterion (d) in the [Sydney Airport decision](#), the Tribunal concluded that the significant potential for accidents of serious dimensions on aprons and surrounding areas could be addressed by including in the terms and conditions for the provision of access to any ramp handler and obligation to satisfy strict safety requirements and a right for SACL to apply appropriate and enforceable sanctions on any operator who breaches that requirement.
- 6.8 The Tribunal stated that s 44G(2)(d), if applied at Sydney International Airport:
 - ... would in practice see the terms and conditions of access for any ramp handler — whether they are agreed by negotiation or determined by

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

- 6.9 Accordingly, if the terms and conditions of access can appropriately address safety concerns, then criterion (d) may be satisfied. The safety requirements and their enforcement may be left to the second stage of the two-stage process of obtaining access to the service - ie the negotiation or arbitration stage.
- 6.10 Declaration applicants are required to provide the Council with a description of how access can be provided, along with details of any risk to human health or safety caused by the proposed method of providing access. Where a service provider seeks to oppose declaration on safety grounds, the provider should supply detailed information to the Council demonstrating that access to the service would be unsafe.

7 Effective access regime (criterion (e))

Introduction

- 7.1 Section 44G(2)(e) of the [TPA](#) (criterion (e)) requires the Council to consider whether access to the service is already subject to an effective access regime. Infrastructure services already covered by an effective access regime cannot be declared under Part IIIA of the [TPA](#).
- 7.2 The main purpose of criterion (e) is to recognise that State or Territory governments may develop industry specific access regimes that comply with the Competition Principles Agreement and for such access regimes to apply to the exclusion of Part IIIA of the [TPA](#).
- 7.3 The [TPA](#) does not define the term ‘effective access regime’. In the [Sydney Airport decision](#), the Tribunal discussed the meaning of the term as follows:
- ... The expression ‘effective access regime’ is not defined in the Act but it is apparent from s 44H(5) that it is a reference to a regime for access to a service or a proposed service established by a State or Territory that is a party to the Competition Principles Agreement which the Commonwealth Minister has decided is an effective access regime for the service or proposed services: ss 44M and 44N. ... (at 217)
- 7.4 Nonetheless, a State or Territory access regime may constitute an effective access regime even if it has not been the subject of a Commonwealth Minister decision or a Commonwealth or private access regime decision regarding its effectiveness. The Explanatory Memorandum to the *Competition Policy Reform Bill 1995*, which enacted Part IIIA, stated:
- An effective access regime could be a regime established under other Commonwealth legislation; for example, the [then] access regime for the Moomba-Sydney gas pipeline. (at 117)
- 7.5 Part IIIA provides guidance on what constitutes an effective access regime implemented by a State or Territory government. In contrast, there is no legislative indication of how to assess the effectiveness of Commonwealth and private access regimes. Commonwealth regimes will generally deal with these issues in the statute and specifically exclude the operation of Part IIIA, but if they do not then the service may be subject to an application for declaration.

Effectiveness of State and Territory access regimes

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

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

- 7.7 Pursuant to s 44G(3), the Council assesses whether a State or Territory regime is effective at the time it considers an application for declaration.³¹ In its assessment, the Council:
- (a) must apply the clause 6 principles
 - (b) must have regard to the objects of Part IIIA, and
 - (c) must, subject to s 44DA of the [TPA](#), not consider any other matters, as per s 44G(3) of the [TPA](#).
- 7.8 Under s 44DA of the [TPA](#) the Council must in applying each individual clause 6 principle, accord each principle the status of a guideline rather than a binding rule. An effective access regime may also contain additional matters that are not inconsistent with the clause 6 principles.
- 7.9 A State or Territory government can remove doubt as to the effectiveness of an access regime it operates (and the availability of declaration in relation to the services the regime applies to) by applying to the Council for certification of the regime. Once certified, a State or Territory regime must be considered effective, with the result that declaration criterion (e) is not satisfied, unless the Council believes the regime or the clause 6 principles have been substantially modified since the certification. If a substantial modification has occurred, then the Council may need to re-examine effectiveness, in accordance with s 44G(4) of the [TPA](#).³²
- 7.10 A State or Territory access regime that is not found to be an effective access regime may nonetheless have implications for the assessment of the ‘promotion of competition’ criterion in s 44G(2)(a) of the [TPA](#). For criterion (a) to be satisfied, the conditions for competition with access or increased access must be an improvement on the conditions for competition without access or increased access. In the Council’s *Application for Declaration of Rail Network Services provided by Freight Australia: Final Recommendation* (December 2001), for example, the Council found that the Victorian rail access regime established by the *Rail Corporations Act 1996* (Vic), although not an effective access regime, nonetheless constrained the market power that Freight Australia would otherwise possess in the dependent market (the bulk freight transport market).
- 7.11 Where a State or Territory access regime is under development at the time a declaration application is being assessed, the service is not already subject to an access regime and so there is no automatic impediment to criterion (e) being satisfied. The Council may, however, take account of a State or Territory access regime that is under development when assessing criterion (a) and criterion (f) and when considering the appropriate duration of any declaration.

³¹ Except where the regime is already certified.

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

Effectiveness of Commonwealth and private regimes

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

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

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

- (a) whether outcomes produced by the regime are efficient
- (b) the legal enforceability of the regime by all interested persons, and
- (c) whether the regime reflects the clause 6 principles.

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

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

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

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

An effective access regime for a substitute service

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

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

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

Introduction

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

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

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

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

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

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

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

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

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

They concluded:

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

- 8.7 The criterion's use of the double negative—requiring satisfaction that access 'would not be contrary to the public interest'—does not constitute an additional positive requirement for satisfaction – ie it is not required that access be in the public interest. Rather, the Council must be satisfied that the overall costs of declaration do not outweigh the benefits of declaring a service or services provided by bottleneck or essential facilities. The extent of these benefits depends on the likely effect of access (or increased access) on competition in the dependent markets (as considered under criterion (a)) and the resultant positive effects on economic efficiency (as identified in the consideration of criterion (f)).
- 8.8 Consideration of criterion (f) must also take into account the nature of the negotiation/arbitration regime that applies to declared services. In particular the provisions of the [TPA](#) that seek to balance the interests of access seekers and service providers and that govern, and in some cases limit, the scope of ACCC determinations of access disputes must be considered. In considering any adverse consequences due to the effect of declaration on a service provider's interests, the Council will consider how the provisions governing arbitration of access disputes would be likely to apply and whether these prevent or limit any potentially adverse public interest consequences.
- 8.9 The Council generally considers that when access results in costs to a service provider that are capable of being compensated for through the conditions of access (notably access terms and prices), such costs of themselves do not lead to declaration being contrary to the public interest. Unless those costs are less than other costs an access seeker would face in achieving access in another way, access will not occur and hence the costs will not arise. Compared to an appropriate counterfactual the overall costs are less and this represents a public interest benefit.

Public interest considerations

Economic efficiency

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

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

- (a) producing at least cost — ie, technical efficiency,
- (b) ensuring services are provided to those who value them most highly — ie, allocative efficiency, and
- (c) preserving incentives for innovation and investment — ie, dynamic efficiency.³³

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

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

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

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

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

³³ The Tribunal considered the meaning of the term 'economic efficiency' in *Re 7-Eleven Stores Pty Ltd* (1994) ATPR ¶141–357. See also, *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at paras 90–91 and 115–116.

8.15 Potential efficiency losses from declaration include:

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

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

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

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

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

Regulatory costs

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

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

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

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

Disruption costs

- 8.23 The Council recognises that the provision of access to a facility may involve some disruption to the operations of the service provider and potentially other parties (such as existing third party users). However, in general terms, disruption costs should be incorporated in access charges or ameliorated through other access terms and conditions and are, therefore, appropriately dealt with at the second stage of the access process where access terms are negotiated or if necessary subject to arbitration.
- 8.24 The [TPA](#) includes a number of provisions to protect service providers. Notably, when the ACCC is making a determination on an access arbitration regarding a declared service, the ACCC:
- does not have to allow access
 - cannot prevent an existing user from obtaining a sufficient amount of the service to meet its current and reasonably anticipated future requirements (which is to be measured at the time of the arbitration)
 - must have regard to the service provider's legitimate business interests
 - cannot make the service provider pay for extensions or interconnections to the facility
 - must, in setting any access price, take into account the need to give a return on investment commensurate with relevant regulatory and commercial risks and must take into account the direct costs of providing access and the economically efficient operation of the facility
 - can make a determination dealing with any matter relating to the dispute
 - must use its best endeavours to resolve the dispute within six months
 - can accept as a party (and therefore submissions from) any person having a sufficient interest in the dispute.
- 8.25 The [TPA](#) also includes provisions allowing the ACCC to terminate an arbitration of a vexatious or trivial dispute.
- 8.26 In the absence of specific reasons why these safeguards are generally ineffective, or would be ineffective in relation to a particular application for declaration, the Council must accept that the [TPA](#) will operate as intended and that the ACCC in undertaking an arbitration and making an access determination (and the Tribunal in conducting a review and 're-arbitrating' a dispute) will act in accordance with these provisions.
- 8.27 Any service provider opposing an application for declaration of a service on the basis of disruption costs should provide clear evidence as to why the protections in the [TPA](#)

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

Investment effects

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

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

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

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

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

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

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

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

Other public interest considerations

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

- (a) ecologically sustainable development
- (b) social welfare and equity considerations, including community service obligations
- (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity
- (d) economic and regional development, including employment and investment growth
- (e) the interests of consumers generally or of a class of consumers
- (f) the competitiveness of Australian businesses, and
- (g) the efficient allocation of resources.

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

Examples of public interest assessment

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

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

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

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

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

9 Develop a facility for part of the service

- 9.1 In deciding whether or not to recommend that a service be declared the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service (s 44F(4)). This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.
- 9.2 The designated Minister must also consider this issue in deciding whether or not to declare a service (s 44H(1)).
- 9.3 In respect of the operation of s 44F(4) the relevant Explanatory Memorandum states:
- [i]f the Council decides that it would be economical for someone to develop a facility that could provide part of the service, it could decline to recommend declaration of the service as defined by the applicant. The applicant could then seek declaration of the service redefined to exclude that part that is economical for someone to provide. (Competition Policy Reform Bill 1995, Explanatory Memorandum at 180)
- 9.4 In the Council's view, while this identifies one course of action open to the Council it is clear from the words used in the Explanatory Memorandum, and the second sentence of s 44F(4), that the Council is not obliged to follow that particular course. The wording of s 44F(4) makes it clear that even if the Council forms the view that part of the service is economical to duplicate, the Council still has a discretion as to whether to recommend declaration. In exercising this discretion the Council will take into account the objects of Part IIIA.

10 Duration of a declaration

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

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

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

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

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

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

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

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

Section 44F: Person may request recommendation

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

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

- (a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and
- (b) must recommend to the designated Minister:
 - (i) that the service be declared; or
 - (ii) that the service not be declared.

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

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

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

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

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

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

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

- (i) the size of the facility; or
- (ii) the importance of the facility to constitutional trade or commerce; or
- (iii) the importance of the facility to the national economy;
- (d) that access to the service can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime;
- (f) that access (or increased access) to the service would not be contrary to the public interest.

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

- (a) must apply the relevant principles set out in that agreement; and
- (b) must not consider any other matters.

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

Appendix B Trade Practices Regulations 1974 (Cth)

— Regulation 6A

Application to Council for declaration recommendation

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

- (a) the applicant's name and, if the applicant is the designated Minister or an organisation, the name and contact details of a contact officer for the Minister or organisation;
- (b) the applicant's address for the delivery of documents, including the notification of any decision of the designated Minister or the Council, relating to the application or the declaration recommendation;
- (c) a description of the service and of the facility used to provide the service;
- (d) the name of the provider, or of each provider, of the service and, if a provider does not own the facility, the name of the owner, or of each owner, of the facility, as the case requires;
- (e) the reason for seeking access (or increased access) to the service;
- (f) a brief description:
 - (i) of how access (or increased access) would promote competition in at least one market (whether or not in Australia), other than the market for the service; and
 - (ii) of the market, or of each of the markets, in which competition would be so promoted;
- (g) the reason why the applicant believes that it would be uneconomical for anyone to develop another facility to provide the service;
- (h) the reason why the facility is of national significance, having regard to the matters set out in paragraph 44G(2)(c) of the Act;
- (i) a description of one or more methods by which access to the service can be provided and details of any risk to human health or safety caused by that method or those methods;
- (j) if the service is already the subject of a regime for access to the service (including an access undertaking):
 - (i) particulars of the regime including details, if any, about when the regime is to end; and
 - (ii) reasons why the regime is not an effective access regime;
- (k) a description of efforts, if any, that have been made to negotiate access to the service

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

Section 44W: Restrictions on access determinations

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

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

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

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

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

- (a) to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and
- (b) to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the second party as compensation for the deprivation.

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

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

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

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

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

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

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

Final determinations

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

- (aa) the objects of this Part;
- (a) the legitimate business interests of the provider, and the provider's investment in the facility;
- (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (c) the interests of all persons who have rights to use the service;
- (d) the direct costs of providing access to the service;
- (e) the value to the provider of extensions whose cost is borne by someone else;
- (ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (g) the economically efficient operation of the facility;
- (h) the pricing principles specified in section 44ZZCA.

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

Interim determinations

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

- (a) a matter referred to in subsection (1);
- (b) any other matter it considers relevant.

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

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

C.11 44XA(1) The Commission must use its best endeavours to make a final determination within:

- (a) the period (the standard period) of 6 months beginning on the day it received notification of the access dispute; or
- (b) if the standard period is extended--that period as extended.

Extensions

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

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

Multiple extensions

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

Publication

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

- (a) stating that it has done so; and
- (b) specifying the day by which it must now use its best endeavours to make a final determination.

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

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

- (a) that regulated access prices should:
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
 - (iii) allow multi-part pricing and price discrimination when it aids efficiency; and

- (iv) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

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



Australian
Competition &
Consumer
Commission

Arbitrations

A guide to resolution of access disputes under
Part IIIA of the *Trade Practices Act 1974*

April 2006



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Commission

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Important notice

This guide is designed to give you basic information; it does not cover the whole of the Trade Practices Act and is not a substitute for professional advice. Moreover, because it avoids legal language wherever possible there may be generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the dispute need to be taken into account when determining how the Act applies to that dispute.

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Abbreviations

ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974</i>
CMT	Case management team
Federal Court	Federal Court of Australia
NCC	National Competition Council
Part IIIA	Part IIIA Access to Services in the <i>Trade Practices Act 1974</i>
Regulations	Trade Practices Regulations 1974
Tribunal	Australian Competition Tribunal

Glossary of terms

Access seeker	A third party who makes a request for access to a service declared under Part IIIA of the Act
Arbitration	Refers to the process of arbitration of an access dispute by the commission under Part IIIA of the Act
Arbitration hearing (or hearing)	The process of conducting the arbitration. A hearing may be conducted in person and/or by way of telephone or closed circuit television. A hearing may be held to receive submissions by oral evidence or for discussing procedural matters or any other purpose
Commission	Refers to those members of the ACCC who are constituted to conduct the arbitration
Conference	A meeting between the parties and one or more commissioners
Declared service	A service (see definition of service) for which a declaration is in operation—see s. 44B of the Act
Final determination	A determination of the commission made pursuant to s. 44V of the Act that is not a draft determination
Hilmer Report	<i>National Competition Policy—Report by the Independent Committee of Inquiry</i> , August 1993, chaired by Mr Fred Hilmer AO
Key infrastructure	Facilities that satisfy the criteria for application of Part IIIA of the Act
Minister	The ‘designated minister’ as defined by s. 44D of the Act to be the Commonwealth minister, unless it is in relation to declaration of a service where the provider is a state or territory body and the state or territory is a party to the competition principles agreement, then the designated minister is the responsible minister of the state/territory
Party	A person who is formally recognised as a party to an arbitration under Part IIIA of the Act—see ss. 44B and 44U of the Act
Provider	The entity that is the owner or operator of the facility that is used (or is to be used) to provide the service (see definition of service)—see s. 44B of the Act

Service	As defined in s. 44B, the term service refers to 'a service provided by means of a facility' and includes the (a) use of an infrastructure facility such as a road or railway line; (b) handling or transporting things such as goods or people; and (c) a communications service or similar service, but excludes matters specified in the Act
Third party	In relation to a service (see definition of service), a person who wants access to the service or wants a change to some aspect of their existing access to the service—see s. 44B

Preface

About these guidelines

Part IIIA of the *Trade Practices Act 1974* (the Act) is a key component of the regulatory framework supporting the development of a competitive environment in markets associated with the operation of key infrastructure facilities. It establishes a regime under which access seekers can obtain access to services provided by owners or operators of key infrastructure facilities. Access may be facilitated under Part IIIA through an access undertaking, certification of a state or territory access regime, or through declaration of the relevant service. The designated minister¹, after consideration of a recommendation by the National Competition Council (NCC), is responsible for determining whether a service should be declared. In the event that an access seeker and provider cannot agree on the terms and conditions of access to a declared service, either party may request the Australian Competition and Consumer Commission (ACCC) to arbitrate the dispute by making a determination.²

There are special features that distinguish access arbitrations from typical commercial arbitrations. Access arbitrations concerning declared services are often characterised by a lack of mutual commercial incentives to reach settlement, particularly where the service is provided by means of infrastructure with natural monopoly characteristics and the access provider would compete with the access seeker in upstream or downstream markets. Moreover, in arbitrating access disputes, the ACCC must reach its determination through the application of specific statutory criteria. These factors typically make access arbitrations more complex than standard commercial arbitrations.

