Declarations of Essential Services Under Part IIIA of the Trade Practices Act: A 'Discipline' on Access Reform

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This article systematically reviews the process of declaration under the access regime in Part IIIA of the Trade Practices Act 1974 (Cth). Its synthesis of legislative provisions, cases, academic commentary and regulatory guidelines represents an important and necessary contribution to this nascent area of Australian competition law. In particular, its comprehensive analysis of the cases has permitted an informed assessment of the recent pronouncements of the Productivity Commission in respect of the declaration process under Part IIIA.

I INTRODUCTION

August 2003 marked the tenth anniversary of the release of the report by the Independent Committee of Inquiry into Competition Policy in Australia[1] (the 'Hilmer Report'). One of the key reforms recommended in the report was the establishment of a national regime governing third party access to 'essential facilities'.[2] This proposal sought to curb the exploitation of market power by owners of core

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1. Independent Committee of Inquiry into Competition Policy *National Competition Policy* (Canberra: AGPS, 1993).
2. Classic examples of 'essential facilities' include electricity transmission grids, telecommunications networks, gas and water pipelines, railroad terminals and tracks, airports, ports and wharves.

infrastructure facilities who typically can be expected to deny potential competitors in dependent markets access to vital inputs, or to charge monopoly prices for such access. Recommendation became reality when Part IIIA ('Access to Services') was inserted into the Trade Practices Act 1974 (Cth)[3] in 1995.[4]

The operation of Part IIIA has been the subject of recent scrutiny by both the Productivity Commission and the National Competition Council (NCC). In September 2002, the Productivity Commission's long-awaited *Review of the National Access Regime*[5] was released.[6] This was followed, some three months later, by the NCC's Guide to Part IIIA,[7] produced to assist parties interested in access issues. The concentration of so much attention on the national access regime underscores its growing importance in Australia's competition reform agenda. It has also acted as a catalyst in the writing of this article.

Part IIIA provides three (mutually exclusive)[8] ways for a third party 'access seeker' to gain access to an eligible infrastructure service:

1. requesting that the NCC recommend that the designated minister *declare* access to the service; if this occurs, then the access seeker obtains the right to negotiate terms and conditions of access with the service provider, or failing agreement, to arbitrate that dispute before the Australian Competition and Consumer Commission (ACCC);[9]

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3. All section references in this article are to the Trade Practices Act 1974 (Cth), unless otherwise specified.
4. Introduced pursuant to the Competition Policy Reform Act 1995 (Cth). Pt IIIA took effect on 6 November 1995.
5. Productivity Commission *Review of the National Access Regime* (Canberra: AusInfo, 28 Sep 2001) (*'PC Report'*) 426-427 summarises the 33 measures recommended by the Productivity Commission to improve aspects of the national access regime. See also the earlier publications of the Commission in respect of the same inquiry: *The National Access Regime* (Oct 2000) (*'PC Issues Paper'*); and *Review of the National Access Regime* (29 Mar 2001) (*'PC Position Paper'*).
6. For background information on the review, see eg S Writer 'Review of the National Access Regime: Productivity Commission Position Paper' (2001) 9 TPLJ 163; F Zumbo 'Accessing Essential Facilities: Part IIIA of the Trade Practices Act' (2001) 39 LSJ 54.
7. NCC *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act 1974* (Melbourne: 2002 & 2003). The Guide has been published in three parts. Part A examines the rationale for access regulation and provides an overview of the different paths to access, while Part B (*'NCC Declaration Guide'*) and Part C (*'NCC Certification Guide'*) provide more detailed information on those routes that involve the NCC directly. The current Guide supersedes the NCC's *Draft Guide to Part IIIA* below n 278.
8. S 44ZZB provides that an access undertaking cannot be accepted in respect of a service that has been declared. Conversely, under ss 44G(1) and 44H(3), a service cannot be declared once it is the subject of an access undertaking, or, under s 44G(2)(e), where it is the subject of an effective access regime.
9. See Pt IIIA ss 44F-44L for the provisions governing the declaration of a service.

2. relying on an existing State or Territory access regime which has been *certified* as 'effective';[10] or
3. seeking access under the terms and conditions specified in an *undertaking* given by the service provider and accepted by the ACCC.[11]

To date, a preference for industry-specific regimes has seen greater use of the second and third avenues for attaining access[12] – involving certification of effective access regimes and acceptance of access undertakings – and surprisingly little reliance on the declaration route.[13] In fact, in the period of Part IIIA's operation, the NCC has made fewer than a dozen declaration decisions; the Australian Competition Tribunal (ACT) has dealt with only three declaration matters, with one declaration resulting from those reviews, and the Federal Court has determined just two cases concerning the declaration provisions under Part IIIA.[14]

However, as the Productivity Commission noted, the declaration process has had a 'significant impact'[15] on access reform, notwithstanding the relatively small amount of declaration activity to date. In particular, the threat of declaration has provided an incentive for States and Territories to seek to have their own access regimes certified as effective.[16] There, the declaration process has acted as a 'discipline'[17] or 'driver'[18] – clearly indicating the 'default regime'[19] that will apply if one of the other paths to access cannot be pursued. Additionally, the intrusive effect of declaration on the property rights of service providers has of itself caused much attention and debate to focus on the declaration process.[20] And even where applications for declaration have failed, participation in the declaration process has facilitated private negotiations by the parties involved, with access agreements

10. See Pt IIIA ss 44M-44Q for the provisions governing the certification process.
11. See Pt IIIA ss 44ZZA-44ZZC for the provisions governing access undertakings.
12. An ironic outcome, given the aversion expressed in the Hilmer Report towards industry-specific regimes: above n 1, 248-249.
13. Most of the main 'essential facility' candidates – electricity, gas, rail, airports and telecommunications – are covered by industry-specific regimes (whether operating under the ambit of Pt IIIA or other legislation) that render access declarations inappropriate. For a useful summary of specific State, Territory and Commonwealth regimes currently in place, see *PC Report* above n 5, App B.
14. See discussion in Part II of this article.
15. *PC Report* above n 5, 14.
16. Ibid.
17. Ibid, citing a submission to the inquiry by the NCC.
18. See *PC Issues Paper* above n 5, 9, where this terminology was used by the Productivity Commission.
19. *PC Report* above n 5, 14, citing a submission to the inquiry by the Queensland Minerals Council.
20. Ibid, 159. For further discussion, see L Evans 'Access Under the Trade Practices Act' (2000) 8 CCLJ 45.

