Part IIIB – Why there is no economic case for additional access regulation

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Stephen King

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Part IIIB – Why there is no economic case for additional access regulation*

Stephen King, Commissioner
Productivity Commission

Introduction

An ‘essential’ or ‘bottleneck’ facility produces a key input for upstream or downstream businesses. These facilities can create a competition concern. By controlling a key input, the owner of an essential facility can potentially control competition along a (vertical) production chain.

In the US and EU these concerns are dealt with through the general competition laws.[1] In contrast, Australia has a specific ‘access’ regime.

The 1995 *Competition Policy Reform Act* established Australia’s access regime. It implemented the recommendations of the report of the 1993 National Competition Policy Inquiry – generally known as the Hilmer inquiry.[2] The access regime continues, albeit in a modified form, in Part IIIA of the *Competition and Consumer Act 2010* (CCA).

Part IIIA involves two-stages. In the first stage, a party approaches the National Competition Council (NCC) to seek declaration of the service provided by a facility. The NCC can only recommend declaration if the service meets specified ‘essential service’ criteria.[3]

If a service is declared, then the facility owner and the access seeker(s) negotiate an access agreement. Such an agreement is simply a commercial contract between the parties and, contrary to the original recommendation of the Hilmer inquiry, does not have to be registered. If negotiations break down, then either the access seeker(s) and/or the declared facility owner can apply to the ACCC to determine the terms and conditions of access.[4]

The Part IIIA access regime was, and remains, controversial.[5] Most recently, the Australian Competition and Consumer Commission (ACCC) has claimed that Part IIIA is inadequate to deal with bottleneck facilities that are not vertically integrated. It has argued that a new ‘Part IIIB’ is needed for such facilities.[6] This would involve some form of explicit price regulation for non-integrated monopoly facilities that did not meet the Part IIIA declaration criteria. It may involve the equivalent of ‘deemed declaration’ although the ACCC’s statements are not precise on the exact form of regulation under their proposed Part IIIB.[7]

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The ACCC has focussed its criticism on two particular industries[8] – airports, which are subject to price monitoring by the ACCC and regular review by the Productivity Commission, but which do not have their key aeronautical services currently declared;[9] and Ports, particularly the Port of Newcastle, where the NCC has recommended against declaration three times since it was privatised in 2014.[10]

In this background paper, we consider the case for a new Part IIIB. We begin by considering the regulatory process that currently exists under Part IIIA and the economic problem that the regulation is designed to solve. We conclude that Part IIIA is ‘ fit for purpose’. The current declaration criteria identify both the relevant infrastructure services and the circumstances when regulatory action is warranted. The post-declaration negotiate-arbitrate regime could be improved, but this would involve only minor changes.

We then consider the proposed Part IIIB. Is there a gap in the existing regulatory regime that could be fixed by Part IIIB? In particular, are there either competition problems or economic distortions due to investment ‘hold up’ that could be fixed by Part IIIB? For competition, we conclude that any relevant concerns are already addressed by Part IIIA. For investment ‘hold up’ we note that this is a broad issue that arises in many industries. At best, Part IIIB would crowd out preferred business-to-business solutions to the hold-up problem. At worst, Part IIIB would create, rather than reduce, economic distortions.

Finally, we consider the Port of Newcastle and airports. The ACCC has raised these infrastructure facilities as examples where Part IIIB would improve economic outcomes. However, this is not supported by the independent reviews of these facilities.

Overall, we find that the case for further access regulation through a Part IIIB has not been established. Given Part IIIA, there is no regulatory gap for monopoly infrastructure industries in Australia that could be fixed by the proposed Part IIIB. Put simply, Part IIIB is a solution in search of a problem.

Essential facilities and Part IIIA

Part IIIA of the CCA is an access regime that aims to “promote competition in markets that use the services of ‘bottleneck’ or ‘essential’ infrastructure facilities, without compromising incentives to develop and maintain such facilities”.[11] It was designed to be “applied sparingly, focussing on key sectors of strategic significance to the nation”.[12]

A ‘bottleneck’ or ‘essential’ facility has two characteristics:[13]

- First, the facility must involve a natural monopoly technology. This means that, at all relevant levels of output, it is cheaper to have that output supplied by one producer than by more than one producer.[14] In such a situation competitive production of the output is economically undesirable and, in many situations, practically unlikely.

- Second, the output of the facility must be an essential input for a related good or service. This means that the facility is part of a production chain – but not the final stage. It also means that:
  - there are no alternative inputs or production processes that can enable a business to produce the related product at an equivalent cost without the essential input; and
  - there are no alternative goods or services that can readily be supplied as a substitute to the related product but that do not require the essential input.

  Put simply, the essential input cannot be avoided by either using a different input or producing an alternative good or service. Production of the related product or any strong substitutes is 'dependent' on the essential input.[15]

These two elements of an essential facility are captured by the declaration criteria in s.44CA of the CCA. These criteria apply to the service provided by a facility and must all be met for the service to be 'declared' and subject to the access regime.

The second criterion in s.44CA is:

> (b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market: (i) over the period for which the service would be declared; and (ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility).

This is a straightforward test as to whether the relevant service supplied by the facility involves a natural monopoly technology.

The first criterion in s.44CA is:

> (a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of 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.

This is a test of the second characteristic for an essential facility. If there are potential alternative inputs or substitute end products, then the service is not essential and access (or increased access) to that service will not promote a material increase in competition in a vertically related market.

These declaration criteria have a somewhat varied history. The current wording was only introduced in 2017.[16] Earlier wording of the criteria was unclear and risked having services declared even if they were not produced by an essential facility.

For example, criterion (b) was previously based on the concept that it was 'uneconomical' for anyone to develop an alternative facility. Unlike the current wording, this older wording for criterion (b) could capture a wide range of facilities, including those that do not involve a natural monopoly technology.[17]

Declaration of a service under Part IIIA initiates a process of facilitated access. It imposes:

> … an obligation on the provider of an infrastructure service to negotiate with any party seeking access to that service. … [However] where a service provider and an access seeker are unable to agree on access terms, either party can notify the Australian Competition and Consumer Commission (ACCC) of an access dispute, and request a binding determination on the parties through arbitration. [18]

ACCC determinations need to be consistent with the pricing principles set out in s.44ZZCA of the CCA and other limitations described in s.44W and 44X of the CCA.[19]

While the current declaration criteria in Part IIIA of the CCA clearly capture the economic concepts that underpin essential facilities, this does not explain why the services produced by an essential facility require a regulated access regime. What is the competitive problem that occurs when an essential facility forms part of a vertical production chain?