The purpose of this guide is to:

- **explain how the ACCC will exercise its dispute resolution powers under Part IIIA of the Act**
- **highlight particular sections of Part IIIA that impose specific obligations on both the parties to a dispute and the ACCC in arbitrating the dispute.**

¹ The designated minister will generally be the Commonwealth treasurer, except in cases where the infrastructure is owned by a state or a territory government, in which case the designated minister will be the responsible minister of that state or territory.

² The ACCC may also be called on to arbitrate disputes under an access undertaking when that undertaking specifies the ACCC would be responsible for resolving disputes pursuant to that undertaking.

Specifically:

- chapter 1 provides an introduction and overview of Part IIIA
- chapter 2 explains the structure and process which the ACCC will generally follow when arbitrating an access dispute
- chapter 3 discusses how the ACCC conducts arbitration hearings, its powers to seek information, including the use of experts, and more general procedural matters such as improper conduct
- chapter 4 looks at how the ACCC may address issues relating to privacy, confidentiality and disclosure of information and matters of procedural fairness
- chapter 5 outlines the circumstances in which arbitrations can be terminated by either the ACCC or by the parties that notified the dispute
- chapter 6 contains a brief overview of post-determination matters (e.g. review, enforcement and variation of a determination).

Where possible, the relevant sections of Part IIIA are identified in bold throughout the text, such as **[s. 44ZF]** to assist anyone wishing to refer to the legislative provisions for further reference.

At the time of writing this guide (April 2006), the ACCC has not arbitrated an access dispute under Part IIIA. However, the ACCC has arbitrated a number of access disputes in the telecommunications industry under Part XIC of the Act. As a result, the ACCC has developed some expertise in this type of dispute resolution which has informed this guide.

The *Trade Practices Amendment (National Access Regime) Bill 2006* was introduced into parliament on 2 June 2005 and passed the House of Representatives with amendment on 9 February 2006. It contains numerous amendments to Part IIIA, which if passed, will affect some aspects of the arbitration process, such as the proposed publication and backdating of final determinations by the ACCC. The ACCC is monitoring the progress of the draft legislation and will update this guide as necessary to reflect any legislative change.

More generally, the ACCC will regularly review the effectiveness of its arbitration processes and update or publish an addendum to the guide as necessary.

1 Introduction

The national access regime contained in Part IIIA was inserted into the Trade Practices Act in 1995, thereby implementing certain recommendations contained in the report on National Competition Policy (the Hilmer Report). The amendment followed an extensive process of negotiations between Commonwealth, state and territory governments involving public consultations.

1.1 Part IIIA—an overview

Part IIIA establishes a regime of regulatory rights and responsibilities relating to the provision of services that are considered critical to competition in related markets. The regime focuses on third party access to the services provided by a limited class of facilities that have the following distinguishing features:

- natural monopoly characteristics wherein, due to economies of scale or scope, a single facility can satisfy all the demand for its services in a market at lower cost than two or more facilities
- occupation of a strategic position in an industry, so that access to the facility's services is a prerequisite for businesses to be able to compete effectively in markets upstream or downstream of the facility (often referred to as a 'bottleneck' facility)
- being of national significance, having regard to its size and/or importance to interstate or international trade.

Access can only be required under Part IIIA if it would promote competition in at least one other market, and not be contrary to the public interest.

What does Part IIIA cover?

The types of services that may be covered by Part IIIA are typically provided by facilities such as gas transmission and distribution pipelines, electricity transmission and distribution networks, railway tracks, airport facilities, water pipelines, communications networks and certain sea ports. The extent to which specific examples of such facilities meet the requirements of Part IIIA will depend on case by case assessment of individual market circumstances.

There is, however, some limit on the types of matters that the ACCC can arbitrate using Part IIIA. A party cannot notify an access dispute under Part IIIA if the dispute relates to a telecommunications service, but instead must utilise the telecommunications specific provisions under Part XIC of the Act [s. 152CK].

How does Part IIIA work?

There are three components of the national access regime under Part IIIA:

- declaration of a service (under s. 44H)
- access undertakings (under s. 44ZZA)
- declaration that a state or territory access regime is effective (under s. 44N).

Declaration

After considering a recommendation made by the NCC, the minister may choose to declare a service. Declaration of a service establishes a right of a third party to negotiate the terms and conditions of access with the service provider. The terms and conditions of access to a declared service are negotiated between the parties in the first instance. Should the parties be unable to agree on the terms of access, either party may notify the ACCC of an access dispute. The ACCC is then empowered to determine the dispute by making a determination. In making a determination, the ACCC must have regard to matters specified in the Act (see s. 44X). Ministerial declarations (or decisions not to declare) and ACCC determinations can be appealed to the Australian Competition Tribunal (Tribunal). An access determination is able to be enforced in the Federal Court.

Access undertakings

Access providers may give an access undertaking to the ACCC but only where a service is not already declared. An undertaking may specify the terms and conditions on which access will be made available to third parties. An undertaking may provide for the ACCC to resolve disputes that arise under that undertaking. If the ACCC accepts an access undertaking, the service cannot then be declared. An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent. An access undertaking is able to be enforced in the Federal Court.

Certification of an effective state or territory regime

The responsible minister for a state or territory may apply for the NCC to recommend to the Commonwealth minister that existing arrangements under state or territory legislation constitute an effective access regime. A service that is subject to an effective state or territory access regime cannot be declared.

Part IIIA establishes an arbitration framework that can be used to resolve disputes concerning the supply of services that have been 'declared'. The arbitration framework reflects a negotiate/arbitrate model. Where the parties both have an interest in establishing and maintaining a commercial relationship with each other, they will often be able to negotiate access arrangements without recourse to arbitration. However this will not always be the case, particularly where the provider has no commercial incentive to provide reasonable access to the access seeker. In situations where the parties are unable to agree on access arrangements or use consensual dispute resolution processes to assist them, the ACCC can, if requested, step in and arbitrate the dispute.

1.2 Declared services

As a general rule, there is no legal obligation on a firm to supply a service to another firm. Normally an access seeker will negotiate directly with the provider of a service to obtain access. However if these private negotiations are unsuccessful, the access seeker may apply to the NCC to have it recommend to the designated minister that the service be 'declared'.³ The Commonwealth minister (or if relevant a responsible state or territory minister) may also apply to the NCC for such a recommendation. Services provided by the crown in the right of the Commonwealth, states and territories are subject to the provisions of Part IIIA.

Method of declaration

For services to be declared an application must be made to the NCC [s. 44F(1)]. The Trade Practices Regulations specify the information that must be included in the application [r. 6A].

In order to make such a recommendation the NCC must be satisfied that [s. 44G(2)]:

- access would promote competition in another market whether in Australia or not (usually in an upstream or downstream market)
- it would be uneconomical for anyone to develop another facility to provide the service
- the facility to which access is required must be of national significance with regard to its size or importance to interstate or overseas trade or the national economy
- access to the facility can be provided without undue risk to human health or safety
- no other effective access regime is in place in relation to the facility⁴
- access must not be contrary to the public interest.

The NCC cannot recommend a service be declared if it is subject to an access undertaking. Similarly, the minister cannot declare a service that is the subject of an access undertaking.

The NCC must make a recommendation to the minister to either declare or not declare the service [s. 44F(2)(b)].⁵ The designated minister cannot proceed to make a declaration without a recommendation of the NCC.

On receiving a recommendation, the minister must either declare or decide not to declare the service [s. 44H(1)]. In deciding whether to declare a service or not, the minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service [s. 44H(2)].

³ See ss. 44G and 44H of the Act.

⁴ In determining whether an effective access regime is in place the NCC must take into account the principles in the Competition Principles Agreement and any relevant previous ministerial decision that the access regime is effective [ss. 44G(3), (4)]. See also s. 44DA.

⁵ Section 44H(9) of the Act specifies that if the designated minister does not publish within 60 days after receiving the declaration recommendation, it is taken at the end of that 60-day period, that the minister has decided not to declare the service and it is taken that she/he has published that decision.

The minister cannot declare the service unless he or she is satisfied of the same matters as those applied by the NCC (listed above) before making a final decision [s. 44H(4)]. If the minister declares the service, the declaration must specify the duration of the declaration [s. 44H(8)].

The minister is not limited in regard to the grounds on which they make a decision.

Application for review of the minister's decision may be made (by the provider or the person who applied for declaration) to the Australian Competition Tribunal [s. 44K]. Subject to any application for review, the declaration takes effect at a time specified in the declaration, but which cannot be less than 21 days after it is published [s. 44I(1)].

Revocation of declaration

The minister may revoke a declaration, but may not do so without the NCC first making a recommendation to the minister that the declaration be revoked [s. 44J(6)]. To make such a recommendation the NCC must be satisfied that at least one of the criteria in s. 44H(4) no longer applies to the service [s. 44J(2)].

The minister must publish the decision to revoke or not to revoke a declaration [s. 44J(4)] and if the minister decides not to revoke, reasons must be given to the provider for this decision [s. 44J(5)].

1.3 Disputes about access to declared services

If an access seeker and the provider of a declared service are unable to agree on one or more aspects of access to the service, they may:

- seek arbitration of the dispute by the ACCC under Part IIIA and/or
- choose to resolve the dispute through other means, for example private arbitration, mediation, conciliation or expert determination.

If parties reach an agreement in regard to access to a declared service the contract of agreement may be registered with the ACCC under s. 44ZW. The ACCC may decide not to register a contract, but if it so chooses, it must publish its decision. Once registered, the contract then becomes enforceable as if it was an ACCC arbitration determination.

Parties may continue to negotiate the terms of access while the ACCC arbitrates a dispute. Parties are permitted to withdraw notification of an access dispute at any time prior to the ACCC making its final determination.

1.4 What is arbitration?

Arbitration is a process whereby the parties submit their dispute to an arbitrator, who then makes a determination that is binding upon the parties.

Arbitration by the ACCC

Under Part IIIA, the arbitration process commences once the ACCC is notified in writing that an access dispute exists.⁶ However, the ACCC would typically expect that parties would attempt to resolve the dispute prior to notification. In some cases the ACCC may be able to assist the parties reach agreement before a dispute is notified. This may occur by ACCC staff being able to, in certain circumstances, provide some preliminary guidance on the ACCC's likely approach to a particular issue in an arbitration. These matters are discussed in more detail in chapter 2 of this guide.

Where the ACCC is notified of an access dispute, it must make a written determination on access unless it terminates the arbitration under s. 44Y or the notification is withdrawn. The use of the term arbitration refers to the broader dispute resolution process set out in Division 3 of Part IIIA of the Act. The process itself may include hearings and/or written submissions and other inquiries.

A reference to 'arbitration hearing' in the guide refers to a meeting between ACCC commissioners (those members of the ACCC nominated to arbitrate an access dispute who, under Part IIIA, constitute the commission for the purposes of conducting the arbitration) and the parties to the arbitration. A hearing may be conducted by way of telephone, closed circuit television (e.g. video conference facilities) or any other means of communication. A hearing may be held to receive submissions by oral evidence or for discussing procedural matters or any other purpose.

There are three main phases to an arbitration—the preliminary, substantive and determination phases. Although these phases can overlap, it is useful to think of an arbitration in these terms because the tasks undertaken in each phase are qualitatively different.

⁶ The written notification must include the information required by r. 6C of the Trade Practices Regulations. See section 2.1 of this guide for more information.

During the **preliminary** phase of arbitration, the ACCC seeks to ascertain the parties to the dispute, resolve any jurisdictional issues and ensure that the relevant parties have identified the substantive issues in dispute.

The **substantive** phase involves the ACCC shaping the processes relevant to the arbitration and receiving all the relevant information. The ACCC will generally make directions for the parties to follow and seek submissions from the parties before deliberating on the issues in dispute. The ACCC may also seek expert advice on particular matters.

In arbitrating an access dispute, the ACCC does not merely choose between the positions put by each party. The ACCC may take into account any matter that it thinks is relevant. Further, a determination may deal with any matter relating to access by the third party to the service including matters which were not the basis of the notification. The ACCC, however, must take certain matters into account in making a determination. This is discussed more fully in section 2.16. In considering its position on the relevant matters, the ACCC may undertake its own analysis and seek information in addition to that provided by the parties.

The steps, obligations and procedures that are involved in the substantive phase of arbitration are detailed in chapter 2 of this guide.

The **determination** phase of an arbitration involves the ACCC issuing a draft determination for comment by the parties and finally making a determination. The ACCC may terminate the arbitration in certain circumstances without making a determination. These matters are discussed in chapter 5.

1.5 Parties may refer dispute to private arbitration

The parties may also seek to refer the dispute to private arbitration rather than refer the matter to the ACCC. The dispute may still be referred to the ACCC if private arbitration is not successful or if either party does not agree to this approach. Private arbitration or some other dispute resolution mechanism can be conducted contemporaneously with the ACCC determining the dispute. A dispute notification may be withdrawn at any time prior to the making of a final determination.

If private arbitration is successful, the parties may enter into a contract for access in accordance with the resolution. The parties may then submit the contract to the ACCC for registration.

Contract registration

A contract for access between parties cannot be registered unless it meets certain pre-conditions. Registration is only applicable if:

- the contract provides for access to a declared service
- the contract was made after the service was declared
- the parties to the contract are the service provider and a third party
- the provider is a corporation or the third party is a corporation
- access is, or would be, in the course of, or for the purpose of, constitutional trade or commerce [s. 44ZV].

The ACCC may register a contract for access to declared services if all the parties to the contract apply for registration [s. 44ZW(1)]. In deciding whether to register a contract the ACCC must take into account [s. 44ZW(2)]:

- (a) the public interest including interest in competition in markets (whether or not in Australia)
- (b) the interests of all who have rights to use the service to which the contract relates.

If the ACCC decides to register the contract it must enter the names of the parties to the contract, the service to which the contract relates and the date on which the contract was made on the public register [s. 44ZW(1)].

If the ACCC decides not to register a contract it must publish the decision and give the parties reasons for its decision [s. 44ZW(3), (4)]. The parties may apply to the Tribunal within 21 days for a review of the ACCC's decision [s. 44ZX].

The advantage of having a contract registered is that it may be enforced as if it were a determination of the ACCC [s. 44ZY(a)]. However, the contract cannot be enforced by any other means [s. 44ZY(b)], such as through the enforcement of private contractual rights arising under the agreement.

1.6 ACCC suggests alternative dispute resolution mechanisms

Should parties notify the dispute to the commission, it has no powers under Part IIIA to order or give directions requiring a party to attend mediation or conciliation. However, at any time after the ACCC is notified that a dispute exists, the commission may suggest to parties that they consider alternative dispute resolution mechanisms if it considers that this will facilitate the resolution of the dispute.

Other contractual arrangements

In some cases, contractual arrangements between the parties may provide for a dispute resolution process. The contract may provide that the dispute resolution process is supplementary to any other avenues available to the parties. Alternatively, it may provide that the parties cannot use alternative avenues of dispute resolution until they have completed the process set out in the agreement.