being reached in connection with a number of rail services that the NCC had recommended be declared, but which were ultimately not declared by the relevant State minister.[21]

Against that background, this article undertakes a systematic review of the process of declaration under Part IIIA. The analysis is informed by relevant decisions, existing academic literature and the guiding precepts of the NCC,[22] all of which have given 'flesh' to the complex regime. Particular attention is also paid to the recent pronouncements of the Productivity Commission, given the importance it attributed to the role of declarations within the access regime. The article provides informed assessment of major changes to the declaration criteria that were foreshadowed by the Commission,[23] and the light-handed recommendations that ensued in its final report.

Part II of the article provides a 'snapshot' of the case-law arising under the declaration provisions, so as to provide context for subsequent detailed discussion of the decisions. Part III considers the threshold matters relevant to determining whether the declaration process may be invoked. The substantive criteria that must be satisfied in order for an infrastructure service to be declared are examined in detail in Part IV, with reference to the Productivity Commission's views and recommendations. Part V discusses certain matters ancillary to the declaration process which have been the subject of on-going criticism since the inception of the regime, and to which the Productivity Commission also had regard in its inquiry. Overall conclusions are then presented in Part VI.

II A 'SNAPSHOT' OF THE DECLARATION PROCESS

The process of declaring, or not declaring, a service to which access has been sought may involve up to five phases, with the possible participation of four different regulatory or judicial bodies. The five phases are summarised briefly below and the decisions released to end 2003, referenced according to each of these phases, are noted in Table 1.[24]

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21. *PC Report* above n 5, 28.
22. See *NCC Declaration Guide* above n 7.
23. See *PC Position Paper* above n 5, 257-258 for a summary of the Tier 1 and Tier 2 proposals countenanced by the Productivity Commission.
24. Table 1 does not include applications made to the NCC but withdrawn prior to a recommendation being made by that body (eg, an application by Virgin Blue Airlines Pty Ltd for declaration of domestic terminal services at Sydney Airport, and an application by Normandy Power Pty Ltd, NP Kalgoorlie Pty Ltd and Normandy Golden Grove Operations Pty Ltd for declaration of electrical transmission and distribution services provided by Western Power Corporation). For details of applications see <http://www.ncc.gov.au/activity.asp>.

TABLE 1: 'Snapshot' of Part IIIA declaration decisions

Case	Phase 1: Applicant	Phase 2: Did NCC recommend declaration?
Austudy payroll deduction application	Australian Union of Students	No[25]
Sydney-Broken Hill rail application	Specialized Container Transport	Yes[26]
Kalgoorlie-Perth rail and freight services applications	Specialized Container Transport	Yes (but rail line only, not freight support services)[27]
SIA freight handling application	Australian Cargo Terminal Operations Pty Ltd (two applications – one for Sydney, one for Melbourne)	Yes[28]
Brisbane-Cairns freight services application	Carpentaria Transport Pty Ltd	No[29]
Hunter Valley rail application	NSW Minerals Council	Yes[30]
Hamersley rail application	Robe River Iron Associates	Ceased assessment after Federal Court decision
Victorian rail application	Freight Australia	No[31]
Wirrida-Tarcoola rail application	AuIron Energy	Yes[32]

25. *Australian Union of Students* (unreported, NCC, 19 June 1996).
26. *Specialised Container Transport* [1997] ATPR (NCC) para 70-004.
27. *Specialised Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) para 70-006.
28. *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) para 70-000.
29. *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) para 70-003.
30. *NSW Minerals Council Ltd* [1997] ATPR (NCC) para 70-005.
31. NCC *Application for Declaration of Rail Network Services Provided by Freight Australia* (Dec 2001) < http://www.ncc.gov.au/pdf/DERaFrAp-001.pdf >.
32. NCC *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (Jul 2002) <http://www.ncc.gov.au/pdf/DERaAuRe-002.pdf>.

Phase 3: What did designated Minister decide?	Phase 4: Was ACT asked to review?	Phase 5: Was any application filed to Federal Court?
Followed recommendation; decided not to declare (Cth Treasurer)	Yes[33] - affirmed Minister's decision not to declare	No
Did nothing; therefore deemed not to declare (NSW Premier)	Yes, but withdrawn when access to track was negotiated	No
Did not follow recommendation; decided not to declare any service (WA Premier)	Yes, but withdrawn when access to track was negotiated	No
Followed recommendation; decided to declare (Cth Treasurer)	Yes[34] - affirmed Minister's decision to declare (Melbourne declared on interim basis)	No
Followed recommendation; decided not to declare (Qld Premier)	Yes, but withdrawn	No
Did nothing; therefore deemed not to declare (NSW Premier)	Yes, but withdrawn after adjournment to Federal Court, following certification of NSW rail access regime	Yes,[35] for declaratory relief
–	–	Yes,[36] for declaratory relief
Followed recommendation; decided not to declare (Cth Treasurer)	Yes[37]	No
Followed recommendation; decided to declare (Cth Treasurer)	Yes,[38] but parties declined to place any material before ACT, which then ordered Minister's declaration be set aside	No

33. *Re Australian Union of Students* (1997) 19 ATPR para 41-573.
34. *Sydney International Airport; Re Review of Declaration of Freight Handling Services* (2000) 22 ATPR para 41-754.
35. *Rail Access Corp v New South Wales Minerals Council Ltd* (1998) 87 FCR 517.
36. *Hamersley Iron Pty Ltd v NCC* (1999) 21 ATPR para 41-705.
37. A series of directions for the hearing of the matter were provided in *Freight Victoria Ltd* (2002) 24 ATPR para 41-884, but to date no decision has been released.
38. *Asia Pacific Transport Pty Ltd* (2003) 25 ATPR para 41-920.