The economic problem of essential facilities

The basic 'access problem' with an essential facility is simple. The facility provides a necessary input for businesses that wish to participate in the relevant vertical supply chain. By controlling both the business-to-business (B2B) pricing of, and access to that input, the owner of the essential facility would like to:

Establish monopoly *consumer* pricing for the final goods and services produced using that input, so as to maximise total industry profits; and

Seize as much of that profit as possible for its own benefit.

Attempts by the owner of the essential facility to achieve these objectives can create economic harm by raising prices to final consumers and by potentially distorting both the efficient use of the essential facility and the competitive process along the chain of production.

This access problem is distinct and different from a simple 'monopoly pricing' problem. This was recognised in the Hilmer report and has also been recognised by the courts.[20] Rather, the economic problem arises from the interactions between the essential facility and other businesses in the chain of production.

The competitive issues relating to essential facilities are most obvious when those facilities are vertically integrated. The owner of an essential facility can eliminate all competition in (part of) the production chain by vertically integrating and denying access. It leverages its monopoly position over an essential input into a monopoly position over the supply chain. As stated in the Hilmer report:

> Where the owner of the 'essential facility' is vertically-integrated with potentially competitive activities in upstream or downstream markets — as is commonly the case with traditional public monopolies such as telecommunications, electricity and rail — the potential to charge monopoly prices may be combined with an incentive to inhibit competitors' access to the facility. For

example, a business that owned an electricity transmission grid and was also participating in the electricity generation market could restrict access to the grid to prevent or limit competition in the generation market. Even the prospect of such behaviour may be sufficient to deter entry to, or limit rigorous competition in, markets that are dependent on access to an essential facility.[21]

Vertical integration is one way to exploit control of an essential input. Indeed, the authors of the Hilmer Inquiry considered that vertical integration was necessary for there to be an *access* concern.

> Where the owner of the "essential facility" is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to use its monopoly position to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency. In these circumstances, the question of "access pricing" is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process outlined in chapter 12.[22]

This view, at best, is misleading and inconsistent with the economics of essential facilities.[23] The owner of a vertically separated essential facility has the same dual objectives as the owner of a vertically integrated facility: to maximize industry profits from final consumers and then to seize as large a share of those profits as possible. Further, the owner of the essential facility can use the contracts that it sets through the B2B transactions for the essential input to try and achieve these objectives. In other words, the owner of an essential facility can use access contracts to 'contractually vertically integrate', controlling the vertical chain of production through its control of access to the essential service, and achieving similar anti-competitive outcomes to actual vertical integration.

To see this, suppose an essential input is used by a small number – say three – downstream businesses that sell a final product to consumers. These businesses engage in imperfect competition. They are strategically interdependent, but operate independently, do not act as an illegal cartel and cannot, by themselves, sustain monopoly pricing to consumers.

The owner of an essential facility could vertically integrate by buying one of the downstream businesses and then excluding the rival businesses from accessing the essential service. Alternatively, the owner of the essential facility can achieve a similar outcome by choosing one of the downstream businesses for exclusive supply. The chosen business would have a contract to buy the monopoly level of the essential service – but no more – at marginal cost while its downstream competitors would be denied access. The chosen downstream business would make monopoly profits, but these could be seized by the upstream facility owner through contractual payments.[24] Contractual integration, just like actual integration, allows the owner of the essential facility to set supply contracts to maximise industry profits and to seize all of the profit.

This example shows one way that contractual vertical integration and refusal of access can be achieved through upstream supply contracts. However, there are numerous ways that an upstream owner of an essential facility can use the supply contracts for the essential service

to limit downstream competition and maximise its own profits. Because the three downstream businesses are indirectly linked to the upstream essential facility through supply contracts, these contracts may be used to sustain anti-competitive coordination that maximises total industry profits.

For example, upstream access to the bottleneck service can be limited by supply contracts to ensure that each of the three downstream businesses is capacity constrained to one-third of the monopoly quantity. When these businesses compete downstream, the contractual capacity constraints limit the extent of competition and drive the consumer price to a monopoly level. The owner of the essential facility can then seize most, or all, of the industry monopoly profits through the upstream supply contracts.[25] Simple fixed-quantity supply contracts with a fixed fee enable the owner of the essential facility to both maximise industry profits and to seize that profit.

These simple examples illustrate why access to an essential service remains a competition issue even without vertical integration.[26] They also highlight the importance of focussing on access or *increased access* in the declaration criteria. Contractual integration does not require an outright denial of access to harm competition.

Of course, most real-world situations are much more complex than the simple examples provided here. Products sold to consumers may be differentiated between sellers, for example by having different quality or supply locations. The structure of the dependent market may not be stable, for example, with potential entry if outsiders view this as profitable. And while all businesses in the production chain wish to maximise industry profits, they also individually wish to seize an increased share of those profits.

These complexities create significant tension between the businesses which may limit the effectiveness of either actual or contractual vertical integration. For example, if (actual or contractual) integration leads the essential facility owner to try and exclude some downstream competitors who supply differentiated products, then this exclusion will limit the range of final products available to consumers and may reduce total industry profits.

Similarly, tensions between the businesses may limit the types of contracts that can be used by the essential facility owner. Under contractual integration, the upstream monopoly and each individual downstream business have an incentive to try and set supply contracts that favour themselves and undermine downstream competitors. But when each downstream business recognises this possibility, they will baulk at signing a supply contract that leaves them vulnerable.[27] To overcome this vulnerability, and encourage downstream businesses to agree to the essential service supply contracts, these contracts may need to include non-discrimination clauses, most-favoured-customer clauses or other provisions that explicitly link the downstream businesses and limit competition.[28]

The tensions between the essential facility and related businesses will often limit the ability for these businesses to maximise total industry profits. However, this does not mean that consumers are 'better off'. Stable B2B contracts may lead to increased supply and lower prices for consumers – albeit still with prices above a competitive level. But the contracts

may lead to total supply being reduced below a monopoly level, for example, as in the well-known case of double marginalisation.[29]

To summarise the economic problem for an essential facility:

- Businesses in a vertical supply chain have an incentive to coordinate behaviour to raise prices and limit supply for final consumers.
- If the supply chain involves a monopoly supplier of an essential input, then that supplier can become a focal-point for anti-competitive coordination.
- While businesses along the supply chain jointly wish to maximise industry profits, they conflict in terms of sharing those profits. This conflict can either limit or exacerbate the competitive distortion and harm to consumers.
- Vertical integration and refusal to supply is one way that an essential facility owner can overcome these problems. It is able to both achieve and seize monopoly profits from end-users.
- However, even in the absence of vertical integration, contracts for supply of the essential input can be used to limit competition in dependent markets. These contracts will often involve particular anti-competitive features. For example, they may 'reference rivals' through non-discrimination or most-favoured customer clauses.30

Part IIIA is 'fit for purpose'

Part IIIA of the CCA clearly addresses key elements of the access problem. At the same time, it can be improved, for example through declaration guidelines and a process to regularly review declared service supply contracts for anticompetitive features.