The commission cannot require a party to attend conciliation or mediation hearings in accordance with the process set out in a contract. Moreover, once a dispute is notified and the commission has jurisdiction to arbitrate the matter, the commission must make a determination unless the matter is terminated or withdrawn.

Mediation

As indicated above, Part IIIA does not confer any powers on the commission to order that the parties participate in a formal mediation process. Accordingly, the commission has no powers in regard to mediation of the dispute and would not mediate the dispute, although it may recommend mediation.

Mediation is a consensual approach, whereby the mediator seeks to facilitate agreement between the parties. Mediation usually has the following characteristics:

- commitment by the parties to participate in the mediation in good faith
- agreement that the contents of the mediation remain confidential
- the ability for private ‘conferencing’ to occur between the mediator and any party
- agreement to embody the outcome of the mediation in an enforceable contract between the parties.

Parties are encouraged to attempt to reach a negotiated outcome at any time, even while the commission is conducting an arbitration. If, for instance, the parties to the arbitration agree to attend mediation and advise the commission that they wish to suspend the arbitration, the commission may agree to a suspension until:

- a specific time limit elapses
- the parties (or a party) advise the commission that they wish to reactivate the arbitration process.

The commission is unlikely to delay the resumption of the arbitration because a specified time limit has not elapsed where it is clear that mediation is no longer favoured by a party.

Referral of a matter to an expert

The parties may agree to refer particular issues to an expert for an opinion. This is a consensual process whereby the parties would ask an expert to express a view on particular issues.

Referral of a matter to an expert could enable the more timely resolution of particular issues outside the scope of the ACCC’s traditional area of expertise (e.g. technical issues). Additionally, the use of a less formal mode of gathering information, without the need to strictly observe the requirements of procedural fairness, may enable the expert to complete the task more quickly than would otherwise be the case.

Typically the referral of matters to an expert would be contained in a resolution contract between the parties. This contract would set out:

- the issues requiring expert determination
- whether the determination was binding or non-binding
- whether the determination would include reasons
- agreement that there will be no appeal from the determination.

The expert's opinion would not bind the commission, but the commission would take into account the findings.

Sequencing

Every opportunity will be given to the parties to conclude commercial negotiations, or engage in alternative dispute resolution processes for particular issues. If the resolution of particular issues is necessary before other issues can be resolved, then it may be necessary for the commission to defer consideration of those issues pending an outcome and continue the arbitration in respect of other outstanding matters.

The fact that the commission is arbitrating particular issues should not prevent or deter the parties from seeking to resolve the dispute themselves. In some cases, the commission would expect that commercial negotiation, mediation and other processes will continue in parallel with an arbitration rather than being treated as mutually exclusive.

The remainder of the guide deals with the process and the matters that the ACCC will generally consider when arbitrating an access dispute.

2 Structure and process of an arbitration

This chapter provides a guide to the structure and process of an arbitration which the ACCC may follow in resolving access disputes under Part IIIA of the Act.

The broad structure of arbitration encompasses three stages:

- notification (i.e. preliminary phase of arbitration)
- procedure and submissions (i.e. substantive phase)
- arbitration and decision (i.e. determination phase).⁷

A flow chart showing the structure and process of dispute resolution is presented in figure 1.

Each arbitration process is likely to be different. Accordingly, the ACCC does not adhere to and is not obliged to adhere to any particular structure or process for conducting an arbitration. This, to some extent, can be determined between the parties and the commission having regard to the matters in dispute and the perceived best means of resolving them. For this reason, the flow chart provides only a general guide as to how an arbitration is likely to be conducted.

⁷ An overview of the three phases of arbitration is presented in chapter 1 of this guide.

Figure 1 Structure and process of dispute resolution system (a guide only)

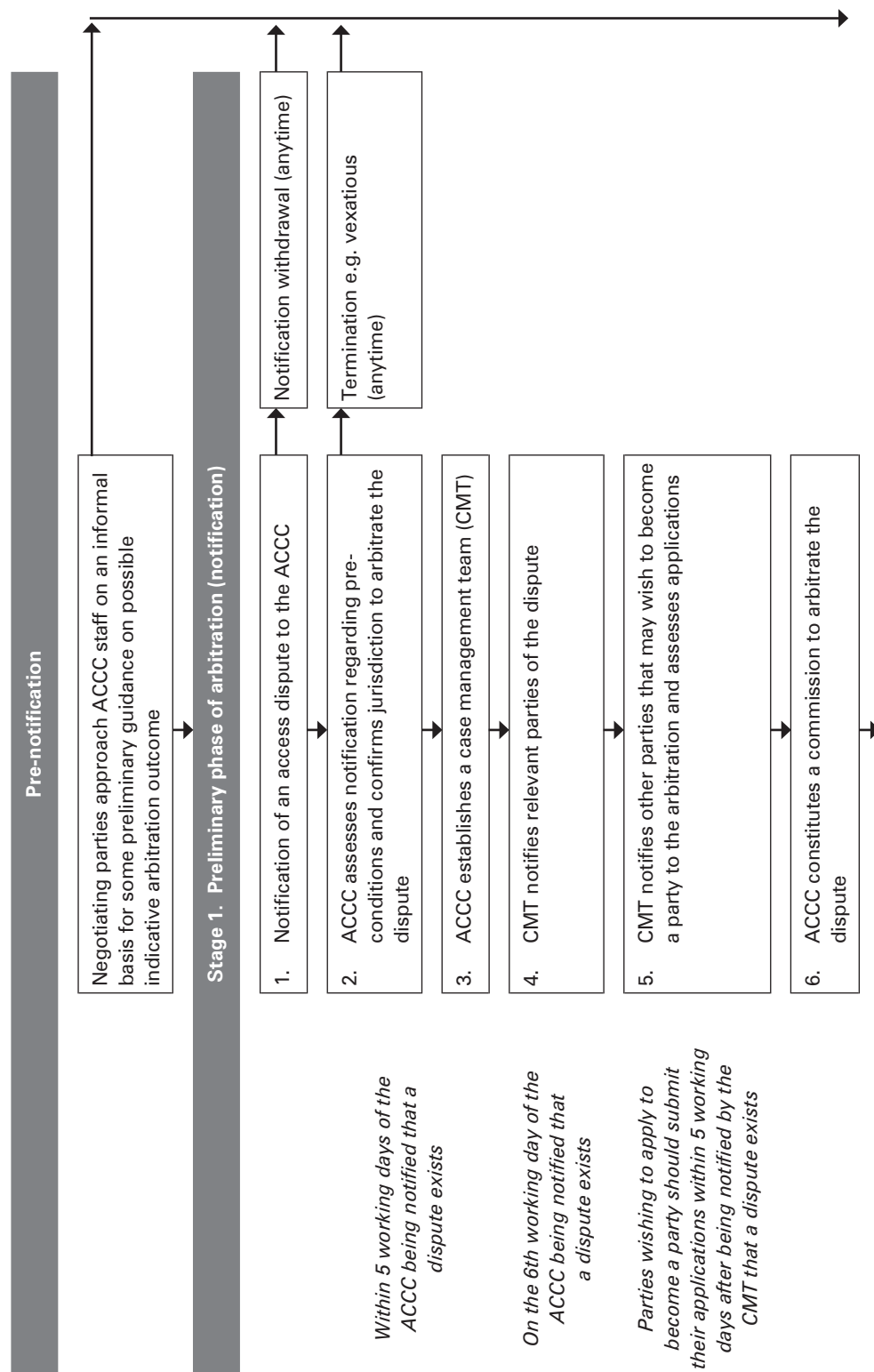


Figure 1 **Structure and process of dispute resolution system (a guide only) (cont'd)**

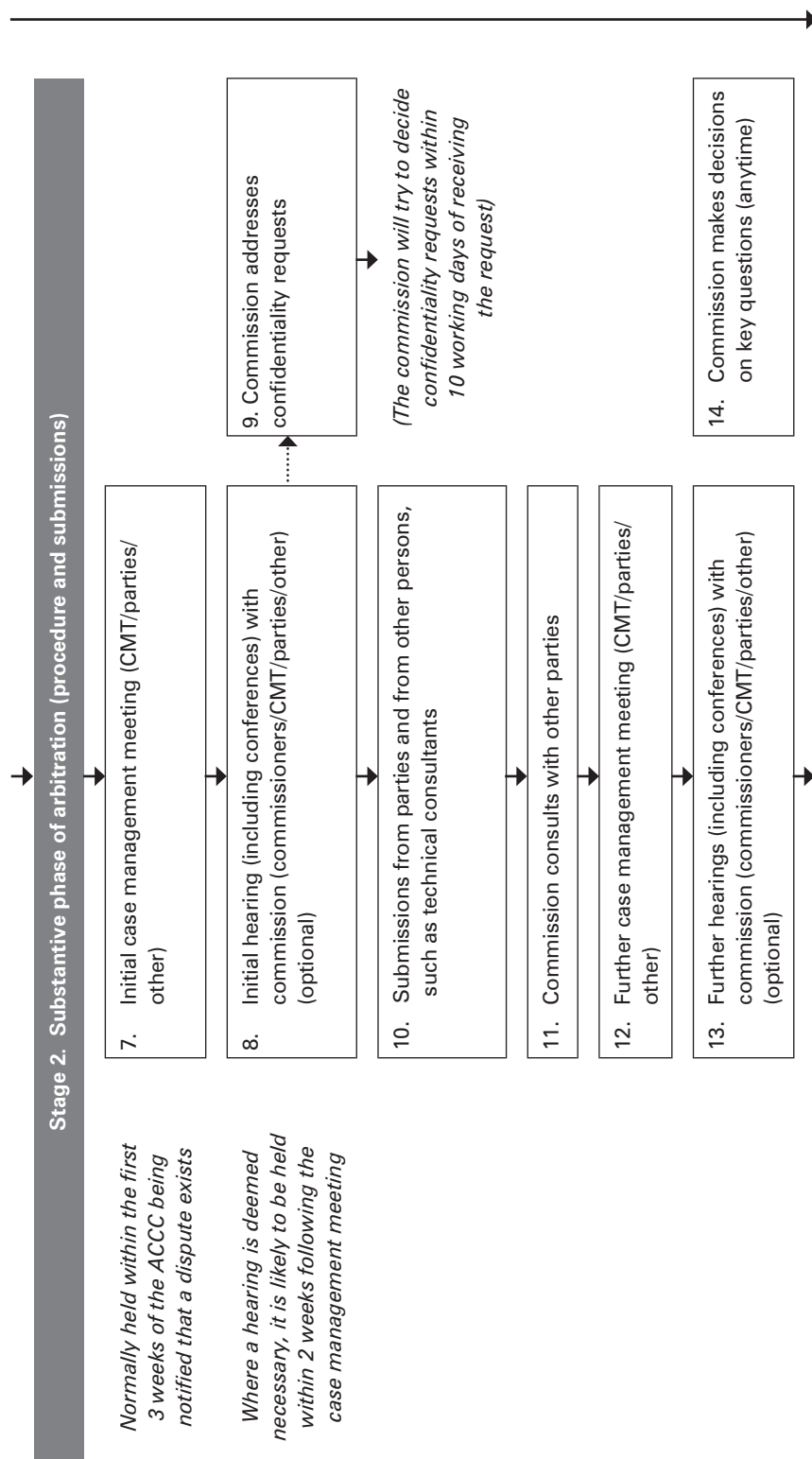
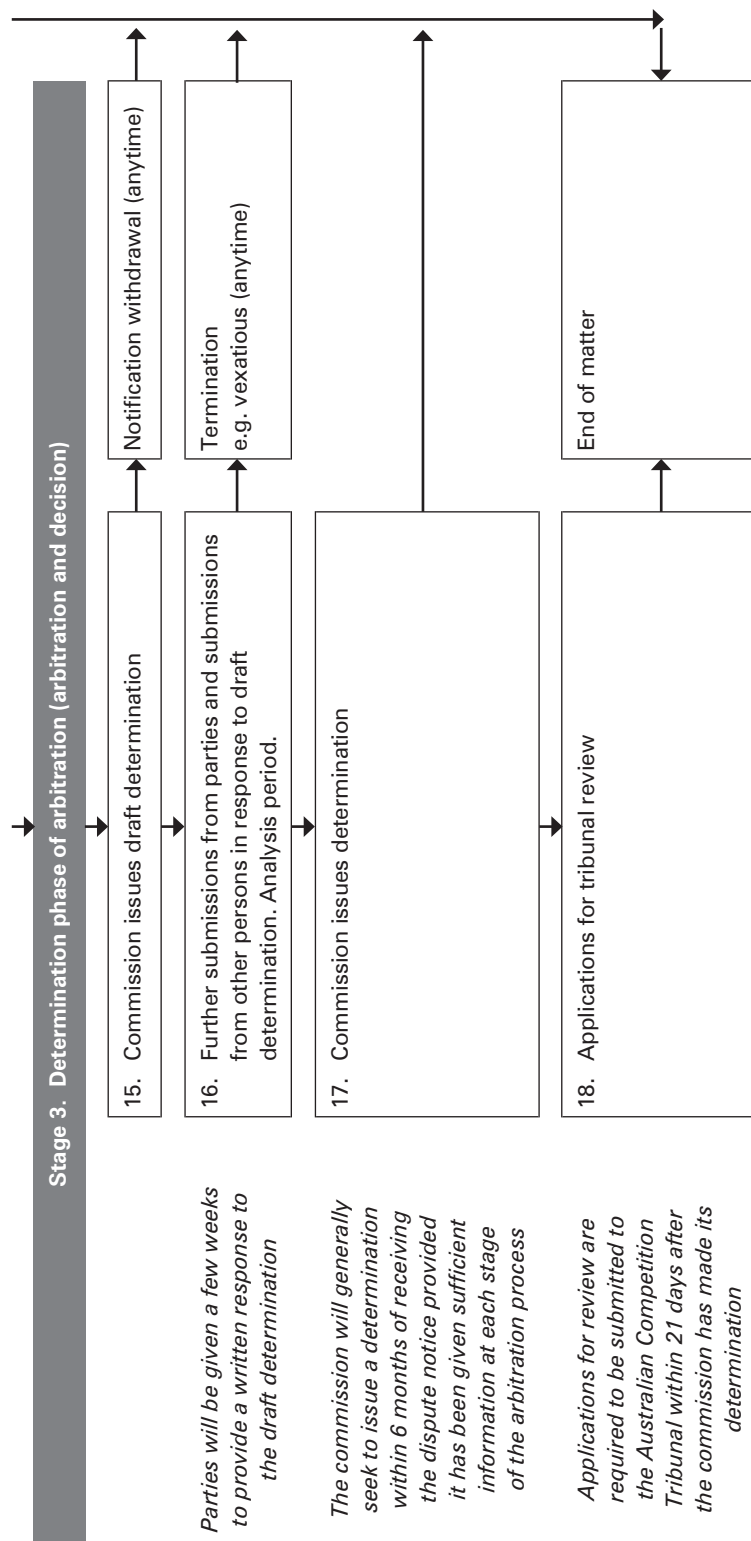


Figure 1 Structure and process of dispute resolution system (a guide only) (cont'd)



Pre-notification

2.1 Preliminary guidance

The ACCC may be of assistance to the negotiating parties before a dispute is notified by improving the level and quality of information available to them.

In certain circumstances, some preliminary guidance from ACCC staff may be provided to assist parties to reach a negotiated settlement. Guidance may relate to encouraging the parties to narrow their scope of disagreement and/or referring parties to publicly available information on cases which the ACCC has previously dealt with same or similar issues. In general, staff would only be able to provide such guidance where there would be no obvious reason why the ACCC would decide the matter differently in the context of the current dispute.

Preliminary guidance would be provided by ACCC staff only, and would not represent the view of the commission as arbitrator. Such guidance is provided on the basis that it is accepted as a non-binding and informal opinion by ACCC staff.

Provision of preliminary guidance by ACCC staff would not preclude either party from notifying a dispute at any time and would not prevent the ACCC from arbitrating a dispute.

Preliminary phase of arbitration (notification)

2.2 Notification of an access dispute to the ACCC

Either a prospective user of a service or the service provider may notify the ACCC of an access dispute if they are unable to agree on terms and conditions for access.

Section 44S of Part IIIA of the Act and the Regulations (r. 6C) set out matters that must be addressed in an access dispute notification.