First, an applicant (whether the designated minister[39] or another person) must ask the NCC to recommend under section 44G that a particular service be declared.[40] The threshold requirement that a non-Ministerial applicant must act 'in good faith' is discussed in Part III of the article.

Secondly, the NCC must determine the application by reference to the six criteria contained in section 44G(2). In interpreting these declaration criteria, the NCC has recently explained that it has regard to: general principles of statutory interpretation; relevant decisions of the ACT and the Federal Court; ACT decisions pertaining to the National Third Party Access Code for Natural Gas Pipeline Systems (where the 'coverage criteria' are substantially the same as the declaration criteria in Part IIIA); the objectives underlying Part IIIA as espoused by the Hilmer Report; and economic approaches to issues that have been raised by previous applications considered by the NCC.[41] Although there is no legislative requirement that the NCC take into account submissions from interested persons, the experience to date indicates that it has been extremely willing to do this as well.[42] The NCC must report its recommendation as to whether or not the service should be declared to the designated minister.

Thirdly, once the designated minister has received a declaration recommendation, he or she must declare the service or decide not to declare it.[43] Declaration of a service depends on the minister being satisfied of all the criteria specified in section 44H(4), which mirror the six matters considered by the NCC under section 44G(2). The minister has 60 days to publish his or her declaration or decision not to declare the service,[44] after which he or she is deemed to have decided not to declare the service.[45]

Fourthly, an application in writing for review of the minister's decision may be made to the ACT by the service provider or the person who applied for the declaration recommendation.[46] The review by the ACT is a reconsideration of the matter, and

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39. For infrastructure owned by a State or Territory, the relevant minister is the Premier or Chief Minister; for all other infrastructure, responsibility for declaring the service lies with the Commonwealth Treasurer: ss 44B and 44D.
40. S 44H(1).
41. *NCC Declaration Guide* above n 7, para 1.13. The Guide states that it sets out 'the Council's current thinking on the declaration criteria': para 1.14.
42. This accords with the Hilmer Report's expectation that the NCC's recommendations 'would be based on an investigation of the facility and markets in question and would take account of submissions from interested persons': above n 1, 252.
43. S 44F(1).
44. S 44H(9). At the same time, copies of the minister's reasons and the NCC's declaration recommendation must be given to the service provider and the access seeker: s 44H(7). A public register of declarations is maintained by the ACCC: s 44Q.
45. S 44H(9).
46. Ss 44K(1) and (2). The application must be lodged within 21 days after publication of the minister's decision: s 44K(3).

for the purposes of the review, the ACT has the same powers as the minister.[47] If the minister declared the service, the ACT may 'affirm, vary or set aside the declaration';[48] if the minister decided not to declare the service, the ACT may either affirm the minister's decision, or set it aside and declare the service in question.[49]

Fifthly, the Federal Court may become involved in the declaration process under Part IIIA, and has done so on two occasions thus far,[50] in order to clarify those threshold matters in respect of which the service provider has sought a declaration of rights. The Federal Court has no function at all in relation to the access regime other than to determine disputed questions of law.

A troubling aspect of the Part IIIA determinations to date concerns the inconsistent conclusions of the NCC and the designated minister. While there has been a tendency for the Commonwealth minister to follow the NCC's recommendation to declare, without advancing substantive additional reasons, the State ministers have tended not to declare (simply by doing nothing in some cases), despite an NCC recommendation to do so.[51] Moreover, the reasons given by the NCC for a recommendation not to declare have not always been followed by the relevant State minister (notwithstanding that the outcome may have been the same), as occurred in the *Carpentaria* application.[52] The whole matter of ministerial involvement in the access regime, considered in Part V of the article, was a focus point of the Productivity Commission's recent inquiry.[53]

III THRESHOLD REQUIREMENTS FOR AN ACCESS DECLARATION

1. Service

Although the Hilmer Report contemplated a regime for promoting access to essential facilities, Part IIIA is more specifically concerned with ensuring access to the *services* provided by such facilities. Part IIIA may have enacted the spirit of the

47. Ss 44K(4) and (5).
48. S 44K(7).
49. S 44K(8).
50. *Rail Access Corp* above n 35; *Hamersley Iron* above n 36. A third case, initiated by Western Power Corporation, settled out of court.
51. Similar observations have been made by I Tonking 'Access to Facilities – Reviewing Part IIIA' (2000) 492 Aust Trade Practices News 1, 3.
52. Whereas the NCC found compliance with criterion (a), the minister did not. On the other hand, the minister considered that criterion (c) had been met, whereas the NCC considered that the facilities were not nationally significant: *Carpentaria Transport* above n 29.
53. *PC Report* above n 5, 370-377.

Hilmer Report,[54] but it did not comprehensively adopt the model therein proposed,[55] and the distinction between a 'facility', and a 'service' provided by the facility, is but one instance of departure from the Hilmer philosophy. To quote an example recently used by the NCC, 'it is the use of a rail track, rather than the rail track itself, that could be the subject of a declaration recommendation'.[56]

This refinement in the legislation also recognises that a given facility may provide a range of services, only one of which might be essential to enable competition in an upstream or downstream market. It is the use of the facility for that particular purpose which is the focus of Part IIIA, not the overall use of the facility. A simple example helps to clarify the point:

> A port may be capable of handling passengers, general freight cargo and fresh produce. There may be other ports nearby capable of also handling passenger and general freight but none within reasonable distance capable of handling fresh produce. In this case, the service of transporting fresh produce might be judged to be an essential service for the particular port in question.[57]

Thus, as a threshold matter, the NCC must consider whether the service in respect of which the declaration recommendation is sought meets the statutory definition of 'service' in section 44B.[58] According to this definition:

> 'Service' means a service provided by means of a facility and includes:
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> (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:
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> (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.