First, as noted above, the declaration criteria in s.44CA – at least in their current form – clearly identify essential facilities. They also correctly identify the economic problem. They focus on competition in a relevant upstream or downstream market and situations where access to the essential service is constrained, so that increased access "on reasonable terms and conditions" will materially increase competition. Thus, the declaration process under Part IIIA identifies those situations where regulatory intervention is likely to improve economic outcomes across the vertical production chain.

Second, the post-declaration obligation on the owner of an essential facility to negotiate, together with compulsory arbitration, limits the ability of that owner to exploit its position in a production chain by limiting competition.

This is clear for the most egregious denials of access. If a vertically integrated facility owner wants to deny access to upstream or downstream competitors, this will be stymied by the negotiate/arbitrate process.

However, compulsory negotiation and arbitration under Part IIIA will also help to overcome access issues that arise in the absence of integration.

To see this, note that if an access dispute goes to the ACCC then it is highly unlikely that the ACCC will make a determination that maximises total industry profit to the detriment of consumers. One of the matters that the ACCC must take into account when reaching a final determination is “the public interest, including the public interest in having competition in markets (whether or not in Australia)” (s.44.X.1.b of the CCA). If an access dispute goes to arbitration, then the ACCC determination will balance the legitimate interests of the relevant businesses together with the broader benefits of competition.

The likelihood of a pro-competitive determination from the ACCC changes the options facing businesses in the supply chain. It creates an outside option for any upstream or downstream business that thinks it ‘can do better’ through the arbitrated outcome than through existing supply contracts.

For example, suppose that the existing contracts attempt to control downstream competition by limiting supply of the essential input. A new competitive entrant may be excluded from upstream supply and can seek arbitration to gain supply. Alternatively, a small downstream business that is currently allocated little supply can use arbitration to increase its market share.

Further, the essential facility owner cannot simply claim that it is capacity constrained or that the existing capacity is ‘already taken’. A determination under Part IIIA can require that the capacity of a facility is expanded, subject to a range of safeguards in s.44W.

While compulsory negotiation and arbitration may help avoid anti-competitive agreements between the (declared) access provider and access seekers, it could be improved. For example, any (potentially anti-competitive) agreements that are established outside a determination will depend on the relevant businesses’ beliefs about the likely outcome in the alternative – where one of them seeks an ACCC determination.

This means that *economic* guidance about how the ACCC will approach a determination can be critical to any party seeking such a determination.[31] However, explicit economic guidance is currently absent. The ACCC’s existing guidance is limited to administrative matters.[32]

There is also little precedent that can inform business. The ACCC has only made two determinations.[33] In the 2007 Services Sydney determination, the potential access provider, Sydney Water, was vertically integrated and had regulated consumer pricing. As such, the focus was not on potential monopoly pricing to consumers but on ensuring minimum cost production along the vertical supply chain. In the 2018 Glencore/Port of Newcastle determination, the ACCC considered access to vertically separated port services. The ACCC determination is based on standard building block regulation, as used, for example, in electricity regulation.

In this sense, the best that business can currently do is infer that, in any access determination, the ACCC will treat the service provider as it would any other upstream regulated asset and establish the terms and conditions of access using a building block approach.

Even if this inference is correct, it is significantly incomplete. In its 2013 Inquiry into Part IIIA, the Productivity Commission recommended that the ACCC "should develop and publish guidelines on how its power to direct facility extensions would be exercised".[34] This has not occurred.

More broadly, the negotiate- arbitrate process under Part IIIA could be improved by the ACCC publishing guidelines that outline its economic approach to access determinations. While these will obviously require specific variation in any application, such guidelines would help undermine anti-competitive upstream contracting by setting clear alternatives for access seekers. For example, the guidelines could make it clear that any ACCC determination will allow the access provider to (confidentially) 'loss lead' in providing services to a new, small access seeker or entrant to the industry. Making this clear will help undermine any attempt by businesses to profit share across the supply chain.

The post-declaration process may also be improved by introducing light-handed oversight of the supply contracts between the (declared) essential service owner and its business customers. As noted above, these contracts may contain clauses designed to help the industry reduce competition and sustain monopoly profits. While supply contracts are – and should remain – confidential between the relevant businesses, it would be useful if it was made explicit that supply contracts cannot include specific types of anti-competitive clauses, such as most-favoured customer clauses, or other clauses that 'reference rivals'. The contracts could be regularly reviewed, say by the NCC, to see if they contain any of these clauses.[35] Where an anti-competitive clause exists, a relevant process to alter or delete the clause could be invoked.

This type of process was recommended by the Productivity Commission for monitored airports.[36] In 2019, as part of its regular airport review, the Commission considered supply agreements between the monitored airports and airlines. It concluded that some of these agreements:

> contain clauses that constrain an airline's access to regulatory remedies for the exercise of market power and clauses that restrict an airport's ability to offer incentives to competitor airlines ('no less favourable' clauses). These clauses are anticompetitive and should be removed from all agreements between airport operators and airlines, as should any anticompetitive clauses in agreements with other airport users". [37]

The Commission recommended that:

> the *Aeronautical Pricing Principles* … specify that any agreement between an airport and an airport user must not contain anticompetitive clauses.[38]

It also outlined a process to ensure that the relevant supply contracts would be available to the Productivity Commission on a commercial-in-confidence basis as part of its future airport reviews.[39]

In summary, the Part IIIA declaration criteria in s.44CA of the CCA are clearly fit for purpose. They capture natural monopoly facilities that supply essential services where there is potential harm to competition. The post-declaration negotiate-arbitrate regime is also

broadly fit for purpose, although it could be improved. For example, ACCC guidance around its economic approach to determinations, and how its decisions will undermine anti-competitive contracting and benefit both competition and consumers, is currently missing. Similarly, a process of light-handed oversight of supply contracts for a declared essential service would help avoid any contractual attempts to limit competition.