In summary, the ACCC requires that [s. 44S]:

- notification of an access dispute be provided in written form [s. 44S(1)]
- either the service provider or the third party are a corporation or access is or would be in the course of constitutional trade or commerce [s. 44R]
- the third party is 'unable to agree' with the provider on one or more aspects of access to the declared service [s. 44S(1)]
- the notification includes the following necessary information:
 - the name of the person notifying the dispute (the notifier)
 - the notifier's address for delivery of documents
 - whether the notifier is the service provider or third party and the name and particulars of the other party to the dispute
- a short description of the notifier's existing and anticipated business
- a description of the service and the facility used to provide the service
 - a description of the access dispute
 - whether the dispute is about the varying of existing access arrangements and, if so, a description of those arrangements
 - each aspect of the access to the service on which the parties to the dispute are able to agree
 - each aspect of the access to the service on which the parties to the dispute are not able to agree.
- a description of efforts, if any, to resolve the dispute
- particulars of existing users and those with rights to use the service, and a brief description of how access may affect these other users
- whether access would involve extending the facility
- an estimate or description of the direct costs of providing access to the service and who will bear those costs
- whether access will involve the third party becoming the owner of any part or extension of the facility
- description of one or more methods by which access to the service can be provided and details of any risk to human health or safety caused by that method
- if the notifier is the third party, a short description of the benefits from allowing access to the service or increased access to the service. [r. 6C(1)].⁸

Regulation 6C(2) requires that the notifier pay the ACCC a notification fee of \$2750.

These requirements are set out in template form at appendix A to assist the notifier in preparing a letter and an accompanying dispute notice to send to the ACCC advising it that an access dispute exists for the purposes of arbitrating the dispute.

⁸ The notifier will not necessarily have full knowledge of some these matters. Accordingly, in respect of some of these matters, the regulations only require that details be provided to the best of the notifier's knowledge.

2.3 ACCC assesses notification regarding pre-conditions and confirms jurisdiction to arbitrate the dispute

Notification, pre-conditions

Before the ACCC can accept notification of an access dispute certain threshold requirements must be satisfied. These are:

- the provider of the service is a corporation
- the access seeker (called the 'third party' in the Act) is a corporation
- access is or would be in the course of or for the purposes of constitutional trade or commerce [s. 44R]
- the third party is 'unable to agree' with the provider on one or more aspects of access to the declared service [s. 44S(1)].

Once it receives the notification, the ACCC will assess whether these pre-conditions have been satisfied, and if so, it will accept the notification of an access dispute provided under s. 44S. The parties will be advised if any of these pre-conditions are not satisfied.

Unable to agree

A party may notify a dispute even where a contract for access already exists between the access seeker and the provider. Some contracts will have dispute resolution clauses. When parties have not used a dispute resolution process established by contract, the ACCC will likely ask the parties why not and whether that process would help resolve the dispute.

Nevertheless, the person notifying the dispute must provide information that suggests that the parties have been unable to reach agreement about one or more matters related to access to the declared service. For example, this information may show that a party has sought to vary the contract and that the other party has refused the request or refused to negotiate; or that the agreement was only a partial or conditional agreement.

By way of guidance, the ACCC sets out the following rule of thumb for use in considering whether the access seeker and access provider are unable to agree:

- either the access seeker or the access provider must have made a request of the other party, or put a proposal to the other party
- that the other party must have refused the request or rejected the proposal. The refusal may be an explicit refusal or a constructive refusal (e.g. where the other party has not responded to the request or proposal within a reasonable time).

Where there is insufficient information in the notification for the ACCC to be satisfied that the access seeker and access provider have been unable to agree, the ACCC will write to the relevant party seeking additional information and will generally advise the other party that it has done so. In some instances, but not all, it may seek the views of both parties before reaching a conclusion on the 'unable to agree' issue.

Regulation 6C(1)(g) requires the party notifying a dispute to provide a description of the efforts made to resolve the dispute.

The ACCC may terminate an arbitration if it thinks the notification is vexatious, the matter is trivial, misconceived or lacking in substance or the party that notified the dispute has not engaged in negotiations in good faith [s. 44Y]. Chapter 5 of this guide provides further information on the circumstances in which an arbitration can be terminated.

ACCC jurisdiction and objections

Upon receiving the notification, the ACCC will examine it to see whether the pre-conditions appear to have been met. If so, the ACCC will generally assume jurisdiction. This would normally occur within the first five working days of the ACCC being notified of the dispute. That said, at the outset the ACCC will generally ask the parties whether there is any objection to the ACCC's jurisdiction, and it is at this time that any objections should be raised. This issue may be discussed during the initial case management meeting.

2.4 ACCC establishes case management team (CMT)

Once the ACCC has assumed jurisdiction, it will establish a case management team (CMT) for the dispute. Although the constitution of the team will be determined on a case by case basis, it is likely to include at least two ACCC staff, one of whom is from the relevant line area within the ACCC, and the other from the ACCC's Legal Group.

The commission arbitrating the dispute may engage an expert to advise on any matter relevant to the dispute [ss. 44ZF(1)(c), 44ZG(1)(e)]. However, the role of the expert is to assist the commission with the evidence and not to resolve the dispute through expert determination. More information about the use of experts in an arbitration is provided in chapter 3 of this guide.

2.5 CMT notifies relevant parties of the dispute

The CMT will give written notice of the access dispute to the access provider (if the access seeker notified the access dispute) or the access seeker (if the access provider notified the access dispute). This would normally occur around the sixth working day following the ACCC receiving the dispute notification.

2.6 CMT notifies other parties that may wish to become a party to the arbitration and assesses applications

The CMT will also notify persons whom it thinks might want to become a party to arbitration after receiving notice of an access dispute [s. 44S].

Any person who is not the access provider or access seeker who wishes to become a party should send a written application to the ACCC within five working days after being notified by the CMT.

The provider and access seeker automatically become parties to the arbitration. Whereas a party that applies in writing to the ACCC to become a party has no automatic right to become a party. If the applicant has demonstrated a 'sufficient interest', then the applicant will also become a party to the arbitration [s. 44U].

However, once notified, there is no obligation on the person to apply to become a party and the person must make an application to become a party in the required way. All applicants must satisfy the test of sufficient interest, which is discussed more fully in the next section.

There may be persons who do not want to become a party to the arbitration or who would not pass the sufficient interest test required to become a party. However, it is not always necessary to be a party to the arbitration to express views about the issues. The commission is required to take into account a range of specific matters including the public interest and the interest of all persons who have rights to use the service [s. 44X(1)]. The commission may also take into account any other matters that it thinks are relevant [s. 44X(2)].

The commission may consult more widely than the actual parties to the arbitration, including, in some cases, calling for public submissions as part of the conduct of the arbitration. The commission can take issues raised by those persons into consideration when determining a dispute.

A person may wish to be joined as a party because under Part IIIA certain rights are conferred on parties. For example, only a party to the arbitration can attend and present their case at an arbitration hearing. Further, only a party to an arbitration can seek review of a commission determination by the tribunal.

Parties to an arbitration—sufficient interest

In the context of dispute arbitration under the Act, the ACCC understands the expression 'sufficient interest' to mean 'sufficient interest in the determination(s) to be made in the arbitration'. Typically, the determination(s) will create rights and obligations between two persons in relation to supply of the declared service. The person seeking to become a party will need to demonstrate that it has a sufficient interest in those arrangements.

The expression 'sufficient interest' is not defined in the Act. The tribunal has been called upon to consider the meaning of the phrase in the context of reviewing two arbitration determinations made under Part XIC.⁹ There, the tribunal drew a distinction between an interest that was 'direct and immediate' and an interest which was 'indirect'. In the tribunal's view (below), an indirect interest could not be characterised as a sufficient interest:

The effect of the Tribunal's determination, even if it does establish a benchmark for the pricing of the declared services will be an indirect one in common with consequential effect that the price of access to the declared services is likely to have on a wide range of intermediate and end-users of carriage services. Macquarie, like all those other users has an interest, but we do not think the interest is a "sufficient interest" for the purpose of Part XIC. If it were, intervention by numerous users of other carriage services and services supplied by means of carriage services would be permissible under s. 152CO.

⁹ *Telstra Corporation Ltd* [2001] ACompT 1; (2001) ATPR 41-812

This cannot be the intention of the Act, as to allow the intervention by numerous people would frustrate the arbitration process envisaged by Part XIC, including the object of protecting commercially sensitive information to be achieved by requiring hearings to be in private under s. 152CZ, and for the arbitration procedure to be expeditious: see s. 152DB.¹⁰

The distinction drawn by the tribunal between direct and indirect effects is one that the ACCC has previously used and will continue to use in determining who may be a party.

On the basis of the tribunal's decision, it can be said that the precedent effect of a determination in itself is generally not enough to prove sufficient interest. Something more is required. In the above instance, the extensive assistance provided by Optus in the cost modelling work, which was a central issue in dispute before the tribunal, was held to be one of the factors that provided a basis for accepting that Optus had a sufficient interest in the matter.¹¹

In addition, the ACCC may accept that a person has a sufficient interest if it considers that the person's interests may be directly affected if, for instance:

- the person is contractually bound to take a price that would be determined in the arbitration
- the person has agreed to acquire a controlling interest in one of the parties to the arbitration.

Although the precedent effect or commonality of issues may not always provide a basis for making a person a party to an arbitration, in appropriate cases it may provide grounds for initiating a separate arbitration.

2.7 ACCC constitutes a commission to arbitrate the dispute

The chairperson of the ACCC is required to nominate in writing two or more members of the ACCC to constitute the commission for the purposes of a particular arbitration [s. 44Z]. The ACCC will inform all parties in writing once the commission has been constituted.

The presiding member throughout the arbitration is to be:

- the chairperson [s. 44ZA(1)] or
- a member nominated by the chairperson if the chairperson is not a member of the commission as constituted for the arbitration [s. 44ZA(2)].

If a member of the arbitration stops being a commissioner or for whatever reason becomes unavailable for the purposes of the arbitration, the chairperson must either:

- direct that the remaining member(s) will constitute the commission for the arbitration [s. 44ZB(2)(a)] or
- appoint another member of the commission to the arbitration [s. 44ZB(2)(b)].

¹⁰ *ibid.*, p. 40

¹¹ *ibid.*, p. 24 and 26. The tribunal also noted that what may not be a sufficient interest for one purpose may be so for another.

A newly constituted commission under **s. 44ZB(2)**:

- must continue and finish the arbitration
- may have regard to the records of previous commission proceedings of the arbitration [**s. 44ZB(3)**].

Decisions of the commission

If the commission is constituted by two or more members, any question before the commission is to be decided according to the opinion of the majority of those members, or if the members are evenly divided on the question, according to the opinion of the member who is presiding [**s. 44ZC**].

ACCC staff

While the commission is responsible for making decisions in the arbitration, it is supported by staff drawn from the ACCC's regulatory and legal groups. Staff will generally perform three roles in an arbitration:

- First, some will perform a case management role as part of a team. This is a process role and does not involve staff providing advice to the commission on the merits of the substantive issues in dispute.
- Second, staff will provide advice to the commission and assist it in considering the substantive issues in dispute. This may involve providing oral or written advice to the commission and drafting correspondence. However, the commission will ultimately form its own view on the issues and any relevant considerations to be reflected in the determination and reasons for decision.
- Third, staff may facilitate and encourage conciliation or mediation for particular issues in dispute. However, this may be problematic because of the other roles of staff and therefore, the commission will consider the role of staff in this respect on a case by case basis, in consultation with the parties.

ACCC staff should be the contact point for all enquiries regarding an arbitration.

ACCC correspondence will identify the relevant staff member and contact details. In general, this will be the CMT leader.

Substantive phase of arbitration

2.8 Initial case management meeting

The CMT will contact parties regarding the initial case management meeting. These meetings are likely to be held within three weeks of the ACCC receiving the dispute notification.

These meetings are not initiated or governed by any specific statutory requirement but are conducted at the discretion of the commission and CMT in order to facilitate the arbitration. Accordingly, there will be flexibility in terms of having these meetings, the conduct and procedures adopted at meetings and which parties will be invited to attend.

That said, the commission is required to ensure that arbitrations are managed and conducted in a balanced and transparent manner such that all parties are given a fair and reasonable opportunity to present their case.

In the interests of transparency and procedural fairness, parties will not generally meet and discuss matters that are the subject of the dispute with the commission or ACCC staff outside of these case management meetings.

The CMT will determine the issues to be discussed with parties at the initial case management meeting. These may include:

- identifying the issues in dispute and the respective positions of the access provider and access seeker on those issues
- identifying attempts made by the access provider and access seeker to resolve the dispute, including the use of third party mediation
- whether the access provider or access seeker have any concerns with the ACCC's jurisdiction
- whether the access provider or access seeker have any concerns with the commissioner(s) or staff involved with the conduct of the arbitration
- the approaches that could be used to resolve the dispute—this could involve mediation by a third party, referral to an expert for determination or arbitration by the commission, or a mix of these methods
- consideration of requests received from persons who wish to become parties to the arbitration, and the views of the access provider and access seeker in this regard
- the flow of information between the parties, including proposed confidentiality arrangements
- whether the commission is conducting any other arbitrations or other matters involving the same or similar issues and the views of the parties toward these other matters
- identifying any potential barriers and delays to resolution of the dispute, as well as the skills that are likely to be necessary in order to resolve the dispute.

In organising the case management meeting, the CMT will:

- provide an agenda of the meeting to parties and seek a statement of issues from them in response to the agenda
- consider inviting persons who have applied to become a party to participate in the meeting, and to at least invite such parties to participate in any part of the meeting where their applications are discussed
- invite parties and ensure that their representatives at the meeting are empowered to make decisions regarding issues or process of the arbitration.

People who have applied to become a party to the arbitration will usually be invited to participate in the part of the meeting where their applications are discussed with the parties. Discussion of an application may only take 15–30 minutes and applicants may be given the option of participating by telephone rather than appearing in person. Applicants may also be invited to attend discussions of other items on the agenda.

Within one week of the meeting being held, the CMT will prepare a report on the meeting setting out the substance of the discussions. The report will be provided to the commission and to the parties to the arbitration. An extract of the report dealing with the applications to become a party to the arbitration will also be copied to the parties and to the other interested persons.

2.9 Initial hearing (including conferences) with commission (optional)

Once the initial case management meeting has been held, the commission arbitrating the dispute may decide to hold a hearing with the parties to the arbitration. Whether or not this hearing takes place is at the discretion of the commission hearing the dispute and will be determined by them having regard to the matters in dispute and the perceived best means of resolving them. The commission may also decide to meet with parties in conference, in addition to, or in lieu of these hearings where it thinks such a conference may expedite the dispute resolution process as well as clarify the issues in dispute.

When a hearing is considered necessary, it is likely to be held within two weeks following the case management meeting. The case management meeting report will be the main input for this hearing and is intended to enable the commission to better understand the background to the notification and focus on the issues in dispute, especially what strategies might be used to resolve the dispute.

A hearing may be conducted by telephone or closed circuit television (e.g. video conference facilities) [s. 44ZF(4)] and will be conducted in private, unless the parties agree otherwise [s. 44ZD(1), (2)].

Hearing purpose

The purpose of the initial hearing is for the commission to make decisions on the process issues arising from the initial case management meeting. Generally, the parties to the arbitration will not be invited to provide submissions to the commission between the time of the initial case management meeting and the initial hearing with the commission. This is to ensure that all relevant matters are considered at the case management meeting, with the commission then being in a position to advance those matters at the hearing.

Issues that may be discussed at the hearing include:

- dispute resolution procedures (e.g. whether other dispute resolution options are continuing, or are planned by the parties)
- other applications to become a party to the arbitration
- timeframes for the making of submissions and whether they will be written or oral or both
- information requirements beyond the parties' submissions and how the information will be obtained (e.g. use of independent experts and fees)
- confidentiality arrangements and any other procedural/process issues relevant to the arbitration.

The commission may issue an opinion to the parties on the matters discussed at the hearing.

The commission will wish to ensure that all the persons who will be parties to the arbitration have been identified and are included in the process. People who have made a request to become a party may be invited to attend the hearing in order to discuss the basis for their request. If the commission is not in a position to make a decision on particular requests at the time of the hearing, then those people may be excluded for part of the hearing, with the commission subsequently providing its decision in writing.