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54. See A Abadee 'The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?' (1997) 5 TPLJ 27, 40.
55. That concession was explicitly recognised by the ACT in *Sydney International Airport* above n 34, 40,755: 'Any submission as to the proper construction of the provisions in Part IIIA of the Act or as to the policy underlining Part 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 Part IIIA of the Act.'
56. NCC *Freight Australia* above n 31, 10; and reiterated in *NCC Declaration Guide* above n 7, para 1.7.
57. Explanatory material accompanying the original draft legislation that was presented to the Council of Australian Governments (19 Aug 1994) para 1.16. See also the careful explanation provided in *NCC Declaration Guide* above n 7, paras 3.11-3.14.
58. S 44B is the definitions section of Pt IIIA.

As expected, the definition has been the source of challenges by service providers seeking to avoid the operation of Part IIIA.[59] Such a challenge succeeded in *Hamersley Iron Pty Ltd v NCC*.[60] Another application for declaration was also challenged on the basis that the services the subject of the application did not comprise 'services' within section 44B,[61] but the matter subsequently settled.

2. Facility

A key requirement of the definition of 'service' reproduced previously is that the service must be provided by means of a 'facility'. Should the NCC require assistance with the interpretation of this term, which is not defined in Part IIIA,[62] the ACT has suggested that 'the dictionary definitions may be of some help'.[63] Heeding its own advice, the ACT has noted, without additional comment, that '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".'[64] Fortunately, further guidance as to the meaning of 'facility' has now been provided, notwithstanding the ACT's unhelpful inclination to disregard this threshold matter when it has appeared that any of the substantive declaration criteria (discussed in the following Part) would not be satisfied.[65]

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59. An unsuccessful challenge occurred in *Rail Access Corp* above n 35, discussed in detail in R Baxt 'The Access Regime in the Courts – Ensuring the Access Regime Works as Widely as Potentially Possible!' (1998) 26 Aust Bus L Rev 472.
60. Above n 36. For case note discussion, see A Hood 'When is a Railway Part of a Production Process? *Hamersley Iron Pty Ltd v NCC*' (1999) 27 Aust Bus L Rev 421; M Legg 'Access to Services Under Part IIIA' (1999) 15 TPLB 50; L Gamertsfelder 'Why the Decision in *Hamersley Iron* May Not be Good Law' (2000) 74 ALJ 621. The *Hamersley* decision has been extensively criticised: see eg S Aliprandi '*Hamersley Iron Pty Ltd v NCC*' (2000) 8 TPLJJ 40, 44; A Cull '*Hamersley Iron Pty Ltd v NCC*' (1999) 18 AMPLJ 169, 173; S King & R Maddock 'Issues in Access' *Industry Economics Conference* (Melbourne: Monash Uni, 1999) 21-22; A Hood & S Corones 'Third Party Access to Australian Infrastructure' *Access Symposium* (Melbourne: Law Council of Aust, 28 Jul 2000) 59; N Calleja 'Access to Essential Services – Have the Hilmer Reforms Been Successfully Implemented?' (2000) 8 TPLJ 206, 216.
61. The challenge was mounted by Western Power Corporation in respect of an application for declaration lodged by three parties on 9 January 2001: see above nn 24, 50.
62. This is perhaps surprising, given that the s 44B definition of 'service' refers to roads and railway lines by way of examples of such facilities. The *NCC Declaration Guide* also acknowledges that the NCC must consider the declaration criteria in the absence of a definition of the 'facility' providing the service: above n 7, para 3.33.
63. *Re Australian Union of Students* above n 33, 43,957.
64. Ibid.
65. Ibid 43,959: '[T]he Tribunal does not find it necessary to decide these questions' of whether the Austudy payroll deduction service was a 'service', or whether the DEETYA computer database was a 'facility'. Failure to clarify these points was the subject of criticism in K O'Connell & S Aliprandi 'Application for Review: Australian Union of Students' (1997) 5 TPLJ 252.

First, according to the NCC, a 'facility' is expected to be infrastructure as opposed to the persons working the infrastructure (ie, crew necessary to work to provide the service).[66]

Secondly, seeking access to a service which relies on the use of *several* assets or components can cause particular difficulties to manifest. The definition of the facility in such cases is extremely important, for this will, to a large extent, determine whether the substantive declaration criteria (eg, whether development of another facility is feasible, whether the facility is of national significance, and so on) are satisfied or not. The ACT has noted that a key factor in defining the relevant facility is the 'minimum bundle of assets required to provide the relevant services subject to declaration'.[67] The access seeker will usually (but not always)[68] seek a more comprehensive definition of the set of physical assets which make up the facility, since it is then less likely that anyone would find it economical to develop another facility; whereas the narrower the definition of facility, the lower the investment hurdle and inhibition on development.[69]

On the other hand, as the NCC pointed out in the *Carpentaria* application, by defining a service which relies on the use of many facilities, the applicant makes it more difficult for the cluster/bundle to meet the declaration criteria in the Act.[70] This is because section 44F(4), in particular, requires the NCC to consider whether it would be economical for anyone to develop another facility that could provide *part* of the service. According to the NCC, the access regime in Part IIIA was designed with access to natural monopolies in mind, and any cluster of facilities which seeks to push the application of the regime beyond that which was intended will not be permitted.[71]

This issue arose squarely for consideration in the *Sydney International Airport* (*SIA*) review. The access seeker (seeking declaration of certain freight handling services at Sydney International Airport) successfully convinced the ACT that the relevant 'facility' should be defined as widely as possible.[72] The alternative definitions of the 'facility' were: the concrete hard stands alone; the passenger and freight aprons adjacent to the international terminal; the combination of the hard stands, aprons and the international terminal together; and the airport as a whole. The ACT held that the relevant facility was –

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66. *Specialised Container Transport – Westrail* above n 27, 70,427.
67. *Sydney International Airport* above n 34, 40,791.
68. Note that the access seeker in the *Freight Australia* application was arguing a definition of 'facility' which included rail tracks but which excluded sidings and branch lines. Ultimately, this was rejected, and the facility was held to include these components: NCC *Freight Australia* above n 31, 10.
69. *Sydney International Airport* above n 34, 40,791.
70. *Carpentaria Transport* above n 29, 70,272.
71. Ibid.
72. *Sydney International Airport* above n 34, 40,773.