Part IIIB – a solution in search of a problem

The ACCC has proposed that Part IIIA should be supplemented by a new Part IIIB. This new law would aim to regulate non-integrated upstream infrastructure service providers with market power, even if they did not satisfy the Part IIIA declaration criteria. It would explicitly be aimed at pricing rather than access.

> The Hilmer Review was clear that the proposed access regime was primarily aimed at vertically integrated monopolies.
>
> Now, we are seeing issues primarily with non-vertically integrated monopoly infrastructure. Ports, airports, railways, for example. In these cases the issue is use of market power; not denial of access. These monopolies should be regulated.[40]

Further:

> Just as under the Part IIIA access regime the test for vertically integrated monopolies is one of harm to upstream or downstream competition, for vertically separated infrastructure we may need a 'market power' test.
>
> The ACCC has been considering the need for such a 'Part IIIB' provision for some time. The reasonable alternative is bespoke regulation as we have for electricity networks and gas pipelines, both of which are not vertically integrated. Either can work. Why regulate these monopolies and not others. Alternatively, why regulate energy monopolies but not transport monopolies?
>
> Just as we do not want vertically integrated monopolies denying access to their competitors, we do not want non-vertically integrated infrastructure exercising their market power to raise prices to users and so damage the economy.[41]

One motivating factor behind the ACCC’s calls for a Part IIIB appears to be the belief that Part IIIA is inadequate to deal with vertically separated infrastructure providers. This is clearly incorrect, as already discussed.

Another motivating factor appears to be the view that an infrastructure owner can use its market power to create economic harm by raising its prices to other businesses in the supply chain, even if it is not an essential or bottleneck facility.

> The reform [Part IIIA] was an innovative way of dealing with situations where monopoly power prevented competition.
>
> But it did not adequately deal with situations where monopolies simply use their market power to raise prices.[42]

There appear to be two alternative arguments. The first is that the infrastructure owner can use its market power to 'raise prices' in a way that harms competition. The second is that the infrastructure owner can use its market power to 'raise prices' opportunistically, to undermine the incentives for other businesses in the supply chain to efficiently invest. This is referred to as the 'hold up 'problem'.[43] We deal with these two alternatives in turn.

The competition problem

Any problem of enduring competitive harm associated with a monopoly infrastructure facility is already captured by the declaration criteria in Part IIIA.

If there is an on-going competition problem directly associated with the upstream facility, driven by technology that makes competitive entry either economically undesirable or infeasible, then this is captured by the 'natural monopoly' test in s.44CA(b). When an infrastructure service fails this test then it is both economically feasible and desirable for there to be competition in the provision of the relevant service. There is not an enduring monopoly problem.

There may be an issue of entry. The development of a competing facility is likely to take time and the existing facility (or facilities) may make transient economic profits before a new entrant is established. This is not, however, an issue unique to infrastructure industries. It is relevant to all markets, and it is difficult to see why regulatory intervention would be required in infrastructure industries.

The entry problem may be exacerbated through anticompetitive conduct by the owner of the incumbent facility. The existing facility owner may artificially limit competitive entry, for example, by locking in customers through its existing supply contracts. However, any anticompetitive behaviour is best dealt with under the existing competition provisions in the CCA.

While an infrastructure facility may satisfy the 'natural monopoly' test, this does not imply an economic problem. A facility may be the only provider of a specific input service in a particular supply chain, but this does not create a competition problem if there are competitive substitutes – either as inputs or final goods and services. This is captured by the competition test in s.44CA(a). Declaration under Part IIIA requires that access, or increased access, will materially increase competition. If this will not occur, because there is competition from alternative inputs or alternative final products, then there is no competition problem and no competition-based reason for regulatory intervention.

The hold-up problem

The ACCC has claimed that there is economic harm when an upstream service satisfies the natural monopoly test in s.44CA(b) but not the competition test in s.44CA(a). This is not

due to a failure of competition but due to *ex post* hold-up of sunk, relationship-specific investments.

> One needs to understand that, in order to produce or extract a commodity like coal, this requires a major sunk investment in mining equipment and infrastructure. These sunk investments give rise to what are known as "quasi-rents" which are subject to the threat of hold-up.
>
> The threat of expropriation of rents by a monopoly service provider in such a situation would only in extreme circumstances result in a pure transfer. More likely, even the threat of such expropriation can limit future investment and innovation by the upstream firms.
>
> What miner would invest in reducing its extraction costs if it knew that the lower extraction costs would simply be met by higher port charges? More generally, what miner would invest in its mines knowing that the benefits of that investment could be expropriated by a monopoly somewhere else in the supply chain?[44]

It is well known in economics that the potential for opportunistic 'hold up' by one party to a contract may lead to inefficient investment.[45] The problem arises when:

- it is economically efficient for a party to a contract to make a sunk, relationship-specific investment prior to some other party to the contract completing its obligations, and
- the contract is incomplete in the sense that it does not cover all possible future situations and leaves scope for dispute or renegotiation when such a situation arises.

Under these circumstances, the party that is able to make the efficient investment may choose not to do so, knowing that some or all of the return on this investment may be seized by other parties to the contract through later renegotiation or dispute. This leads to an economic loss that is borne by the parties to the contract who are faced, for example, with an inefficient production process. In other words, the potential for hold-up leads to an economic loss that is borne, at least in part, by the business that could engage in the hold-up as well as the investor, creating incentives for all the relevant businesses to solve the hold-up problem in advance and encourage efficient investment. [46]

The hold-up problem is one frequently faced by business. It is not unique to infrastructure industries, far less monopoly infrastructure industries. It can impact all types of business and all sectors of the economy. For example, it can impact a manufacturer of car parts, who must reconfigure its equipment to supply a particular automaker. It is a common problem in the software industry where applications are written to be run on particular hardware. It impacts service industries, such as when a business invests in training staff for a particular project only to find that the customer cancels the project at the last minute.