Party representation

At an arbitration hearing a party may appear before the commission in person or be represented by someone else [s. 44ZE]. In many cases, the parties will wish to be represented by legal advisers. As a general rule, the commission would prefer parties to approach an arbitration bearing in mind that the objectives of the arbitration are to provide a dispute resolution process that is less formal, more expeditious and less costly than would be the case in legal proceedings.

When holding a hearing with the parties, the commission should seek to ensure the presence of a representative of each party who is authorised to make binding decisions.

Transcript

A full transcript of the hearing will be taken and provided to the parties as soon as practicable afterwards. If a party believes that the transcript is inaccurate in any way, it should provide a submission to the commission (copied to the other party or parties) setting out the areas of inaccuracy, along with suggested changes. This should occur within one week of receipt of the transcript. The commission will arrange for the areas of concern to be checked against the tape recording of the hearing.

2.10 Commission addresses requests for confidentiality

The commission will, at this stage of the process, seek to implement a regime for dealing with requests for confidentiality that would be intended to apply throughout the course of the arbitration (apart from exceptional circumstances). The Act provides a specific regime for the commission's treatment of confidentiality requests by a party, however, there is some scope for flexibility in how this aspect of an arbitration can be dealt with.

Confidentiality and matters regarding the disclosure of information are discussed in chapter 4.

2.11 Submissions from parties and from other persons (such as technical consultants)

The commission will write to parties seeking submissions on the issues identified as being in dispute. Submissions will set out the views or conclusion that the party believes the commission should adopt on particular issues, along with supporting reasons.

The commission will generally issue directions specifying the information that it requires from the parties [s. 44ZG]. When information is likely to be required over the course of an arbitration, the commission may issue several directions. Each party will be required to observe the directions, including any timeframes for the making of submissions. The ACCC may determine the periods that are reasonably necessary for the 'fair and adequate' presentation of the respective cases of the parties [ss. 44ZF(2), 44ZG(1)(a),(f)]. The timing of parties' responses will of course depend on the complexity of the issues under consideration.

Parties will generally be required to provide a copy of their submission to each other party to the arbitration, subject to any confidentiality orders.

The commission may require evidence or argument to be presented in writing and decide the matters on which it will hear oral evidence [s. 44ZF(3)]. However, the ACCC's experience with telecommunications arbitrations is that written submissions have been the primary means by which the commission receives argument from the parties. Detailed written submissions are particularly appropriate in disputes involving:

- complex questions of law
- methodology of calculating costs and/or charges
- analysis of detailed, or large amounts of, information that has been presented into evidence
- resolution of apparent conflicts in the evidence upon which an argument is based (for example, evidence on the availability of capacity or state of competition).

There is a risk that written submissions can delay the arbitration process especially when they are large or become a series of replies to the other party's submissions. Accordingly, in some instances, the commission may direct the parties to make submissions in summary only. The commission may give parties the opportunity to supplement summary submissions at hearings.

The commission may inform itself of any matter relevant to the dispute in any way it thinks appropriate [s. 44ZF(1)(c)]. The commission may seek information:

- voluntarily—that is, with consent of the parties
- by summons issued by the commission [s. 44ZH(2)]
- by conducting its own inquiries
- by referring a matter to an expert for an expert’s report [s. 44ZG(e)].

The commission’s powers to seek information and obtain evidence are discussed in chapter 3 of this guide.

2.12 Commission consults with other parties

The commission may undertake wider consultation when determining an access dispute. The form of consultation adopted by the commission will depend on the circumstances in each case. It should be noted that persons consulted will not become parties to the arbitration, nor will they have any rights to attend or become involved in the arbitration, as only parties to an arbitration have such rights.

More information about the powers of the commission to conduct its own inquiries is provided in section 3.5 of this guide.

2.13 Further case management meeting

It may be appropriate to hold further case management meetings in addition to the initial case management meeting. While the matters addressed at each case management meeting will depend on the case at hand, meetings may be called in order to:

- identify information relevant to matters the commission is deliberating, including claims for confidentiality
- identify and discuss issues that have subsequently emerged
- discuss reasons where major deadlines have been missed
- discuss future steps for progressing the arbitration.

These meetings are intended to ensure that the arbitration process is kept on track. In addition, where new issues arise during the substantive phase, case management meetings may enable the parties to reconsider the scope for mediation and expert determination.

2.14 Further hearings (including conferences) with commission (optional)

Further hearings with commissioners may be held to discuss parties’ views on particular issues where this is likely to be more efficient than the commission receiving written submissions. These can also be used to supplement written submissions. Whether or not this hearing takes place is again at the commission’s discretion.

In deciding whether to hold a hearing, the commission will consider whether there are benefits in getting the parties together to better understand each other's point of view.

To hold a hearing with commissioners, the CMT will:

- contact parties to the dispute
- organise the hearing to be conducted via video conference, telephone or in person
- prepare an agenda and send it to parties for comment/suggestions
- seek to ensure parties have a representative at the hearing who is authorised to make binding decisions on behalf of the company
- ensure a transcript of proceedings is taken.

After the hearing, the CMT will:

- prepare a report outlining the main issues discussed and any resolutions
- acquire commission sign-off on that report
- send the report to parties
- make the transcript available to the parties.

Consistent with section 2.9, the commission may also decide to meet with parties in conference outside of, or in lieu of, these formal hearings where it thinks such conferences may expedite the dispute resolution process as well as assist in clarifying the issues in dispute.

2.15 Commission makes decisions on key questions

Unless the commission terminates an arbitration under s. 44Y, the commission must make a written determination on access by the third party to the service **[s. 44V(1)]**.

It may be possible for the commission to make a decision in relation to a dispute in an 'all-in-one' inclusive manner. Depending on the dispute, however, the commission may, in the course of an arbitration be required to make a number of preliminary decisions that impact on the final determination (for example, deciding on a pricing model). Accordingly, resolution of issues during an arbitration process may be dealt with by the commission making decisions on individual issues in a staged manner throughout the course of the arbitration, which are then consolidated into a final determination.

Determination phase of arbitration

2.16 Commission issues draft determination

Before making a determination, the commission is required to give a draft determination to the parties [s. 44V(4)]. A draft decision is issued only after the commission has given full consideration to the matters in dispute. However, the draft determination is designed to give the parties an opportunity to comment on the draft determination and for the commission to further consider its analysis and position before making its final determination.

In issuing a draft determination, the commission will take into account the same matters as those that it is required to take into account in making a final determination. These are [s. 44X(1),(2)]:

- the legitimate business interests of the provider and its investment in the facility
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of all persons who have rights to use the service
- the direct costs of providing access to the service
- the value to the provider of extensions whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of the facility
- the economically efficient operation of the facility
- any other matters the commission considers to be relevant.

It should be noted that only some of these criteria have been judicially considered, and only in other contexts. Accordingly, in taking these matters into account, it has been necessary for the ACCC to form its own view as to what they mean.

Legitimate business interests and direct costs

The concept of legitimate business interests should be interpreted in a manner consistent with the phrase 'legitimate commercial interests' used elsewhere in the Act. Accordingly, it would cover the access provider's interest in earning a normal commercial return on its investment.

This does not extend to receiving compensation for loss of any 'monopoly profits' that occurs as a result of increased competition.¹²

¹² This is the approach adopted to a similar provision in the telecommunications regulatory framework. In this regard, the Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 provides:

... the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

When considering the legitimate business interests of the access provider in question, the commission may consider what is necessary to maintain those interests. This can provide a basis for assessing whether particular terms and conditions in the determination are necessary (or sufficient) to maintain those interests.

The ACCC has previously discussed its approach to assessing the 'legitimate business interests of the provider' in the access undertakings guidelines (*Access undertakings: a guide to Part IIIA of the Trade Practices Act—Sept 1999*). In these guidelines the ACCC states that its consideration of 'legitimate business interest of the service provider' will focus on commercial considerations of the service provider. Further, in conducting this analysis the ACCC will take into account the provider's obligations to shareholders and other stakeholders, including the need to earn commercial returns on the facility. The ACCC also states that it would aim to ensure that any undertaking provides appropriate incentives for the provider to maintain, improve and invest in the efficient provision of the service.

The ACCC's approach to 'direct costs' in this context has been to rely on the concept as a basis for forming the view that the service provider should not be compensated for any costs (or lost profits) incurred as a consequence of increased competition in an upstream or downstream market.¹³

The public interest

'The public interest' is not defined in the Act. The wording in s. 44X(1)(b), '... the public interest, including the public interest in having competition in markets (whether or not in Australia) ...', is also contained in s. 2.24(e) of the *National Third Party Access Code for Natural Gas Pipeline Systems 1997*. The Supreme Court of Western Australia commented that the notion of public interest in s. 2.24(e) was expressed first in its generality, and then more narrowly as the public interest in having competition in markets. The court suggested that consideration of the public interest would require that regard be had to wider considerations (than just competition in markets).¹⁴

In this regard the ACCC has historically taken a broad interpretation to concepts like public interest (and the more familiar public benefit test). The ACCC has provided a detailed consideration of the concept of public interest in its guide to access undertakings.¹⁵

In that guide the ACCC discussed the approach it would take to considering the 'public interest, including the public interest in having competition in markets (whether or not in Australia)' in the context of considering access undertakings. The ACCC considered that the public interest criterion looked beyond the immediate interests of service providers and potential third party users, exploring the extent to which an undertaking contributes to the improved welfare of other parties and the broader community. In assessing the public interest criterion, the ACCC stated that it would consider concerns raised and identified by the service provider, potential third

13 *Resolution of Telecommunications Access Disputes* guidelines. This is also expressed in the Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996.

14 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd*, 2002, WASCA 231, p. 134.

15 *Access Undertakings—A Guide to Part IIIA of the Trade Practices Act—Sept 1999*.

party users and other interested parties. Further, it would draw on four sources in identifying the issues relevant to assessing the public interest:

- the wording used in Part IIIA itself, which specifies that the commission must have regard to ‘the public interest including the public interest in having competition in markets (whether or not in Australia)’
- the objective of the Trade Practices Act as outlined in s. 2 of the Act ‘... to enhance the welfare of Australians through the promotion of competition and fair trading ...’
- clause 1 (3) of the Competition Principles Agreement which provides a list of matters to be considered in the evaluation of a course of action under the Competition Principles Agreement
- a list of factors recognised by the ACCC and the Australian Competition Tribunal as public benefits for the purposes of the authorisation process.

Interests of persons who have rights to use the declared service

Persons who have rights to use a declared service will, in general, use that service as an input to supply services to end-users. In the ACCC’s view, these persons have an interest in being able to compete for the custom of end-users on the basis of their relative merits. Terms and conditions that favour one or more service providers over others—and thereby distort the competitive process—may prevent this from occurring and consequently harm those interests.

Although s. 44X(1)(c) directs the commission’s attention to those persons who already have rights to use the declared service in question, the commission can also consider the interests of persons who may wish to use that service. Where appropriate, the interests of these persons may be considered under s. 44X(2) as a relevant consideration.

Economically efficient operation of the facility

In the ACCC’s view, the concept of economic efficiency consists of three components:

- **productive efficiency**—the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs
- **allocative efficiency**—the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers
- **dynamic efficiency**—the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The ACCC’s view is that the phrase ‘economically efficient operation’ embodies the concept of economic efficiency as set out above. The commission may also consider general industry efficiency (and benchmarks) in applying this criterion.

To consider this matter in the context of a determination, the commission may consider whether particular terms and conditions enable a facility to be operated in an efficient manner. This may involve, for example, examining whether they allow for the provider supplying the declared service to recover the efficient costs of operating and maintaining the relevant infrastructure.

In general, there is likely to be considerable overlap between the matters that the commission takes into account in considering the interests of end-users and its consideration of this matter.

The operational and technical requirements necessary for the safe and reliable operation of the facility

An access price should not lead to arrangements between access providers and access seekers that will encourage the unsafe or unreliable operation of a facility.

Any other matters the commission considers relevant

The commission may take into account any other matter that it thinks is relevant.

Matters in a determination

A determination (and therefore a draft determination) may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute [s. 44V(2)]. These may include:

- requiring the provider to provide access to the service by the third party
- requiring the third party to accept and pay for access to the service
- specifying the terms and conditions of the third party's access to the service
- requiring the provider to extend the facility
- specifying the extent to which the determination overrides an earlier access determination [s. 44V(2)].

However, a determination does not have to require the provider to provide access to the service by the third party [s. 44V(3)].

When making a determination the commission must give the parties its reasons for the determination [s. 44V(5)]. The commission will usually provide its draft reasons for decision at the time of making its draft determination.

A draft determination does not need to be approved by the full commission (i.e. the ACCC), but is made by decision of the commission as constituted for the arbitration.

Restrictions of a determination

The commission must not make a determination that would have any one of the following effects:

- prevent an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified
- prevent a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements

- deprive any person of a protected contractual right
- result in the access seeker becoming the owner (or one of the owners) of any part of the facility, or extensions of the facility, without the consent of the provider
- require a provider to bear some or all of the costs of extending the facility, or maintaining extensions of the facility [s. 44W(1)].

A determination will have no effect if it contravenes these restrictions.

The first two of these restrictions do not apply to the requirements and rights of the access seeker and provider when the commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the access seeker and provider [s. 44W(2)].

Determination, compensation for loss of pre-notification right

If the commission makes a determination that has the effect of depriving a person (the second person) of a pre-notification right to require the provider to provide access to the declared service to that second person, the determination must also require the access seeker:

- to pay to the second person such amount (if any) as the commission considers is fair compensation for the deprivation
- to reimburse the provider and the Commonwealth for any compensation that the provider or the commonwealth agrees, or is required by a court order, to pay to the second person as compensation for the deprivation [s. 44W(4)].

2.17 Further submissions and analysis period

Following release of the draft determination a period will be provided for the parties to make submissions on the draft and for the commission to undertake further analysis before a final determination is made.

During this period, if the circumstances require, the commission may:

- hold further case management meetings
- make further decisions on key issues
- hold further hearings with the parties
- refer any further matters to experts
- receive any expert reports.

In general, parties will be given an opportunity to comment on any new information or reports obtained by the commission that it proposes to use as a basis for its final decision.

In giving the parties time to comment on the draft decision, the commission will determine a period that will allow the parties a 'fair and adequate' opportunity to present their respective cases [s. 44ZF(2)]. Parties will usually be given a few weeks to provide a submission to the commission in which to respond to the draft determination.

2.18 Commission issues determination

Once the commission has considered and decided upon all the substantive issues, it will make its final determination.

Before making a final determination, the commission will:

- have issued a draft determination for comment [s. 44V(4)]
- ensured that all relevant factual material has been made available to the parties (subject to any confidentiality constraints)
- have considered the factual material and parties' submissions, including those made in response to the draft determination
- have taken into account the matters listed in section 2.16 of this guide
- considered the restrictions on access determinations listed in s. 44W.

The arbitration continues until a final determination is made, unless terminated or the notification is withdrawn prior to that time.

As noted earlier, a determination may deal with any matter relating to access by the access seeker to the declared service, including matters that were not the basis for notification of the dispute [s. 44V(2)].

Although not a requirement of the legislation, the commission would usually limit the duration of a determination to a certain period.

A final determination is made by the commission as constituted for the arbitration.

Upon making a final determination, the commission is required to give the parties to the arbitration its reasons for making the determination [s. 44V(5)].

Part IIIA does not require the commission to publish a determination, but the commission would usually publish some form of statement (e.g. a press release publicly advising that it has made a determination in relation to the dispute).

The time taken by the commission to arbitrate the dispute and its final determination will depend on the nature of the dispute, the complexity of the issue under consideration as well as the conduct of parties in providing necessary information to the commission and to each other in a timely manner throughout the process. Given these factors, the timeframes herein are indicative only. However, the commission will generally seek to make a decision within six months of being notified of the access dispute provided it has been given sufficient information at each stage of the arbitration process, and depending on the time required for submissions.

To assist parties involved in an access dispute, appendix B lists the important milestones that are likely to occur during the ACCC's arbitration process.

Register of determinations

The ACCC is required to maintain a register of determinations which specifies the names of the parties to the determinations, the services to which the determinations relate and the date on which they were made **[s 44ZZL]**. People may request from the ACCC a copy of any document held on that register. A fee of \$1 is payable for each page of the document. A person may also request a certified copy of a document on the register, in which case the fee payable would be \$1 for each page of the document plus \$10 for a certified copy **[rr. 6H, 28]**.