> the minimum set of physical assets necessary for international aircraft to land at SIA, load and unload passengers and freight and depart in a safe and commercially sustainable manner, that is, all the basic air-side infrastructure, such as the runways, taxiways and terminals and the related land-side facilities integral to the effective functioning of air-side services. This is, in practical terms, of the whole airport.[73]

Thirdly, whether the access problem under Part IIIA arises in the context of a monopolist or in the case of multi-firm ownership, the NCC will recommend access to a facility if the legislative criteria are satisfied. It is the nature of the facility, rather than the owner, that will determine whether a recommendation is made under section 44G(2). As the OECD has said, the Part IIIA regime applies the same standards to single versus jointly owned facilities.[74]

3. Requirement of good faith

In accordance with section 44F(1), a written application to the NCC seeking a recommendation that a service be declared may be made by the designated minister[75] or any other person.[76] To date, as Table 1 demonstrates, no application has been made by the designated minister.

In the case of a non-ministerial applicant, the legislation provides a filtering mechanism: pursuant to section 44F(3), the NCC may recommend against the declaration if it thinks the application was not made in good faith. Clearly, the NCC must be satisfied that the application is bona fide, and neither trivial nor vexatious,[77] before expending its resources on the relevant inquiries. In only one application thus far has the service provider challenged the bona fides of the access seeker, but without success.[78]

IV CRITERIA FOR DECLARATION

Assuming that the relevant 'service' is provided by means of a 'facility', and that the application is made in good faith, section 44G(2) comes into play. This

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73. Ibid. For further comment, see A Hood 'Access to Bottleneck Facilities: The Australian Competition Tribunal's Sydney International Airport Decision' (2000) 8 TPLJ 113.
74. Organisation for Economic Co-operation and Development 'The Essential Facilities Concept' OCDE/GD(96)113 in *Roundtables on Competition Policy* (Paris, 1996) 41.
75. See above n 39 for which minister is responsible.
76. The Hilmer Report envisaged that proceedings would be initiated by 'government' (Commonwealth, State or Territory): above n 1, 252. However, this approach was strongly criticised on the basis that a party denied access to a facility would have to lobby the relevant government to lodge the application: W Pengilley 'Hilmer and "Essential Facilities"' (1994) 17 UNSWLJ 1, 38.
77. *Specialised Container Transport* above n 26, 70,340.
78. *Australian Union of Students* above n 25; confirmed on review in *Re Australian Union of Students* above n 33.

stipulates that the NCC cannot recommend the declaration of the service unless each of the following criteria is satisfied:

(a) that access (or increased access) to the service would promote 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.

Each of these criteria is considered in turn.

1. Promoting competition in other markets

Pursuant to section 44G(2)(a), a service cannot be declared unless access to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service. In this section of the article, the former will be called 'market #2', and the latter 'market #1'.

(i) Issues arising under criterion (a)

• Market definition

The first step in assessing whether criterion (a) is satisfied is for the NCC to 'define the relevant market(s) in which competition may be promoted and verify that this market or these markets are separate from the market for the service to which access is sought'.[79] In considering market definition, the NCC has noted[80] that it will be guided by High Court pronouncements,[81] and those of the ACT,[82] on the

79. *NCC Declaration Guide* above n 7, para 5.4(a).
80. NCC *Wirrida-Tarcoola Rail* above n 32, 17.
81. Notably *Queensland Wire Industries v BHP* (1989) 167 CLR 177, citing the Trade Practices Tribunal's decision in *Re Queensland Co-operative Milling Association Ltd* (1976) 1 ATPR para 40-012, 17,247.
82. Eg *Sydney International Airport* above n 34, 40,772-40,773.

meaning of 'market'. Thus the NCC has recently confirmed, in the *AuIron* application, that a market typically has four dimensions: the product dimension (the type of goods or services in the market); the geographic dimension (the area which the market covers); the functional dimension (the relevant stage in the production and marketing chain); and the temporal dimension (whether the size or scope of the market is likely to change over time).[83] If there is any difficulty in defining one or more of these aspects, then market #2 may not be capable of identification and the criterion will fail.[84]

In those applications in which services have been successfully declared to date, it is evident that the market in which the service is provided (market #1), and the market in which competition will be promoted (market #2), have often been very closely related. For example, in the *Carpentaria* application, the applicant successfully argued that market #1 was the rail transport market (in which Queensland Rail owned the rail lines, the services of which Carpentaria wanted declared), and that market #2 was the freight forwarding market, a market which involved the logistical collection of freight and its organisation and delivery to a particular destination by means of a variety of line-haul modes of transport (including rail).[85] Criterion (a) was therefore considered to be satisfied on the basis that allowing Carpentaria access to the rail track service would promote competition in the freight forwarding market.[86] However, the minister declined to accept the NCC's recommendation, briefly dismissing, in connection with criterion (a), the NCC's delineation of the two markets described above.[87]

As another example of fine delineation, the NCC was prepared to hold in the *Hunter Rail* application that the Hunter railway line service, and the rail haulage of Hunter region coal, were different markets for the purposes of criterion (a), given that the assets required for the production of services in each market were not common.[88]

- **Vertical integration?**

Access disputes typically arise where the owner of an essential facility is vertically integrated, with an incentive to inhibit competitors' access to the facility

83. NCC *Wirrida-Tarcoola Rail* above n 32, 18-19. For further discussion, see *NCC Declaration Guide* above n 7, para 5.19 ff.
84. This occurred in the *AuIron* application in respect of *one* of the alleged markets; however, the criterion was satisfied in respect of the market for bulk freight forwarding.
85. *Carpentaria Transport* above n 29, 70,274. QR's argument that both it and Carpentaria operated in the same market, and that QR provided a total logistical solution for clients, of which rail linehaul was but one aspect, was not accepted by the NCC.
86. Ibid, 70,293.
87. See the minister's decision, reproduced ibid, 70,323; relevant part of decision ibid, 70,325.
88. *NSW Minerals Council* above n 30, 70,395.

so as to hinder competition in dependent markets. As the NCC noted in the *AuIron* application, a vertically integrated facility provider (as existed in that case) has the incentives and opportunities to distort competition in upstream and downstream markets.[89]