All businesses to a contract have incentives to reduce the hold-up problem, as this raises all their profits. And there are a variety of ways to reduce the risk of hold-up. It can be (at least partially) solved by integrating the various parties into a single business.[47] Alternatively, businesses reduce the hold-up problem by writing more detailed, long-term contracts.[48] That said, there are practical limits to contract length and complexity. Hold-up also may be limited or removed by including principles in a contract that can be invoked if there is a dispute, such as compulsory and binding arbitration based on principles that are established in the contract.

This leads to three key points:

1. The hold-up problem is not a competition problem. While it may reduce the efficiency of production around a particular element of a supply chain, if the competition test in Part IIIA is not met then there are competitive alternatives for either the relevant input or the final product of the supply chain.
2. The hold-up problem is a common issue in a wide variety of industries. It is not specific to monopoly infrastructure businesses. Businesses across a range of industries and countries have developed tools to reduce the impact of the hold-up problem and these can be used in infrastructure or any other impacted industries. As such, there is no specific problem facing monopoly infrastructure industries that demands regulatory intervention.
3. It is far from clear that the form of compulsory arbitration and binding determination proposed by the ACCC under Part IIIB would reduce the hold-up problem to the degree that it exists in infrastructure industries. Such regulatory intervention will crowd out alternative private sector solutions to the hold-up problem and may make the problem worse.

To expand on the third point, the ACCC appears to view the external imposition of a compulsory arbitration process on the parties to a private contract dispute as having little if any cost.

> It is the ACCC's view that a negotiate-arbitrate framework is the minimum for effective regulation of monopoly infrastructure. This approach doesn't impose upfront requirements on the infrastructure owner, so the regulatory burden is minimal. It allows robust commercial negotiations to take place.
>
> However, it means that users can seek binding independent dispute resolution if they can't agree with the monopoly asset owner on price or other terms of access. This provides an incentive for the asset owner to offer reasonable terms and conditions in order to avoid the process of arbitration, and it levels the negotiating playing field by providing leverage to users.
>
> It's hard to see what anyone would have concerns over for such arrangements; they impose minimal costs and provide strong incentives for parties to negotiate sensibly.[49]

At a minimum, the legislative right to such arbitration, presumably governed by a set of principles and precedents that are outside the control of the relevant businesses, will change the incentives of those businesses to deal with any hold-up issues up front. It will result in alterations to business contracts and could crowd out alternative dispute resolution processes that the businesses would otherwise build into those contracts. It is far from clear why a hold-up solution established by legislation would be better than those that would be agreed *ex ante* by the businesses who are directly impacted by the hold-up problem.

Further, providing a legislative right of arbitration and determination through Part IIIB may undermine other efficient elements of infrastructure supply contracts.

For example, it could undermine risk sharing. When dealing with volatile downstream product prices, an optimal upstream supply contract may involve risk sharing between businesses along the supply chain. The price for an critical input (such as access to a coal port) would rise if the final product price (say, the world coal price) were high but fall when

it was low. However, if one party were able to seek 'binding independent dispute resolution' then it could behave opportunistically when facing an adverse price movement. For example, if the world coal price were high, so that the contract established a high price for use of the coal port, the coal producer could seek a determination under Part IIIB knowing that the arbitrator would probably set a lower price based on the costs of the port, not the world coal price. Similarly, if the world coal price is low, so that the contract sets a low price for the coal port, the port could apply for a binding determination. Again, if this determination is based on the costs of the port including a 'commercial' return on capital, it is likely to raise the price of port services.

It may be argued that legislated arbitration would be sophisticated enough to allow for such risk sharing. However, precedent suggests that this is unlikely. As noted above, the ACCC's 2018 determination of a dispute between Glencore and the Port of Newcastle used a standard building block methodology to set prices for the port. This approach is based on the costs of the port and does not allow for any risk sharing based on the world coal price. Indeed, if a coal miner and port considered that arbitration would lead to a similar result in the future then they would be unable to optimally share final-price risk.

It may be argued that optimal risk sharing can be built into the rules for legislated arbitration. Maybe. But that misses the point. Distortion of the incentives to share final price risk is only one of the potential distortions that could arise through a Part IIIB process. To suppose that legislation could involve a set of arbitration rules or guidelines to deal with all such distortions in advance is fanciful.

While hold-up is a real issue in many business relationships, the best parties to solve those problems *ex ante* are the businesses themselves. To introduce a legislated arbitration and determination process to deal with hold-up in specific infrastructure industries has little if any economic merit. In particular, it may lead to greater economic distortions by making infeasible mutually-beneficial business solutions.

Summary

To the degree that an infrastructure provider is captured by Part IIIB but not by Part IIIA then either:

1. The service provider is not an enduring monopoly and can be subject to economically-desirable direct competition, or
2. The service provider is an enduring monopoly provider of a specific input service, but faces indirect competition through alternative supply chains or alternative final products.

In the first case, entry and competition may take time to develop. However, this is an issue that arises in many parts of the economy. It is difficult to see why regulatory intervention in a specific industry is needed through a tool such as Part IIIB.

In the second case, there is no competition problem and regulatory intervention via Part IIIB will simply redistribute any economic rents. This may or may not have economic consequences. It will be supported by those who believe that regulation will increase their share of the rents. However, to the degree that a redistribution of rents has an economic impact, it has nothing to do with competition.

The ACCC has claimed that the redistribution of rents will help avoid issues of hold-up. Such issues are common across industries and there are a range of private solutions to hold-up that have been developed by business. It is difficult to see why regulatory intervention such as Part IIIB is needed in infrastructure industries given that the relevant parties have both the incentive and ability to find a mutually agreeable solution up front that can be used to facilitate desired investment. An imposed solution through Part IIIB is unlikely to be better than these private solutions. Indeed, it may be worse, and may lead to other distortions in supply contracts.

Ports, airports and privatisation

If there is no economic problem that requires a Part IIIB solution, what of the airports and shipping ports, particularly the Port of Newcastle, that have been highlighted by the ACCC?

The National Competition Council has considered declaration of the services provided by the Port of Newcastle on three separate occasions.[50] Each time it has concluded that declaration will not meet the test of materially promoting competition in a relevant upstream or downstream (dependent) market.[51]

For example, in 2015 the NCC concluded (at paragraph 4.107) that criterion (a) was not satisfied. This reflected that some of the relevant upstream and downstream markets were already “effectively competitive” (paragraph 4.105) such as the relevant world coal market. This was consistent with arguments put forward by the applicant in the matter, Glencore.[52] Other relevant markets were also broader in geographic scope than simply the Hunter Valley and the Council was not satisfied that increased access at the Port of Newcastle would promote a material increase in competition in any of these geographically broader markets (paragraph 4.106).