2.19 Applications for tribunal review

A determination takes effect 21 days after it is made if none of the parties to the arbitration apply to the Australian Competition Tribunal for review of the determination **[s. 44ZO(1)]**. For a discussion of tribunal review of determinations, see section 6.1. Further information on post-determination matters generally is presented in chapter 6 of this guide.

3 Conduct of arbitration hearings

3.1 General

The commission will seek to conduct the arbitration process with as little formality as possible. The commission is not a court, nor are arbitrations akin to court proceedings, so many of the formalities associated with court proceedings will generally not be appropriate.

An arbitration may be conducted via written or oral means or a combination of both [s. 44ZF(3)] and may cover:

- meetings with the parties
- written submissions
- hearings with commissioners
- other means used to address particular issues as may be considered appropriate.

An arbitration hearing may be conducted by:

- telephone
- closed circuit television (e.g. video conference facilities)
- any other means of communication as determined by the commission [s. 44ZF(4)].

The commission may sit at any place [s. 44ZG(1)(c)] and adjourn to any time and place [s. 44ZG(1)(d)].

Specifically, in conducting an arbitration, the commission:

- is not bound by technicalities, legal forms, or rules of evidence
- must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute
- may inform itself of any matter relevant to the dispute in any way it thinks appropriate [s. 44ZF(1)].

3.2 Privacy

Arbitrations are generally conducted in private. This means that all information arising out of an arbitration, for example, the parties' written submissions, are not disclosed to anyone outside of the arbitration process.

Generally, only the parties, their advisers, the nominated commissioners and relevant ACCC staff review information arising out of an arbitration (for example, these would be the people who would be present at a hearing with the commission or would review written submissions).

To ensure the private nature of arbitrations, the commission will usually make an order preventing the parties from disclosing arbitration information beyond the arbitration.

Likewise, arbitration hearings are generally held in private, however, the parties may agree that all or part of an arbitration hearing be conducted in public [s. 44ZD(2)]. Courts have noted that privacy is an ordinary incident of an arbitration and can be important to the efficacy of an arbitration.¹⁶

Where a hearing is conducted in private, the presiding member of the commission may give written directions as to the persons who may be present [s. 44ZD(3)]. In doing so, the member must have regard to the wishes of the parties and the need for commercial confidentiality [s. 44ZD(4)]. If necessary, this power may be exercised to exclude certain parties from part of the hearing in order to maintain the commercial confidentiality of information being presented by another party [s. 44ZD(4)].

3.3 Commission—power to give directions

The commission may give a direction for the purposes of arbitrating a dispute [s. 44ZG(1)(a)] and may generally give all such directions and do all such things as are necessary or expedient for the speedy hearing and determination of the access dispute [s. 44ZG(1)(f)].

3.4 Commission—power to establish timeframes

The commission will use its direction making powers noted above to establish timeframes for dealing with disputes in a timely manner. In determining the timeframes for presenting arguments, the commission will determine periods that are reasonably necessary for the ‘fair and adequate’ presentation of the respective cases of the parties [s. 44ZF(2)]. In setting these timeframes, the commission is mindful of its obligation to act as speedily as a proper consideration of the dispute allows.

In doing so, however, it is equally mindful of observing the principles of procedural fairness in terms of giving the parties adequate opportunity to present their respective cases and respond to matters as the situation may require.

The commission will generally give directions and other requirements that set procedural time limits by specifying a particular calendar date. However, consistent with the *Acts Interpretation Act 1901 Cth*, where the last day of a prescribed period falls due on a weekend or public holiday then the next business day would be the due day.

As stated previously, the commission will generally seek to make a decision within six months of being notified of the access dispute, provided it has been given sufficient information at each stage of the arbitration process, and depending on the time required for submissions.

¹⁶ *Eso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

3.5 Commission—power to seek information

In order to consider the issues in dispute, the commission will need information (e.g. information concerning service costs and prices) from the parties and possibly other sources. In some cases, it will be possible to identify the type of information required at the outset, whereas in other cases it may be necessary to ‘resolve’ particular issues in advance before it is clear what information will be required.

For instance, if the arbitration involves determining the price for particular services, it may first be necessary to establish a pricing model (which implements relevant pricing principles). After the pricing model has been built, it would then be necessary to populate the model with relevant data.

In each step the information requirements are likely to be significantly different. The information required to build the pricing model is likely to differ in both qualitative character and the level of detail from that used to populate the model. Moreover, the information required for a subsequent step may depend on the approach adopted at the previous step. For example, the relevant data for the pricing model will be influenced by the level of disaggregation used in the model.

The commission may require the above information, evidence or argument to be presented in writing and may decide on which matters it will receive orally [s. 44ZF(3)]. It may take the oral evidence on oath or affirmation and, for this purpose, a member of the commission may administer an oath or affirmation [s. 44ZH(1)].

The commission may obtain information:

- voluntarily—that is, with consent of the parties
- by summons issued by the commission
- by conducting its own inquiries
- by referring a matter to an expert for an expert’s report.

That said, the commission may inform itself of any matter relevant to the dispute in any way it thinks appropriate [s. 44ZF(1)(c)].

Voluntary

Parties may voluntarily supply information to the commission, or provide information upon the commission’s request. However, the commission will generally issue directions indicating the nature of the information it requires from the parties. Parties may also engage their own experts to produce a report on a particular issue and submit that report to the commission as part of their argument.

Each party will generally be required to provide a copy of the information to all other parties, subject to any confidentiality orders.

Before issuing directions relating to information that the commission requests, the commission will usually ask the parties what they perceive as being the information requirements. This may be done in the context of a case management meeting, a hearing, or by way of written request. It will ultimately be for the commission to determine what information it considers as relevant to determining the matters in dispute.

Summons issued by the commission

The presiding member of the commission may summons a person to appear before the commission to give evidence and to produce documents in an arbitration hearing [ss. 44ZH(2), (3)]. The summons must be served on the person by:

- delivering a copy of the summons to the person personally
- showing the original summons to the person when the copy is delivered to the person [r. 6E(2)].

A person issued with a summons to appear will be required to appear before the commission in an arbitration hearing. A full transcript is made of these hearings. That part of the transcript recording the appearance of the person answering the summons will be provided to that person as soon as practicable.

If a person summoned to provide evidence fails to appear, the commission has the power to hear and determine the arbitration in that person's absence [s. 44ZG(1)(b)].

Commission conducting its own inquiries

When determining an access dispute, the commission may undertake wider consultation rather than confining itself to the direct submissions of the parties. There are two distinct approaches open to the commission in this regard.

One approach is to initiate a wider consultation but in the context of the actual arbitration process hearing and determining the matter. This may be in the form of public-wide or industry-wide consultation, or could be a more selective consultation with certain identified people. The consultation will be confined to matters relevant to the points in dispute and to people the commission thinks may be able to assist with its consideration of the matters. Relevant to this approach is:

- s. 44ZF(1)(c) which provides that in an arbitration hearing the commission may inform itself of any matters relevant to the dispute in any way it thinks appropriate
- s. 44X(1) which details matters the commission must take into account in making a determination, including requiring the commission to consider the public interest and the interests of all persons who have rights to use the service (which may in some cases necessitate wider consultation)
- s. 44X(2) which permits the commission to take into account any matters it thinks relevant and, dependant on what matters the commission considers relevant, may also necessitate wider consultation.

An alternative approach is for the commission to undertake a consultation process in the form of a separate stand alone inquiry, which is conducted outside the actual hearing of the dispute. Some matters may particularly lend themselves to a separate consultation, in particular matters that might have a wider impact or relevance

to matters outside of the arbitration itself. Once the information is gathered and conclusions reached, the work in this separate process can then be incorporated back into the arbitration process if considered appropriate.

The process may be as follows:

- a discussion paper is released outlining the matter under consideration and the particular issues the commission wishes to explore.
- submissions are invited from interested persons, including the parties to the arbitration.
- a draft report is released inviting comment.
- the commission releases a final report setting out its views and supporting reasons.
- the commission will seek submissions from parties to the arbitration about whether the report should be applied to the arbitration.

In practice the form of consultation adopted by the commission will be dependant on the circumstances in each case. It should be noted that persons consulted will not become parties to the arbitration, nor will they have any rights to attend or become involved in the arbitration other than to provide the specific further information required by the commission.

Referral of matter to an expert

In order to better understand particular issues or analyse factual material, it may be necessary to engage the assistance of an expert. Such experts could include economists, accountants, lawyers, or persons experienced in an industry or trade.

Experts appointed by parties

Parties should indicate at the earliest possible time the expert witnesses they propose to use. In the interests of an expeditious resolution of the dispute, the commission may ask the parties to limit themselves to no more than two expert witnesses, with only one expert witness in any one field of expertise.

Where experts are to be used, the parties and experts should note the requirements discussed below which are based on the *Guidelines for Expert Witness Statements in proceedings in the Federal Court of Australia*.

Experts appointed by the commission

For the purpose of arbitrating an access dispute, the commission may refer any matter to an expert and receive the expert's report as evidence [s. 44ZG(1)(e)]. Before referring a matter to an expert, the commission may seek comments from the parties on the terms of reference.

Expert reports

The evidence of an expert should be set out in the form of a report on the following matters:

- the qualifications and experience in support of the expert's expertise
- the questions or issues that the expert has been asked to address
- the factual material considered by the expert
- the assumptions made by the expert
- the process used by the expert to consider those issues (i.e. did it involve industry consultations and if so with whom)
- the expert's conclusions in respect of those issues along with full reasons in support of those conclusions
- where the expert is aware that other persons (including, but not limited to other experts) have expressed conflicting views on those issues, the reasons should explain why the expert believes the other views to be incorrect
- where the expert is of the view that additional information is necessary to resolve particular issues or to provide a firm conclusion, what that information is and how it is relevant to the issues or conclusion
- whether any question or issue falls outside his or her field of expertise.

At the end of the report, the expert should declare that he or she has:

... made all the inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Commission.

The expert should attach to the report or summarise within it:

- all oral and written instructions (original and supplementary) given to the expert that define the scope of the report
- the documents and other materials that the expert has been asked to consider.

Where an expert's report refers to calculations (including those set out in spreadsheets), photographs, plans or other reports, these should be provided along with the report.

In general, where a party provides a copy of the expert's report to the commission, it should provide a copy of the report to all other parties. If, after providing their report, the expert changes views on a material matter (e.g. because the expert has read another expert's report, or the expert receives further information), the change of opinion should be communicated without delay to the commission.

Similarly, where the commission engages an expert, their report will generally be provided to all parties. Where appropriate, the commission will also consider making a draft report of the expert available to the parties so that the expert can take account of, and comment on, the views expressed by parties. In most cases, comments should be provided in writing.

If the commission considers it appropriate, the expert may be required to attend an arbitration hearing or similar forum to answer questions by parties and, or, the commission.

If a party wishes to dispute the capacity or qualification of a person to give an expert opinion, it should give written notice to the other parties and to the commission immediately after it has become aware of the nominated expert. The written notice should set out the grounds upon which it disputes the expert's capacity and qualifications. If the party does not object at that time but waits until later, it may be appropriate for the commission to give less weight to the party's objections.

A party may request confidentiality of any expert reports that it provides to the commission [s. 44ZL]. A party may also request that confidentiality apply to expert reports that it commissioned and that the expert submitted directly to the commission.

A party may also request a confidentiality order be made with respect to expert reports provided by commission appointed experts.

Experts hearing

In cases where there are several experts' reports, the commission may consider it useful to convene a forum¹⁷ for the discussion of relevant issues, particularly where the experts express conflicting conclusions. In these instances, the commission considers it improper for the expert to be given or to accept instructions not to reach agreement with other experts. If the experts cannot reach agreement, they should seek to specify the reasons for the differences between them.¹⁸ This then assists the commission to understand and further refine the areas of difference between the parties.

Experts costs

Each party must meet the costs of engaging its experts. The commission does not have the power to award costs incurred by a party to an arbitration. Where the commission incurs costs in engaging an expert, it may recover those costs only as part of its general costs charge within the limits specified in the Trade Practices Regulations. In some instances, particularly when the parties are unable to reach agreement on a technical issue, the commission may engage an expert, and, with the consent of the parties, allocate the cost of engaging the expert between the parties.

3.6 Improper conduct

The Act prescribes a number of rules that govern the conduct of persons involved in an arbitration. These include rules relating to:

- doing any act or thing that would constitute a contempt of court
- the failure of a party to attend or comply with a commission order
- the failure of a person to answer questions or produce documents
- intimidation.

17 This may be a private forum or, where the issues are being addressed publicly as part of an industry wide process, the forum may be open to members of the public.

18 For instance, at the conclusion of a forum, each expert may be requested to summarise his or her position, whether he or she agrees with the views expressed by the other experts and if not, what he or she perceives as being the areas of difference between him or her and the other experts.

Contempt of court

A person must not do anything in relation to an arbitration that would be a contempt of court if the commission were a court of record [s. 44ZG(2)]. The commission may consider taking action against a person in response to such conduct.

Failure to attend or comply with commission order

In the event that a person is summoned or served with a notice to appear as a witness before the commission, but fails:

- to attend
- to comply with the legitimate requirements of the commission

the commission may continue with the hearing and, or, arbitration and determine the dispute in that person's absence [s. 44ZG(1)(b)].

In addition, it is an offence with a penalty of up to six months imprisonment for a person summonsed to appear as a witness before the commission, who without reasonable excuse:

- fails to attend as required by the summons
- fails to appear and report from day to day unless excused, or released from further attendance, by a member of the commission [s. 44ZI].

Failure to answer questions or produce documents

Similarly, under s. 44ZJ(1), it is an offence with a penalty of up to six months imprisonment for a person appearing as a witness before the commission, without reasonable excuse, to:

- refuse or fail to be sworn or to make an affirmation
- refuse or fail to answer a question that they are required by the commission to answer
- refuse or fail to produce a document required to produce by a properly served summons.

However, s. 44ZJ(2) provides that it is a reasonable excuse for an individual to refuse or fail to answer a question or produce a document on the ground that this might tend to incriminate the individual or to expose the individual to a penalty.

Intimidation

Under s. 44ZK it is an offence with a penalty of up to 12 months imprisonment for a person to:

- threaten, intimidate, or coerce another person
- cause or procure damage, loss, or disadvantage to another person

because that other person:

- proposes to produce, or has produced, documents to the commission
- proposes to appear, or has appeared, as a witness before the commission.

3.7 Joint hearings

Under Part IIIA the ACCC cannot require that two or more disputes be heard jointly. In terms of procedures, if all parties agreed to hear the disputes together, because for instance, one or more matters are common to the disputes, the ACCC may for practical purposes, conduct two or more arbitrations simultaneously. However, the ACCC would still be required to make a separate written determination in respect of each notified dispute.

3.8 Arbitration fees

A notification fee of \$2750 is payable in respect of an access dispute notification [r. 6C(2)].

In addition, the commission may levy fees on parties in relation to arbitrations to cover the costs incurred by the commission in conducting an arbitration [s. 44ZN]. The nature of these fees and the amounts are set out in the regulations [r. 6F]. The fees are as follows:

- a pre-hearing fee payable by the notifier on or before the commencement of the arbitration hearing [r. 6F(3)] of \$2170 if the dispute relates to a variation of an existing determination
- a hearing fee of \$4340 for every day or part thereof [r. 6f(2)(a)] apportioned between the parties appearing at the hearing on that day [r. 6f(4)].

At the hearing, the commission will discuss the hearing fee and will generally invite submissions from parties as to how the fee might be apportioned.

In situations where issues are jointly heard, the commission will generally only charge a single pre-hearing fee and a single daily hearing fee.

4 Confidentiality, disclosure and procedural fairness

The receipt of information is crucial to the ACCC's ability to arbitrate access disputes. Matters of confidentiality, disclosure and use of information are therefore important parts of this process. Matters of procedural fairness will also have an important bearing on the way in which arbitrations are conducted. These issues are discussed below.

4.1 Confidentiality

The Act provides a specific regime for the commission's treatment of confidentiality requests by a party. After considering the request and any objections, the ACCC may decide not to give the information to the other party. A person who receives information of a confidential nature in circumstances of confidence must not make unauthorised use of that information. The information must be of a confidential nature and not be trivial, nonsensical or already in the public domain.¹⁹

In the context of arbitrating a dispute under Part IIIA, the exchange of information between the commission and parties to the arbitration is specifically governed by s. 44ZL, which establishes a regime for the treatment of confidential commercial information.