However, the Hilmer Report regarded situations where a facility owner does not compete in an upstream or downstream market, but charges monopoly profits at the expense of economic efficiency, to be an equivalent problem.[90] Accordingly, there is no requirement under section 44G(2)(a) to characterise the service provider as a vertically integrated monopolist, or that access be essential to promote competition in an upstream or downstream market. On the contrary, the broad terms of criterion (a) simply require that access to the service must promote competition in *any other* market.[91] As the NCC stated in the *Carpentaria* application: 'To recommend that an application meets this criterion, the Council must be convinced that the service to which access is sought is not in the same market as the market in which competition is promoted.'[92]

More recently, however, in the *Freight Australia* application, the NCC considered that 'the purpose of criterion (a) is to determine whether declaration would enhance the environment for competition in an upstream or downstream market'.[93] This latter emphasis on promoting competition in an upstream or downstream market, rather than in *any other market*, accords more closely with the terminology in clause 6 of the Competition Principles Agreement (CPA).[94] Certainly, the upstream/downstream test will be easier to satisfy if the service provider is a vertically integrated monopolist.[95]

The significance of vertical integration was explicitly addressed in the *SIA* review.[96] As noted previously, this case related to the services provided at Sydney International Airport (SIA), used by third parties for the loading and unloading of international aircraft. The facility owner, Sydney Airports Corporation Limited (SACL), was not vertically integrated. While it controlled SIA, it did not itself provide ramp handling services for international aircraft. Such services were provided by other organisations who were given access to the airport to carry out these activities.

89. NCC *Wirrida-Tarcoola Rail* above n 32, 21.
90. Hilmer Report above n 1, 240-241.
91. King & Maddock above n 60, 22 have argued, for instance, that access under the Pt IIIA regime will be desirable if it promotes competition (in the sense that it leads to prices that better reflect social costs) in the market for final goods and services.
92. *Carpentaria Transport* above n 29, 70,273.
93. NCC *Freight Australia* above n 31, 18.
94. See cl 6(1)(b), which requires access to infrastructure services if this is 'necessary to permit effective competition in an upstream or downstream market'.
95. This point is also discussed in Hood & Corones above n 60, 73-77.
96. *Sydney International Airport* above n 34.

SACL argued that, since it was not a vertically integrated monopolist, it could not leverage its power into the market for ramp handling services, and it was not appropriate that Part IIIA apply to its facility.[97] In response, the ACT stated that, while an access declaration may be particularly appropriate where a facility is controlled by a vertically integrated monopolist, the provisions of Part IIIA are not limited in their application to a vertically integrated monopolist.[98]

- **Promotion of competition**

Assuming market #2 exists, the arguments put forward by service providers, in seeking to disprove that access would promote competition in that other market, have been many and varied. Largely unsuccessful, these arguments have included:

1. that market #2 is such a highly contestable market with services that are so substitutable (eg, road for rail transport) that providing access to, say, rail lines would not increase competition in market #2;[99]
2. that tender processes in market #2 had brought about, and would continue to foster, a competitive situation in market #2 without the need to declare access;[100]
3. that the access seeker already had access to the service, so declaration would merely preserve the status quo rather than promote competition;[101]
4. that the access seeker's access to the service would preclude anyone else from having access (due to limited availability of terminals, etc), which would not promote competition in market #2, even were a declaration of access to occur;[102]
5. that access may not lead to any lower prices in market #2 because of access charges that the access seeker may have to pay;[103]
6. that there was already strong competition in market #2 which was unlikely to be enhanced by a declaration of access;[104]
7. that the access seeker already had such significant market power in market #2 that access would merely entrench the access seeker as a dominant market player, and prevent other players from entering market #2, rather than stimulate competition in that market;[105]

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97. Ibid, 40,755.
98. Ibid, 40,756.
99. Eg unsuccessful in *Carpentaria Transport* above n 29; but partially successful in NCC *Freight Australia* above n 31, for the passenger and general transport markets.
100. Eg unsuccessful in *Sydney International Airport* above n 34; *Carpentaria Transport* above n 29.
101. Eg unsuccessful in *Carpentaria Transport* ibid.
102. Eg unsuccessful as in above n 100.
103. Ibid.
104. Eg successful in NCC *Wirrida-Tarcoola Rail* above n 32. See further *NCC Declaration Guide* above n 7, para 5.64.
105. Eg unsuccessful as in above n 100.

8. that granting access to the access seeker would give that party substantial market power which it would seek to abuse;[106]
9. that while access would promote competition in the short-term, competition was likely to be discouraged in the long-term, as investment in the necessary facilities to provide those services declined;[107]
10. that the facility owner/service provider did not possess market power in market #1, and so was not in any position to adversely affect competition in upstream or downstream markets;[108] and
11. that no market #2 existed in which competition could be promoted by the granting of access, because the access seeker was not intending to use the facility for a few years, and no other party was seeking to use the facility in the interim.[109]

Contrary to the Hilmer Report's recommendation, criterion (a) simply requires that competition in another market be 'promoted', rather than result in *effective* competition in another market, or result in the introduction of competition in another market where previously, without access to the facility, that would have been completely impossible.[110] As the criterion is presently worded, the concern has been that any trivial or insignificant increase in competition in another market would be sufficient to satisfy the test.[111]

These fears have been exacerbated by the ACT's reasoning, in the *SIA* review, that –

> the notion of "promoting" competition ... involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. In other words, *the opportunities and environment for competition given declaration, will be better than they would be without declaration.*[112]

In reaching a view as to whether increased access 'would promote competition', the ACT explained that it 'must look to the future on a similar basis to the way it looks at the authorisation provisions, namely the future with or without

106. Ibid.
107. Eg successful in *Specialised Container Transport – Westrail* above n 27.
108. Eg successful in *Duke Eastern Gas Pipeline Pty Ltd* (2001) 23 ATPR para 41-821; cited as relevant in NCC *Wirrida-Tarcoola Rail* above n 32, 20.
109. Eg unsuccessful in NCC ibid, 23 ('a market may exist for a particular existing service if there is a demand for such a service, notwithstanding that there is no trade in those goods at a given time').
110. Hilmer Report above n 1, 266.
111. S King & R Maddock *Unlocking the Infrastructure: The Reform of Public Utilities in Australia* (Sydney: Allen & Unwin, 1996) 76.
112. *Sydney International Airport* above n 34, 40,775 (emphasis added).