In this situation, effective ‘declaration’ of the Port of Newcastle, say through a Part IIIB, could change the bargaining position between the port and the coal miners.[53] The miners, like Glencore, would be able to seize a higher share of the economic rents associated with the Hunter-valley coal export supply chain. However, as shown by the NCC, these transfers would not have any competitive impact. It is also highly unlikely that these transfers would reduce any future investment hold-up problem. Both the port and miners have significant on-going relationship-specific investments. They have strong incentives to avoid the mutual loss of profit associated with reductions in investment due to hold-up. In this situation, requiring that the Port of Newcastle and its associated coal miners be subject to compulsory negotiation and arbitration, as envisaged under Part IIIB, at best, would simply lead to a transfer of rents. At worst, it would crowd out alternative approaches to reduce hold-up and potentially distort supply contracts.

In the case of the airports, there have been both successful declaration applications for specific airport services[54] and other applications for declaration that were withdrawn, presumably after the applicant gained a satisfactory agreement with the airport.[55] The airports have also been reviewed by the Productivity Commission four times since 2000, most recently in 2019. In this 2019 review the Productivity Commission found that:

> Sydney, Melbourne, Brisbane and Perth airports (the monitored airports) have significant market power in aeronautical services, but they have not systematically exercised their market power to the detriment of the community.[56]

The Productivity Commission provides a range of evidence for this conclusion in chapter 4 of the report. Of course, the Commission could be wrong. However, if that were the case, then an airline could seek declaration and provide evidence to the NCC to show that declaration will increase competition, for example, in a market for airline services.[57]

The Productivity Commission noted that investment is a key element in contracts between airlines and airports and that, as expected, the negotiated contracts covered a range of contingencies:

> Airport and airline operators typically engage in commercial negotiations to secure aeronautical and terminal agreements on charges, types of services, service quality and future capital investments. Typically these agreements outline service charges, including price paths for future access, consultation requirements, dispute resolution arrangements, charges to recover passenger security screening costs, and discounts on scheduled aeronautical charges if, for example, agreed passenger numbers are reached. Negotiating agreements for airport services is challenging — it is time consuming, resource intensive and costly, and the argy bargy between airports and airlines sometimes plays out in the media. This is in part because agreements can involve complex and contested investments that affect many parties, including competing airlines, with different objectives.[58]

The Commission did not find any evidence of an investment problem. As such, there does not seem to be any gap in the existing regulatory structure that can be fixed by a new Part IIIB.

The ACCC's focus on ports and airports, in part, reflects that these assets were once in government ownership and were then privatised. The ACCC considers that the privatisation process did not take appropriate account of the need to regulate these infrastructure assets when they changed ownership.

> Privatising assets without allowing for competition or regulation creates private monopolies that raise prices, reduce efficiency and harm the economy … This lack of regulation of monopolies may increase the sale price, but ends up being, via higher prices to justify the higher sale price, a multi-decade tax on Australian consumers and exporters.[59]

While this is a reasonable concern, introducing a legislated arbitration process through Part IIIB may undermine the future efficiency of contracts between the privatised business and its customers and will not address the historic gap identified by the ACCC.

The ACCC identifies an alternative solution.

> One potential solution is that all governments agree not to privatise an asset unless there has been a prior public regulatory and competition assessment by a Commonwealth or State regulatory body …[60]

This approach already exists for the future privatisation of NBN Co.[61] Whether this type of approach is warranted more generally is beyond the scope of this background paper.

Conclusion

This background paper has considered the arguments surrounding the introduction of a new Part IIIB access regime as a supplement to the access regime established under Part IIIA of the CCA. Overall, we find that the economic case for a new Part IIIB has not been made.

The existing Part IIIA of the CCA is fit for purpose. The current declaration criteria in s.44CA clearly identify essential facilities and the relevant economic problem The post-declaration negotiate-arbitrate regime could be improved, for example, by ACCC guidance around its economic approach to determinations. However, there is no regulatory gap for monopoly infrastructure industries in Australia that could be fixed by the proposed Part IIIB

Part IIIB cannot be justified as a solution to contractual hold-up in infrastructure industries. The problem of investment hold-up is common across many industries and well-understood by business. Business has developed a range of ways to mitigate any economic loss due to hold-up. An imposed solution through Part IIIB is unlikely to be better than these private solutions. Indeed, it may be worse, and may lead to other distortions in supply contracts.

The ACCC has identified ports, airports and other privatised assets as a source of concern. However, independent reviews of both the Port of Newcastle and airports do not validate those concerns. While the concern may be relevant for future privatisations, Part IIIB is not an appropriate solution.

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[1] For example, in the US through the 'essential facilities doctrine'. See King, S. (1997) "National competition policy", *Economic Record*, 73, 270-284 for details.

[2] Commonwealth of Australia (1993) *National competition policy: Report by the independent committee of inquiry*, (the 'Hilmer Inquiry'), Canberra, August.

[3] Formally the 'designated Minister' chooses whether or not to declare a service, after receiving a recommendation from the NCC. See s.44H of the CCA.

[4] There are alternative regulatory mechanisms that bypass this process. First, if the ACCC accepts an 'access undertaking' from a facility owner then the service cannot be declared. An undertaking must include terms and conditions of access and can only be accepted by the ACCC prior to declaration. Second, a service cannot be declared if it is already the subject of an effective access regime, such as an access regime established by a state government. Third, a facility that is government owned and was built and operated through an approved tender process cannot be declared. See s.44F of the CCA and related sections for details.

[5] King, S. (1997) *op. cit.* note 1, discusses the early debate around Part IIIA. See also Industry Commission (1997) *Industry Commission Submission to the National Competition Council on the National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act*, AGPS, Canberra.

[6] For example see Sims, R. (2020) *Speech to the Committee for Economic Development Australia (CEDA)*, 25 February available at: https://www.accc.gov.au/speech/accc-2020-compliance-and-enforcement-

priorities which states that "[a]s Australia's general infrastructure regulator we are also pointing out that we have no general regulatory regime for infrastructure monopolies that are not vertically integrated. We have Part IIIA for vertically integrated infrastructure, but no 'Part IIIB' where the monopoly owners are not vertically integrated." See also Sims, R. (2021) "ACCC 2021 Compliance and Enforcement Priorities", *Speech to the Committee for Economic Development Australia (CEDA)*, 23 February, available at: https://www.accc.gov.au/speech/accc-2021-compliance-and-enforcement-priorities.