There is no expressed definition of 'commercial confidential information', however confidential information is generally considered to be facts or knowledge not in the public domain.²⁰

In applying this regime, the commission may disclose or protect as much of a confidential document that it thinks should be disclosed [s. 44ZL(4)] according to the circumstances relevant to that information.

The commission, as standard practice, will give a general confidentiality direction and order to the parties (including their employees, contractors and agents) at an early stage of the arbitration. This general confidentiality direction provides that the recipient must not use or disclose any information obtained from the other party or the commission in the course of the arbitration (other than information in the public domain) except to the extent that the use or disclosure is:

- necessary for the purpose of the arbitration
- required by law (including any rules of a securities exchange)
- permitted by the ACCC or the provider of the information.

In the ACCC's view, issuing this type of direction and order at the commencement of an access dispute contributes to the establishment of an environment in which the parties can more openly discuss issues with each other and the ACCC.

¹⁹ *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31.

²⁰ *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41.

The commission may need to review the form of any confidentiality direction and order at the time of making a determination in relation to an access dispute, and the form of any variation will depend on the circumstances of the access dispute. However, in general the commission will seek to ensure that the confidentiality of information contained in correspondence or submissions exchanged during the arbitration remains protected even after finalisation of the arbitration.

Confidentiality arrangements between the parties

It is important that confidentiality not be an issue in the arbitration and a source of dispute between the parties and therefore a cause of delay. The general confidentiality order will protect the confidentiality of information arising in the arbitration from disclosure beyond the arbitration. The parties, however, may feel the need for further protection of information within the arbitration context. To this end, the commission will encourage the parties to agree on a confidentiality regime that will allow for the free flow of information between the parties beyond the general confidentiality order, if the parties require further protections.

Although there is a specific regime under Part IIIA for dealing with confidentiality requests, the commission prefers that matters of confidentiality be dealt with at an early stage of an arbitration and in a manner that does not require the commission to make decisions about disclosure or non-disclosure of information on a document-by-document basis.

Accordingly, when it is anticipated that there will be confidential information used in an arbitration, it is usually appropriate for the parties to provide and exchange confidentiality undertakings (acceptable to the commission). These undertakings may only allow identified persons from each party (usually consisting of limited internal regulatory personnel and external lawyers) to have access to all the confidential information of the other party. To facilitate this process, the commission has developed a standard form of confidentiality undertaking at appendix C. The commission will, however, consider modified forms of the undertaking to suit particular circumstances.

If the parties are not able to agree on a satisfactory regime for the exchange of information, the Act provides a process for dealing with specific confidentiality requests, and the commission can give directions in relation to such matters.

In some instances, there may be a need for the complete non-disclosure of confidential information (though very limited occasions), in which case, the party seeking such form of protection can make a request under s. 44ZL as discussed below.

Confidentiality requests under s. 44ZL

There are a number of circumstances in which the ACCC may receive confidential commercial information during the course of an access dispute. A party may request that confidentiality applies in respect of expert reports that the party provides to the ACCC or confidentiality apply to expert reports that it commissioned and which the expert submits directly to the commission. A party may also request that confidentiality applies to expert reports provided by commission appointed experts.

The commission may direct a party to provide certain information in relation to a particular access dispute and a party may, in response, indicate that the request relates to information that is confidential commercial information and that it does not want it disclosed to the other party. In either case, there is a specific statutory process for dealing with these situations that may be utilised in the absence of prior agreed approach to confidentiality. A description of the statutory process follows.

- A party claiming confidentiality should inform the commission in writing that a specified part of a document contains confidential commercial information and request that the commission not give a copy of the document to another party [s. 44ZL(1)].
- The party making the request should provide the commission with a submission describing the information over which confidentiality is claimed as comprehensively as possible, setting out the grounds for its request and outlining the form of the proposed decision sought from the commission.

If the information is to be provided orally:

- The CMT may arrange for the information to be provided during a private transcribed meeting with one or more commissioners and staff.
- The party will be provided with a full transcript after the meeting and can identify parts of the transcript that it believes contain confidential commercial information.
- The party can then make a request for confidentiality in relation to identified items in the transcript.

Upon receiving a request for confidentiality, the commission must:

- inform the other parties to the arbitration that the request has been made and of the general nature of the matters to which the relevant information relates
- ask the other parties whether there is any objection to the commission complying with the request (usually within five working days of receiving the request) [s. 44ZL(2)].

In general, this will involve providing those parties with a copy of the requesting party's submission setting out the grounds for the request. Where the party making the request has not described the information in sufficient detail, the commission may supplement the description or ask the requesting party to supplement the description so that the other parties are able to adequately consider the request.

The other party may object to the request for confidentiality. If there is an objection to the commission complying with a request, the party objecting may inform the commission of its objection and of the reasons for it [s. 44ZL(3)], which should be done in writing. The party should also provide the form of any proposed decision sought from the commission. This should usually occur within five working days of receiving the notice of request for confidentiality. The party objecting to confidentiality should also provide a copy of their submission to all the other parties.

If there is an objection to the request for confidentiality, the commission may ask the party making the request to reply to the issues raised by the objection.

The commission must then consider:

- the request
- any objection
- any further submissions that any party has made in relation to the request [s. 44ZL(4)]

and make a decision (usually within 10 working days of receiving the original confidentiality request) on whether or not, or the extent to which, the information should be disclosed to another party.

Other matters relevant to claims of confidentiality

The commission's starting point is generally that disclosing information to all parties will facilitate a more informed decision-making process. By not disclosing relevant information to all parties, the commission is less able to test the veracity of that information and therefore may be entitled to give less weight to that information.

Courts have generally balanced three factors when considering whether it is appropriate to allow access to information. In cases where a party has demonstrated that information is, in fact, confidential commercial information, the commission will have regard to these three factors when assessing a request under s. 44ZL:

- the extent to which disclosure will be likely to harm the legitimate commercial interests of the information provider
- the extent to which non-disclosure will be likely to harm the party who does not have access to the information and therefore is not able to comment on matters affecting its interests
- the extent to which non-disclosure will be likely to hinder the ability of the commission to perform its functions (i.e. in this context, to assess the veracity of the information).

The commission will need to make an assessment on a case by case basis. However, based on prior experience in the telecommunications sector under the equivalent s. 152DK of Part XIC, the following is provided by way of guidance.

Disclosure will cause harm

To establish that disclosure will be likely to cause harm, it is not sufficient to assert that the information is confidential. Rather, it must be shown how the information could be used by that other party and that this would be likely to cause harm to the provider's legitimate commercial interests. The onus of establishing these matters will generally rest with the person making the request.

With respect to information about the costs of commercial operations, generally it will be appropriate to draw a distinction between current (or contemporaneous) information and past (or 'out of date') information. It is less likely that disclosure of past information would cause harm. Also, in general, it will be appropriate to draw

a distinction between situations in which the cost information concerns operations that are similar to those conducted by the party from whom the document is to be withheld. If the information does not concern competing operations, disclosure would be generally less likely to cause harm.

With respect to information concerning the prices at which services are supplied to competitors, in general the commission does not consider that disclosure would be likely to cause harm merely because it would improve the state of knowledge of the party from whom it is to be withheld.

Existing restrictions are inadequate

It should be established that existing restrictions on the use of information (e.g. those set out in the standard confidentiality direction made at the commencement of the arbitration) are insufficient to prevent or minimise the likelihood of harm. In the event that the existing restrictions are insufficient, it may be possible to strengthen them by limiting disclosure to certain internal staff of the party and external advisers, with a prohibition on those persons communicating contents of the documents to other staff. In rare situations, in order to minimise the likelihood of harm, it may be appropriate to limit disclosure to external advisers only. This is the most limited form of disclosure that the commission usually orders.

Whether the information is material

The commission will consider the materiality of the information. Where the information is likely to have a material bearing on the commission's arbitration determination, then the case for providing the document to the party in question will be stronger. This is because non-disclosure is likely to cause greater harm to that party than in other situations. Moreover, limiting disclosure to external advisers could constrain the ability of the party to adequately provide instructions to its advisers and therefore hamper its ability to provide submissions to the commission.

Commission decisions on confidentiality requests

After the commission has considered the request, any objection in relation to the request and any reply submission, it may decide that the document:

- does not contain confidential commercial information
- does contain confidential commercial information, but it is nevertheless appropriate to give other parties a copy of those parts of the document
- does contain confidential commercial information, and it is not appropriate to give other parties a copy of those parts of the document.

If the commission is not satisfied that a document contains confidential commercial information, it will usually decide that the specified part of the document must be disclosed to all parties, on the basis that the usual confidentiality direction and order offers sufficient protection.

If the commission is satisfied that the document contains confidential commercial information, it may decide to direct a modified form of disclosure [s. 44ZL(4)].

The types of disclosure it could direct include:

- an order to disclose the specified part of the document to a limited number of internal representatives of the party, subject to satisfactory confidentiality undertakings
- an order to disclose the specified part of the document to identified external representatives of the party (usually legal advisers and/or technical experts), subject to satisfactory confidentiality undertakings
- a combination of both.

Where the commission orders disclosure subject to confidentiality undertakings, then the people who are entitled to receive the documents would be expected to provide the other party with a confidentiality undertaking in a form acceptable to the parties and commission. Where the commission decides that limited disclosure is appropriate, it can also order a person not to communicate to anyone else specified information that was given to the person in the course of the arbitration unless the person has the commission's consent [s. 44ZG(4)]. In practice, however, the confidentiality undertaking is likely to be sufficient.

Any person who contravenes an order not to disclose information (issued under s. 44ZG(4)) is guilty of an offence punishable on conviction by imprisonment for a term not exceeding six months [s. 44ZG(5)].

The commission may provide confidential information to its own experts, subject to confidentiality undertakings, or pursuant to an order under s. 44ZG.

The commission does not adopt a particular default position in regard to the treatment of information. If a party specifies that a document contains confidential commercial information, then the commission's treatment of that document will depend on the type of document, the nature of the information in the document and the significance of the document to the arbitration along the aforementioned basis.

Confidentiality during consultation with other parties

Section 44ZL establishes a procedure that governs the exchange of information between the commission and parties to the arbitration. As noted earlier, the commission is entitled to inform itself of any matter relevant to the dispute in any way it thinks appropriate [s. 44ZF(1)(c)]. Accordingly, the commission may decide to consult with people other than the parties. This course of action may raise the need for the disclosure of confidential information.

As a matter of practice the commission will alert parties of its decision to conduct wider consultation at the earliest opportunity. It may be that the information necessary to enable meaningful consultation in a wider forum is in the public domain, e.g. the names of the parties, the nature of the service and brief description of the dispute.

Where the consultation would require the disclosure of confidential information, as a general rule, the commission will seek to first advise any party who has provided confidential information and explain the need for and extent of the proposed disclosure. In this regard, the commission has a broad duty to consider whether to

consult with the provider of that information before deciding to disclose it. In making any decision to disclose confidential information, the commission will always try to balance the need for informed decision-making with the need to respect the confidentiality of information and therefore the overall confidence of providers of information to the commission.

4.2 Disclosure and use of information

Disclosure

As noted above, the parties are usually bound by a general confidentiality order that imposes restrictions on the disclosure and use of information arising from an arbitration as well as any specific confidentiality requirements that the commission may impose. The commission will not generally discuss matters in the arbitration with anyone beyond the parties to the arbitration. When there is a need to discuss the arbitration with people other than the parties, such as when the commission may wish to consult more broadly, the commission will generally observe the usual confidentiality obligations.

Specific disclosure obligations on the commission

The commission can be compelled to produce material provided to it during the conduct of an access dispute:

- in response to a request under the *Freedom of Information Act 1988*
- as part of its duty to provide discovery or comply with a notice to produce in proceedings it commences or in proceedings against it
- in response to a subpoena in relation to proceedings between third parties
- in response to statutory disclosure obligations or its obligations as a government body.

Before complying with such requirements the commission will first seek to advise a party who has provided confidential information. However, the commission will not seek to consult with parties in relation to the release of non-confidential information. That said, in circumstances where a party has not requested confidentiality, the commission may consider that the information may be confidential in nature and, accordingly, will seek to clarify this with the provider.

Courts and tribunals understand the need to protect the confidentiality of information where appropriate and the commission can, in consultation with the provider of information, seek to ensure that the disclosure of information is subject to a court-imposed confidentiality regime.

Use of information

Obtained during an arbitration for other commission activities

The commission and its staff are subject to a number of general limitations in respect of the use of information:

- ACCC staff cannot make improper use of information.²¹
- Where information provided under a statutory power is confidential, the commission must comply with any specific statutory restrictions on disclosure.

The commission recognises that it is critical to adopt sound information handling practices to maintain the confidence of all parties to an access dispute. However, if the commission has legitimately obtained information using its powers for one purpose, and that material discloses information relevant to another of its statutory functions, it is under no general duty to disregard the information in the context of that other statutory function.²²

Obtained in other commission activities for use in an arbitration

The commission may receive information relevant to an arbitration in the context of performing other (non-arbitration) responsibilities. This could occur, for example, when assessing an access undertaking proposal.

If the commission wishes to use this information in an arbitration, then the appropriate course of action would usually be to give it to the parties. Before doing so, however, the commission would normally advise the person who provided the information and seek their views on providing the information to the parties.

If the information provider objects, the commission would need to consider whether there are any restrictions on disclosure without the provider's consent. If the commission is restricted in its use of the information, then it would need to consider whether to use its information gathering powers (for example, the summons power under s. 44ZH) to re-obtain the information for the arbitration at hand.

4.3 Procedural fairness

Arbitration will be conducted in accordance with the requirements of procedural fairness (or natural justice).

The precise requirements of procedural fairness, however, will vary and depend on the provisions of Part IIIA and the circumstances of the access dispute.

21 See Public Service Regulations 1999 reg. 2.1, *Crimes Act 1914* s. 70 and the *Privacy Act 1988*.

22 For further information see ACCC, *Collection and Use of Information*, October 2000.

There are two key elements that have a bearing on the manner in which arbitrations are conducted:

- The parties to an arbitration should have a reasonable opportunity to present their case to the commission.
- The arbitrator should be free from bias or the perception of bias.

Reasonable opportunity to present the case

As a starting point, the commission will disclose all relevant matters (subject to confidentiality requests) to parties involved in the arbitration of any access dispute. If the commission receives information from one party without providing other parties with an opportunity to comment on this information, this may impair the ability of other parties to present their case and may affect the weight that the commission ought to give to that information.

All parties to an access dispute should ensure that copies of all submissions and any other information provided to the commission are also provided to all other parties to the dispute. Although the commission is empowered to withhold confidential information from a party, it is likely to use this power sparingly, and only after balancing the extent to which non-disclosure may harm the interests of the party not receiving the information.

The requirements of procedural fairness may apply not only to the substantive issues in dispute, but also to certain process issues. For instance, when the commission is considering establishing a process, or modifying a previously established process, concerning the manner in which the parties present their cases, it will generally seek the views of the parties.

In resolving any procedural issues, the commission must balance a number of competing considerations, including the detriment to the party raising the issue, and the need to act as speedily as a proper consideration of the dispute allows [s. 44ZF(1)(b)].

The requirement for parties to have a reasonable opportunity to present their case is also relevant in setting time frames for the making of submissions. The commission must determine periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties [s. 44ZF(2)]. Likewise, the commission may give directions and do all such things as are necessary or expedient for the speedy hearing and determination of the access dispute [s. 44ZG(1)(f)].

Bias

A further element of procedural fairness is the issue of bias or the perception of bias by the commission. During the preliminary phase of an arbitration, the parties will generally be advised of any interests or involvement commissioners (and assisting staff) hearing the dispute may have in related matters. If a party has any objection to a particular commissioner or staff member taking part in the arbitration, this should be raised in the preliminary phase of the arbitration.

During the arbitration, parties to the dispute will likely be invited by the commission to attend one or more case management meetings (with ACCC staff) and a hearing (with ACCC staff and the commission conducting the arbitration). In the interests of transparency and procedural fairness, parties to the dispute will not generally meet with staff or commissioners outside of these forums to discuss the dispute without at least the knowledge of the other party.