declaration.'[113] In the instant case, the ACT applied this 'future with and without' test to conclude that competition in at least one market, the market for ramp handling services, would be promoted by the declaration.[114]

As one respondent cited by the Productivity Commission noted:

> It is difficult to envisage how the conclusion could ever be other than that competition (that is, in the Tribunal's terms, more competitors) would be promoted by declaring a facility open for access. In other words, the wording of the test predetermines the outcome, all other things (such as the national significance of the facility) being equal.[115]

The NCC's view, as reflected in its decisions, has been that the promotion of competition in market #2 should not be trivial.[116] It has specifically stated that there should be 'tangible benefits'[117] which may be forecast from the declaration. These have been identified to include: increased efficiencies and lower costs in market #2; a choice to users in market #2 that will encourage improvements in service and potentially lower prices; the possibility of new entrants to market #2 who could provide innovative or different types of services for users not presently available; and the removal of barriers to entry to market #2 such as outlay costs.[118] The application of criterion (a) has not required the NCC to prove that a sequence of future events will take place, only that it make a considered judgment as to the likely effects of access in respect of the promotion of competition in markets other than the market for the service.[119] As the NCC has stated in its recent Declaration Guide:

> The promotion of competition cannot be gauged in terms of actual outcomes (that is, an actual increase in competition). Rather, it refers to an improvement in the opportunities and environment for competition such that competitive outcomes are more likely to occur.[120]

(ii) Productivity Commission's review

The Productivity Commission agreed with critics of the ACT's reasoning in the *SIA* review that the 'future with or without' test, discussed above, would hardly ever

113. Ibid.
114. Ibid, 40,791.
115. *PC Report* above n 5, 163, citing a submission to the inquiry by I Tonking. Cf Corones' view that this is a 'useful and workable test for determining the circumstances in which granting access to services is likely to promote competition in another market': S Corones 'Tribunal Opens the Door to Sydney International Airport: Flaws in Part IIIA Exposed' (2000) 28 Aust Bus L Rev 28, 28.
116. Eg *Carpentaria Transport* above n 29, 70,292; *NSW Minerals Council* above n 30, 70,392.
117. Eg *NSW Minerals Council* ibid, 392; *Specialised Container Transport* above n 26, 70,341.
118. See above nn 116-117.
119. *Carpentaria Transport* above n 29, 70,281.
120. *NCC Declaration Guide* above n 7, para 5.56.

not be met.[121] Thus, in order to provide a sufficient hurdle against inappropriate declarations, the Productivity Commission recommended that criterion (a) be bolstered to provide that the declaration should promote a *substantial* increase in competition, while acknowledging that 'substantiality' needs to be interpreted, and perhaps couched explicitly, in terms of the likelihood rather than the certainty of such an effect.[122] Of course, 'substantial' is not a new term for the purposes of trade practices law, having been used and interpreted extensively in Part IV of the Trade Practices Act,[123] which explains the Productivity Commission's preference for it. Interestingly, after extensive review and deliberation, this change to criterion (a) was the only amendment to the declaration criteria ultimately recommended by the Productivity Commission in its final report.

Although the rationale for the Productivity Commission's proposal was said to derive from dissatisfaction with the ACT's approach in the *SIA* review, it is somewhat surprising that the careful statements of the NCC prior to that case about the need for non-trivial and tangible benefits did not dissuade it from the necessity of such change. Moreover, in two decisions handed down by the NCC after the Productivity Commission's report was written but before it was released, the observations of the ACT in the *SIA* review were referred to and applied without apparent difficulty or controversy.[124]

The NCC was against the change on the basis that even adding this one word would fundamentally alter the criterion in an undesirable manner.[125] However, the Productivity Commission concluded that, if the NCC can decide that a declaration of access would create the conditions for increased competition, it should also be able to make an assessment about the likely magnitude of such effects on competition.[126] One wonders at what cost, and with what expert differences of opinion, that quite disparate assessment will have to be made.

2. Uneconomical to develop another facility

Section 44G(2)(b) specifies that, in order for declaration of the service to occur, it must be uneconomical for anyone to develop another facility to provide the service. This criterion recalls the Hilmer Report's endorsement of *MCI Communications Corp v American Telephone & Telegraph Co*,[127] where 'a

121. *PC Report* above n 5, 179. In other words, the overriding criticism of criterion (a) was that it is too easily satisfied.
122. Ibid, 190-192, and see Recommendation 7.1.
123. That is, pursuant to ss 45, 46, 47 and 50.
124. NCC *Wirrida-Tarcoola Rail* above n 32, 19-20; and NCC *Freight Australia* above n 31, 18-19.
125. *PC Report* above n 5, 190.
126. Ibid, 191.
127. 708 F 2d 1081 (1983).

competitor's inability practically or reasonably to duplicate the essential facility'[128] was identified as a crucial element of the essential facilities doctrine.[129]

(i) Issues arising under criterion (b)

• Whether limited to natural monopolies

Criterion (b) has engendered divergent opinions as to what types of facilities would be 'uneconomical to develop'. Given that the Hilmer Report placed particular emphasis on the *MCI* case, which concerned a natural monopoly, it was unsurprising that the Hilmer Report's definition of 'essential facilities' were those 'which exhibit natural monopoly characteristics and hence cannot be duplicated economically'.[130] The NCC has similarly interpreted criterion (b) to mean that facility providing the service must exhibit natural monopoly characteristics.[131] In contrast, the ACCC has stated that criterion (b) extends 'beyond the natural monopoly case to natural duopolies or oligopolies, that is, where there are already two (or more) facilities but it would be uneconomic to develop another one.'[132]

Criterion (b) would seem to be an imprecise way of targeting natural monopolies. Indeed, according to King and Maddock, the initial intention to provide access when a facility was uneconomical to duplicate (that is, in cases of natural monopoly where there is no prospect of competition) has shifted towards providing access to any or all facilities.[133]