[7] For example: "In my view, we need a new 'Part IIIB' monopoly regulation regime that would see owners of significant infrastructure with market power subject to some form of price regulation." Sims, R. (2020a) "*Tackling market power in the COVID-19 era*", speech to the National Press Club, 21 October, available at: https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era.

[8] See Sims, R. (2019) *Speech to the Australasian Transport Research Forum*, 30 September, available at: https://www.accc.gov.au/speech/accc-perspectives-on-transport-issues and Sims, R. (2020a) *op. cit.* note.7.

[9] Some services at Sydney airport have previously been declared, but the declaration has lapsed. There have also been applications for declaration by airlines that have subsequently been withdrawn. These are discussed in more detail below.

[10] The Port of Newcastle was declared in 2016 following an appeal to the Australian Competition Tribunal (*Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6). However, a subsequent change to the wording of Part IIIA meant that the NCC recommended that the declaration be revoked in 2019 (National Competition Council (2019) *Revocation of the declaration of the shipping channel service at the Port of Newcastle: Recommendation*, 22 July).

[11] Productivity Commission 2001, Review of the National Access Regime, Report no. 17, AusInfo, Canberra at p.39. See also p.xiv.

[12] Commonwealth of Australia (1993) *op. cit.* note 2 at p.260.

[13] See King, S. and R. Maddock (1996) "Competition and almost essential facilities: Making the right policy choices" *Economic Papers*, 15(3), 28-37 at 28. Also, see Productivity Commission 2013, *National Access Regime*, Inquiry Report no. 66, Canberra at p.8, 75-76, and Box 1; and King, S. and R. Maddock (1996a) *Unlocking the Infrastructure: The reform of public utilities in Australia*, Allen and Unwin, St Leonards at chapter 5.

[14] See Panzer, J. (1989) "Technological determinants of firm and industry structure" in R. Schmalensee and R. Willig (eds) *Handbook of Industrial Organization*, North Holland. 'Relevant levels of output' refers to levels that satisfy both current and reasonably foreseeable demand at a price that reflects the marginal cost of production.

[15] From a competition law perspective, this is equivalent to saying that access to the input provided by the facility is necessary for a business to compete in an upstream or downstream market.

[16] See the *Competition and Consumer Amendment (Competition Policy Reform) Act 2017*.

[17] For an early discussion of these issues see King, S. and R. Maddock (1996a) *op. cit.* note 13.

[18] Productivity Commission 2013 *op.cit.* note 13 at p.110.

[19] Among other things, s.44W deals with issues relating to another party's existing contractual rights of access and extensions to the declared facility, while s.44X outlines issues that the ACCC must take into account when making a determination, such as the legitimate business interests of the provider and the public interest.

[20] For example, "… establishing an access regime is not directed at the problem of monopoly pricing *per se*, it is concerned with the wider efficiencies that might be delivered in other markets if there is access on price and terms that are established by an independent process guided by the public interest, principles of economic efficiency and the interests of the owner of the facility and other users" (*Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (24 August 2020) at para 34). See also Commonwealth of Australia (1993) *op. cit.* note 2 at p.240-1, quoted below.

[21] Commonwealth of Australia (1993) *op. cit.* note 2 at p.241.

[22] Commonwealth of Australia (1993) *op. cit.* note 2 at p.240-1.

[23] It is theoretically possible for the statement to be correct if there is 'perfect competition' in all vertically related markets and only linear pricing is possible in all B2B transactions. These conditions are so strong that the contention in the Hilmer report is almost certainly false for any real-world application.

[24] For example, the facility owner could run a tender between the three downstream businesses where the winner gains 'exclusive access rights'. The winning bid will likely be close to the monopoly profits with the 'competitive tender' being used to limit downstream competition.

[25] For example, the owner of the essential facility can offer each downstream business a take-it-or-leave-it contract with a fixed payment equal to one-third of the monopoly profits. When each of the three downstream businesses accepts the contract, they each make one-third of the industry profits through sale of the final product. But they each pay this profit to the essential facility through the fixed fee.

[26] The Australian Competition Tribunal has recently confirmed that "where the owner of a bottleneck facility is not vertically integrated, there remains the potential for the facility owner to set terms of access that harm the conditions or environment for competition in dependent markets" (Australian Competition Tribunal, Application by New South Wales Minerals Council (No 3) [2021] ACompT 4 at 157).

27 See for example Rey, P. and J. Tirole (2007) "A primer on foreclosure", ch.33 in (M. Armstrong and R. Porter (eds)) Handbook of Industrial Organization v.3.; Hart O. and J. Tirole., (1990) "Vertical integration and market foreclosure", Brookings papers on economic activity (Microeconomics), p.205-286; O'Brien D.P. and G. Shaffer G., (1992) "Vertical control with bilateral contracts", Rand J. Econ., 23 (3), p.299-308 and McAfee R.P. and M. Schwartz. (1994) "Opportunism in multilateral vertical contracting: nondiscrimination, exclusivity, and uniformity", Amer. Econ. Rev., 84 (1), p.210-230.

[28] These are sometimes referred to as contracts that 'reference rivals'.

[29] Double marginalisation occurs when all B2B and B2C prices in a vertical chain of production are linear. In this situation, it is easy to show that the attempts by each business to individually profit maximise results in consumers paying a price above the monopoly level. For example, see Belleflamme, P. and M. Peitz, (2010) *Industrial organization: markets and strategies*, CUP, Cambridge at section 17.7.

[30] The potential anti-competitive consequences of contract clauses that 'reference rivals' has been noted by the Department of Justice in the US. See: Scott-Morton, F. (2012).'Contracts That Reference Rivals.', Speech delivered at the Georgetown University Law Center Antitrust Seminar, Washington DC, 5 April available at: http://www.justice.gov/atr/public/speeches/281965.pdf.

[31] For example, King, S and R. Maddock (1999) "Light-handed regulation of access in Australia: negotiation with arbitration", *Information Economics and Policy*, 11, 1-22, shows how the ACCC can alter private bargaining outcomes to make them more pro-competitive through its approach to determination decisions.