A perception of bias can also arise where public comments are made about issues in dispute. To avoid the perception of bias, the commission does not generally make public comment about an arbitration until the arbitration has been completed, and after the determination for that arbitration has been published—if it is to be published. Likewise, parties will be precluded from making public comment in relation to a dispute.

The parties should be aware that the commission has other regulatory roles concerning key infrastructure services. It will therefore be necessary, from time to time, for the commission to make comment in relation to those roles despite the existence of arbitration disputes.

5 Termination of an arbitration

Arbitration may be terminated by the commission or in certain circumstances withdrawn by a party to the dispute.

5.1 Termination by the commission

The commission may terminate an arbitration at any time without making a determination, if it thinks that [s. 44Y]:

- the notification of the dispute was vexatious
- the subject matter of the dispute is trivial, misconceived or lacking in substance
- the party who notified the dispute has not engaged in negotiations in good faith
- access to the declared service should continue to be governed by an existing contract between the provider and the access seeker
- if the dispute is about varying an existing determination, there is no sufficient reason why the determination should not continue in its present form.

The commission will consider on a case-by-case basis whether a dispute meets any of the above criteria and should be terminated.

The commission may also consider rejecting a dispute notification if it considers the parties have not established that they have been unable to agree in regard to the matter under dispute.

Generally, parties whose interests will be affected by a decision to terminate an arbitration will be notified of the commission's intention to terminate and will be given the opportunity to make submissions as to whether the commission ought to continue with the arbitration.

5.2 Withdrawal of notification by parties

There are certain circumstances under which a party to the dispute may withdraw a notification [s. 44T]. In some cases, the parties may resolve the dispute before it is determined by the commission. In other cases, the parties may decide that they would prefer a negotiated outcome to a determination by the commission, for example where the commission has indicated the likely direction the determination will take.

A notification may be withdrawn by a provider at any time before the commission makes its determination if the provider notified the dispute [s. 44T(1)(a)(i)].

The access seeker may withdraw a provider's notification at any time after the commission issues a draft determination but before it makes the final determination [s. 44T(1)(a)(ii)]. However, the access seeker cannot withdraw a provider's notification in cases where the dispute is over a variation of a determination [s. 44T(2)].

The access seeker may withdraw the notification at any time before the commission makes its determination if it notified the dispute **[s. 44T(1)(b)]**.

A notice of withdrawal by a party must be made in writing to the commission **[r. 6D]**. It must include the following information **[r. 6D(1)]**:

- the name of the person withdrawing the notification
- whether the person withdrawing the notification is the access provider, or the access seeker
- a short description of the access dispute to which the notification relates
- a reference to the relevant criteria in s. 44T(1) under which the person claims to be authorised to withdraw the notification.

At the time of giving the notice of withdrawal to the commission, the person giving the notice must also give a copy to any other party to the arbitration. The notice of withdrawal takes effect when it is received by the commission **[r. 6D(3)]** and the notification is taken for the purposes of Part IIIA never to have been given **[s. 44T(3)]**.

The commission may issue a media release advising that the dispute notification has been terminated.

6 Post-determination matters

This chapter provides information about the review of arbitration determinations. It also outlines the role of the Federal Court in enforcing determinations. Arbitration determinations can also be varied by the commission in certain circumstances. These issues are discussed below.

6.1 Review of determinations

Review by the Australian Competition Tribunal

A party to the determination may apply in writing to the tribunal for review of the determination. The application must be made within 21 days after the commission made the determination [ss. 44ZP(1), (2)]. If a party does apply for a review, the determination is of no effect until the tribunal makes its determination on the review [44ZP(4)]. A review by the tribunal is a re-arbitration of the access dispute and the tribunal has the same powers as the commission for the purposes of the review [ss. 44ZP(3), (4)].

The tribunal may either:

- affirm the commission's determination
- vary the determination [s. 44ZP(6)].

In the course of the review, the tribunal may require the commission to give information and other assistance and to make reports as required [s. 44ZP(5)].

For Part IIIA the outcome of the review will be taken to be a determination of the commission, whether the tribunal affirms or varies the original determination [s. 44ZP(7)].

A commission determination has no effect until the tribunal makes its determination on the review [s. 44ZO(2)]. The decision of the tribunal will take effect as soon as it is made [s. 44ZP(8)].

No application for tribunal review

If none of the parties to the arbitration apply for tribunal review of the commission's decision, the determination has effect 21 days after the determination is made.

Review by the Federal Court

Appeal of the tribunal's decision

Parties to the arbitration may appeal the tribunal's decision to the Federal Court of Australia. The appeal must be instituted within 28 days of the tribunal decision and be made in accordance with the Rules of the court (made under the *Federal Court of Australia Act 1976*). An appeal is limited to questions of law [ss. 44ZR (1), (2)].

An appeal to the Federal Court does not automatically mean that the decision of the tribunal is affected or that action to implement the decision must cease. In the event of an appeal, the decision of the tribunal has effect until the court or a judge of the court makes an order otherwise. A court may do this if it considers it appropriate to stay or affect the implementation of the decision to secure the effectiveness of the hearing and determination of the appeal [s. 44ZS].

The Federal Court may make orders:

- affirming the decision of the tribunal
- setting aside the decision of the tribunal
- referring the matter back to the tribunal to be decided again in accordance with the directions of the Federal Court
- any other order that the court considers appropriate [s. 44ZR(3), (4)].

Appeal of commission decision under the Administrative Decisions (Judicial Review) Act 1977

A person may be able to seek judicial review of a commission determination by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. An application for review must be made within 28 days of the making of a decision or the furnishing of a statement of reasons for the decision, or within the period allowed by the Federal Court. Although the court has some jurisdiction to review the decision, it may, in its discretion, decline to exercise jurisdiction when the applicant is entitled to seek review of the commission's decision before the tribunal.

6.2 Prohibition on hindering access

The provider or a user of a service to which a third party has access under a determination may not engage in conduct which is for the purpose of preventing or hindering the third party's access under that determination [s. 44ZZ(1)].

This prohibition extends to related corporate bodies. A person's conduct may be used to infer the existence of this proscribed purpose.

A person may apply to the Federal Court if it believes that access is being hindered by a provider or user of the service [s. 44ZZE]. The court may make all or any of the following orders:

- an order granting an injunction on such terms as the court thinks appropriate, restraining the other person from engaging in the conduct, or if the conduct involves refusing or failing to do something, requiring the other person to do that thing
- an order directing the other person to compensate a person for loss or damage suffered as a result of the contravention
- any other order that the court thinks appropriate [s. 44ZZE].

6.3 Enforcement of determinations

A party to a determination can apply to the Federal Court if it believes that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination [s. 44ZZD]. In dealing with the application, the Federal Court may make the following orders:

- an order granting an injunction on such terms as the court thinks appropriate, restraining the other party from engaging in the conduct, or if the conduct involves refusing or failing to do something, requiring the other party to do that thing
- an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention
- any other order that the court thinks appropriate.

6.4 Variation of determinations

Any party to a determination may apply to the commission for a variation of a determination [s. 44ZU]. On receiving an application for a variation, the commission must notify and seek the consent of all other parties to the arbitration. If any party objects to the variation, the variation must not be made [s. 44ZU(1)]. If the parties cannot agree to a variation, a new access dispute may be notified. The commission may terminate such a notified dispute if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form [s. 44Y(2)].

Before making a variation, the commission must take into account the same matters as for an arbitration as set out in ss. 44W and 44X [s. 44ZU(2)].

Appendix A Notification of access disputes (template)

A.1 Covering letter

<Date>

General Manager
Transport and Prices Oversight Branch
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Dear Sir/Madam

I enclose notification of access disputes with <Name of company> under Part IIIA of the *Trade Practices Act 1974*.

A cheque for dispute notification fees is enclosed.

Yours sincerely

<Signatory>

Attachment: Notification

A.2 Notification of dispute to ACCC (template)

Notification of an access dispute under Part IIIA of the *Trade Practices Act 1974*

Between

1. <name of notifying company> of <address of notifying company>

Contact: <name and position of contact>

Telephone: <contact phone number>; facsimile: <contact fax number>;
email: <email address>

and

2. <name of other company> of <address of other company>

Contact: <name and position of contact—if known>

Telephone: <contact phone number—if known>; Facsimile:
<contact fax number—if known>; Email: <email address—if known>

<specify which party is the access seeker and which party is the service provider>

<the notification should specify the name of the owner(s) of the facility used to supply the declared service; where each owner is a legal entity separate from the person specified above, the notification should separately identify the facility owner(s), if known>

Notifier's address for delivery of documents

<specify street address>

Details of the declared service to which the dispute relates

<provide a short description of the notifier's existing and anticipated business>

<specify the declared service, and any standard access obligation that applies to the service or service provider, to which the dispute relates>

Details of the dispute and dispute resolution efforts

<specify in detail the nature of the dispute>

Note: The information included in the notification should establish that the access seeker is unable to agree with the access provider about one or more aspects of access to the declared service. Relevant details may include:

- whether the dispute is about varying existing access arrangements or about future arrangements
- whether the access provider is currently supplying the declared service to the access seeker, and if so, a description of the supply arrangements (for example, contract date and term, key terms and conditions)
- the terms and conditions of supply, or aspects of access, on which the access seeker and access provider **have agreed**
- the terms and conditions, or aspects of access, on which the access seeker and access provider **are unable to agree**, including details of the most recent offers put forward by each of them

- efforts that have been made to reach agreement
 - should include a history of negotiations (particularly details, and evidence, of when negotiations commenced) and indicate whether the parties have used dispute resolution mechanisms (for example, conciliation, mediation). A table summarising the main correspondence and meetings, and position of each party, during the negotiations may be useful
 - details of any options or proposed solutions put forward during negotiations, or in the context of dispute resolution mechanisms, and the parties' responses
- particulars of existing users and those with rights to use the service, and a brief description of how access may affect these other users
- whether access would involve extending the facility
- an estimate or description of the direct costs of providing access to the service and who will bear those costs
- whether access will involve the third party becoming the owner of any part or extension of the facility
- description of one or more methods by which access to the service can be provided and details of any risk to human health or safety caused by that method
- the outcome sought by the notifying party (e.g. the price for supply of the declared service), and the justification for that outcome—should include a short description of the benefits from allowing access to the service or increased access to the service.

Signature of person notifying dispute

<name of signatory and position>

<date>

Appendix B Important milestones during arbitration for parties to an access dispute

Step/action during arbitration	Indicative timeframe/milestone
Pre-notification	
<ul style="list-style-type: none"> Negotiating parties approach ACCC staff on an informal basis for preliminary guidance on possible indicative arbitration outcome. 	<ul style="list-style-type: none"> Anytime before to formal notification to ACCC of dispute.
Notification	
<ul style="list-style-type: none"> Either party notifies ACCC of an access dispute. ACCC's case management team (CMT) will notify relevant parties that a dispute exists. 	<ul style="list-style-type: none"> Template documentation is provided at appendix A. On the 6th working day of the ACCC being notified that a dispute exists.
Procedure and submissions	
<ul style="list-style-type: none"> ACCC's CMT will contact parties to attend initial case management meeting (CMT/parties/other). <ul style="list-style-type: none"> The CMT will circulate minutes of the meeting to attendees and provide opportunity for comment. ACCC's CMT will contact parties to attend initial hearing (including conferences) with commission (optional) (commissioners/CMT/parties/other). <ul style="list-style-type: none"> The CMT will circulate minutes of the meeting to attendees and provide opportunity for comment. Commission will invite submissions from parties. Parties may submit confidentiality requests to commission for consideration. 	<ul style="list-style-type: none"> These meetings are normally held within the first 3 weeks of the ACCC being notified that a dispute exists. When a hearing is deemed necessary it is likely to be held within 2 weeks following the initial case management meeting. Timeframes to be determined by commission arbitrating the dispute. The commission will try to decide confidentiality requests within 10 working days of receiving the request. A standard confidentiality undertaking template is provided at appendix C.

Step/action during arbitration	Indicative timeframe/milestone
Procedure and submissions (cont'd)	
<ul style="list-style-type: none"> • Further case management meetings and hearings may be held if necessary. • Commission makes decisions on key questions. 	<ul style="list-style-type: none"> • Timeframes to be determined by commission arbitrating the dispute. • Anytime.
Arbitration and decision	
<ul style="list-style-type: none"> • Commission issues draft determination • Parties invited to provide submissions in response to draft determination. • Commission issues final determination. 	<ul style="list-style-type: none"> • Parties will be given a few weeks to provide a written response to the draft determination. • Commission will generally seek to issue a determination within six months (provided it has been given sufficient information at each stage of the process).

Appendix C Draft confidentiality undertaking

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974

IN THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

ACCESS DISPUTE NOTIFIED BY: ☒ (ACCESS SEEKER/ACCESS PROVIDER)

OTHER PARTIES: ☒ (ACCESS PROVIDER/ACCESS SEEKER)

☐ (X—IDENTIFY OTHER PARTIES)

DATE OF NOTIFICATION: ☒

DECLARED SERVICE: ☒

NOTIFIED UNDER: Part IIIA of the *Trade Practices Act 1974* (Cwlth) [s. 44S]

CONFIDENTIALITY UNDERTAKING

I, _____ of _____ undertake to [INFORMATION PROVIDER] and to the Australian Competition and Consumer Commission (**the ACCC**) that:

1. Subject to the terms of this undertaking and any order of the ACCC, I will keep confidential at all times the information provided by [INFORMATION PROVIDER] listed at Attachment 1 to this undertaking (**'the [INFORMATION PROVIDER] confidential information'**).
2. I will only use the [INFORMATION PROVIDER] confidential information for the purposes of this arbitration.
3. Subject to paragraph 4 below, I will not disclose any of the [INFORMATION PROVIDER] confidential information to any other person without the prior written consent of [INFORMATION PROVIDER] or without first obtaining an order authorising such disclosure from the ACCC.
4. I acknowledge that I may disclose the [INFORMATION PROVIDER] confidential information to which I have access to:
 - (a) the ACCC
 - (b) any employer, internal legal advisor, external legal advisor or independent expert currently employed or retained by [PARTY] for the purposes of the conduct of the arbitration provided that:
 - i. the person to whom disclosure is proposed to be made (the person) is named in attachment 2 or has otherwise been approved of by [INFORMATION PROVIDER] in writing, or by order of the ACCC
 - ii. the person has signed a confidentiality undertaking in the form of this undertaking or in a form otherwise acceptable to [INFORMATION PROVIDER]

- iii. a signed undertaking of the person has already been served on [INFORMATION PROVIDER]
 - (c) any person to whom I am required by law to disclose the information.
- 5. Except as required by law and subject to paragraph 6 below, within a reasonable time after:
 - (a) The finalisation of this arbitration.
 - (b) My ceasing to be employed or retained by a part to this arbitration.

I will destroy or deliver to [INFORMATION PROVIDER] the [INFORMATION PROVIDER] confidential information and any documents or things (or parts of documents or things) recording or containing any of the [INFORMATION PROVIDER] confidential information in my possession custody or control.

Note: For the purpose of paragraph 5(a) above, this arbitration may be finalised where:

- (c) The notification is withdrawn under s. 44T of the Trade Practices Act 1974 (Cwlth) (**the Act**)
 - (d) The ACCC terminates this arbitration under s. 44Y of the Act
 - (e) The ACCC make a final determination under s. 44V of the Act.
- 6. Nothing in this undertaking shall impose an obligation upon me in request of information:
 - (a) which is in the public domain

or

 - (b) which has been obtained by me otherwise than from [INFORMATION PROVIDER] in the course of this arbitration provided that the information is not in the public domain and/or has not been obtained by me by reason of, or in circumstances involving, any breach of a confidentiality undertaking in this arbitration or a breach of any other obligation of confidence in favour of [INFORMATION PROVIDER] or any other unlawful means.

Signed: _____ Dated: _____

ACCC contacts

The ACCC cannot give legal advice. However, it can give you information on the issues discussed in this guide. For more information contact the ACCC.

The General Manager
Transport and Prices Oversight Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001

Tel: (03) 9290 1800

Email: transport.prices-oversight@acc.gov.au

For all general business and consumer inquiries

ACCC Infocentre: 1300 302 502

email: infocentre@acc.gov.au

website: www.acc.gov.au