[32] See ACCC (2006) *Arbitrations: A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974 (A summary guide)* April; ACCC (2006) *Arbitrations: A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, April; and ACCC (2017) *Guidelines relating to deferral of arbitrations and backdating of determinations under Part IIIA of the Competition and Consumer Act 2010* August.

[33] ACCC (2007) *Access dispute between Services Sydney Pty Ltd and Sydney Water Corporation Final determination, Statement of reasons* 22 June, available at: https://www.accc.gov.au/public-registers/access-to-services-registers/s-44zzl-determinations-determination-of-the-access-dispute-between-services-sydney-and-sydney-water and ACCC (2018) *Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, Final Determination under section 44V* 18 September, available at: https://www.accc.gov.au/public-registers/access-to-services-registers/determination-of-the-access-dispute-between-port-of-newcastle-operations-and-glencore-coal-assets-australia.

[34] See Productivity Commission 2013, *op. cit.* note 13 recommendation 8.9.

[35] Maintaining confidentiality of these supply contracts is important to ensure that pro-competitive renegotiation is always feasible without the knowledge of other competitors in the supply chain. In this sense, the approach outlined here is significantly different to recommendation 11.5(c) from the Hilmer report. That recommendation stated that post-declaration "agreements, whether achieved through negotiation or arbitration should be placed on a public register …" (Commonwealth of Australia (1993) *op. cit.* note 2 at p.267).

[36] These are Sydney, Melbourne, Brisbane and Perth airports.

[37] Productivity Commission 2019, *Economic Regulation of Airports*, Report no. 92, Canberra, at p.296.

[38] *Ibid.* Recommendation 9.1.

[39] *Ibid.* at p.298.

[40] Sims, R. (2019) *op. cit.* note 8.

[41] Sims, R. (2019) *op. cit.* note 8.

[42] Sims, R. (2020a) *op. cit.* note 7.

[43] See Sims, R. (2016) "Ports: what measure of regulation" *Speech presented to the Ports Australia Conference*, Melbourne, 20 October, available at: https://www.accc.gov.au/speech/ports-what-measure-of-regulation

[44] *Ibid.*

[45] For example, Alfred Marshall, in his Principles of Economics, noted the potential for hold-up by a landlord of a tenant farmer when the farmer increases the yield of the land by "improvements of a reasonable nature made by himself". See Marshall, A. (1890) *Principles of Economics* (8th ed), MacMillan and Co., London, at Book 6, chapter X, section 10.

[46] In its recent decision regarding the Port of Newcastle, the Australian Competition Tribunal noted the potential for hold-up, but also noted that such hold-up would not be in the Port's long-term interest. See Australian Competition Tribunal, Application by New South Wales Minerals Council (No 3) [2021] ACompT 4 at 180, 184, 192-3, and 233.

[47] For a survey of the implications of incomplete contracts and hold up for firm structure see Aghion, P. and R. Holden (2011) "Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?" *Journal of Economic Perspectives*, 25(2), 181-197.

[48] Joskow considers the relationship between contract length and asset specificity for coal miners and electricity utilities in the US. He finds strong support for the hypothesis that the length of contractual commitments are directly related to variations in the importance of relationship-specific investments. See P. Joskow (1987) "Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets", *The American Economic Review*, Vol. 77, No. 1, 168-185. Similarly, Vázquez looks at franchise contracts in Spain, concluding that "franchisors mitigate franchisee fears of hold-up by providing them with longer contract terms"(L. Vázquez (2007) "Determinants of contract length in franchise contracts", *Economics Letters* 97, 145–150 at p.149).

[49] Sims, R. (2016) *op. cit.* note 43.

[50] For example, see National Competition Council (2015) *Declaration of the shipping channel service at the Port of Newcastle: Final recommendation,* 2 November; National Competition Council (2019) *Revocation of the declaration of the shipping channel service at the Port of Newcastle: Recommendation*, 22 July; and National Competition Council (2020) *Application for declaration of certain services at the Port of Newcastle: Recommendation*, 18 December. These are all available at: https://ncc.gov.au/applications-past/past_applications

[51] It should be noted that wording the relevant criterion changed between the 2015 and 2019 decision. The 2019 decision was based on the current wording in s.44CA(a). The exact argument for the Council's decision also differs between the decisions, particularly between the 2015 decision and the 2019 and 2020 decisions. Further, in the 2020 decision, the NCC determined that the public interest test in s.44AC(d) was also not satisfied.

[52] For example, see paragraph 4.5: "Glencore notes that it and other coal producers operating in the Hunter Valley export their product into a highly competitive global market. It notes that coal is a globally traded commodity with prices determined by international markets, and that coal producers can be regarded as price-takers".

[53] "In essence, this approach evens up the bargaining power imbalance between the monopoly and users" Sims, R. (2019) *op. cit.* note 8.

[54] See National Competition Council (2003) *Application by Virgin Blue for declaration of airside services at Sydney airport: final recommendation*, November available at: https://ncc.gov.au/applications-past/past_applications.

[55] For example, "[o]n 3 July 2014 Tiger Airways Australia Pty Ltd applied for declaration of the Domestic Terminal Service at Terminal 2 at Sydney Airport provided by Sydney Airport Corporation Limited." The applicant withdrew the application on 8 August 2014. See: https://ncc.gov.au/application/application-for-declaration-of-the-domestic-terminal-service-at-terminal-2.

[56] Productivity Commission 2019, *Economic Regulation of Airports*, Report no. 92, Canberra, finding 5.1.

[57] Interestingly, a number of the anticompetitive clauses in airport-airline agreements (discussed above) involved penalties on an airline if they made an application for declaration application regarding an airport. See Productivity Commission 2019, *op. cit.* note 56 at Box 4.6. As noted, such clauses are anticompetitive and should not be allowed as part of airport-airline contracts.

[58] Productivity Commission 2019, *op. cit.* note 56 at p.13.

[59] ACCC (2021) "Privatise for efficiency, or not at all" *Media release*, 30 July available at: https://www.accc.gov.au/media-release/privatise-for-efficiency-or-not-at-all.

[60] *Ibid.*

[61] One of the requirements for the sale of NBN Co by the government is that "the Productivity Commission has an inquiry into regulatory, budgetary, consumer and competition matters relating to the NBN". See Australian Government (Department of Infrastructure, transport, regional development and communications) *NBN legislative framework* available at: https://www.communications.gov.au/what-we-do/internet/national-broadband-network/nbn-legislative-framework accessed August 4, 2021.