• Meaning of 'anyone'

Under criterion (b), it must be uneconomical for *anyone* to develop another facility. In that context, what is meant by the word 'anyone'? Does the criterion require that the particular access seeker could not duplicate the facility or that any firm or individual could not duplicate it? It has been argued that the inclusion of the term 'anyone' in this test distinguishes it from the United States' approach which

128. Ibid, 1132.
129. Hilmer Report above n 1, 244. In the United States, third party access to facilities that are essential to competition in a particular industry is governed by the 'essential facilities doctrine'. The doctrine derives from judicial interpretation of the monopolisation provisions of the Sherman Act 1890 (US).
130. Hilmer Report above n 1, 239. To economists, the term 'natural monopoly' means that the size of the market is such that it is only efficient for there to be the one facility in the market.
131. See the discussion in *NCC Declaration Guide* above n 7, paras 4.53-4.75.
132. ACCC *Access Regime – A Guide to Part IIIA of the Trade Practices Act* (Canberra: AGPS, 1995) 5.
133. King & Maddock above n 111, 45. See also D Clough 'Economic Duplication and Access to Essential Facilities in Australia' (2000) 28 Aust Bus L Rev 325.

involves assessing whether the *party* wanting access can economically duplicate the facility.[134] That difference of approach has been confirmed by the NCC.[135]

Resolution of this matter was provided in the *SIA* review, where the ACT held that, in determining whether it would be economical for anyone to develop another facility to provide the service, 'anyone' excluded SACL, the facility owner;[136] that is, the reference to 'anyone' in section 44H(4)(b) excluded the provider of the existing facility. The justification for the Tribunal's view is encapsulated in the following passage: '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.'[137] Thus, the decision confirmed that in criterion (b) 'anyone' does not include the owner of the facility because economies of scope may allow the incumbent to develop another facility.

- **Meaning of 'uneconomical'**

Whose perspective should be adopted in assessing criterion (b) – that of the access seeker or society as a whole?[138] In the *SIA* review, the ACT stated that 'the uneconomical to develop test should be construed in terms of the associated costs and benefits of development for society as a whole.'[139] This view lay to rest a strong difference of expert opinion in that case as to whether a private perspective (ie, the costs to an individual access seeker of developing another facility) or a social perspective (ie, the costs to society as a whole of another facility being developed) should be brought to bear on the criterion. The ACT considered that the 'social test' interpretation was consistent with the underlying intent of the legislation,[140] which is directed to securing access to essential facilities of national significance.[141] The ACT concluded that, because of the substantial economies of scale and scope associated with operating Sydney International Airport, it would be uneconomical for anyone to develop another facility to provide the relevant service.[142]

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134. King & Maddock above n 111, 78-79.
135. *Carpentaria Transport* above n 29, 70,279. See also *NCC Declaration Guide* above n 7, paras 4.97-4.98.
136. *Sydney International Airport* above n 34, 40,792.
137. Ibid.
138. Hood & Corones above n 60, 66-69.
139. *Sydney International Airport* above n 34, 40,793.
140. See *Hansard* (HR) 30 Jun 1995, 2799.
141. *Sydney International Airport* above n 34, 40,793. The test may be illustrated by reference to the use of an existing railway line for a new mine operator. Even where the new mine operator can afford to build its own line on a cost-benefit analysis, this would be wasteful from a social point of view if there is excess capacity on the existing line. On this basis, it would be uneconomical for another facility to be developed.
142. Ibid.

- **Meaning of 'to develop another facility'**

Kench has pointed out that criterion (b) states that it must be uneconomical for anyone 'to develop another facility'; it is not a test of duplication of the existing facility (which, if it is a natural monopoly, may defy duplication by definition).[143] Willett similarly cautions that 'develop' should be interpreted liberally to recognise that an *existing* facility may be developed, rather than any requirement of duplication.[144] The OECD has further explained that, when considering whether it is economical to develop another facility to provide the service, the cost of *duplicating* the facility may not necessarily be relevant.[145] For instance, it may not be necessary exactly to replicate the facility in order to provide the service; only part of the facility may be used to provide the service; or a new facility might be able to provide a range of services, including the service in question, which cannot be provided by the existing facility.[146] Thus, it may be economical to *develop* another facility.

However, until recently, the NCC had taken a contrary 'uneconomical to duplicate' approach in its recommendations under Part IIIA. For example, in the *SIA* application, the NCC stated that 'in order to duplicate those facilities to provide the services as are intended to be provided by the Applicant, the Council considers it would be necessary to duplicate the Sydney and Melbourne International Airports.'[147] Similarly, in *Re Specialised Container Transport – Westrail*, the NCC adopted the view that 'the key question is whether it is likely that an actual or potential market participant would find it commercially worthwhile to duplicate the facility in question.'[148]

Considerable clarification of this matter was recently provided by the ACT in *Duke Eastern Gas Pipelines Pty Ltd.*[149] Although this decision concerned the *National Third Party Access Code for Natural Gas Pipeline Systems*, criterion (b) of the access criteria operative under that Code[150] duplicates criterion (b) of Part IIIA. Of this criterion, the ACT stated that a 'literal construction ... might require the decision-maker, in the application of the criterion, to ignore the existence of pipelines which have already been developed' because the words of the criterion ask whether it is economic to develop *another* pipeline.[151] The ACT considered that to proceed

143. J Kench 'Part IIIA: Unleashing a Monster' in F Hanks & PL Williams (eds) *Trade Practices Act: A Twenty-Five Year Stocktake* (Sydney: Federation Press, 2001) 122, 153.
144. E Willett 'The Role of Declaration in Infrastructure Regulation' *Law and Regulation Symposium* (Sydney: UNSW, 24-25 Aug 2000) 16.
145. OECD above n 74, 42-43.
146. Ibid.
147. *Australian Cargo Terminal Operations* above n 28, 70,124.
148. *Specialised Container Transport – Westrail* above n 27, 70,439.
149. Above n 108.
150. See s 1.9 of the Code.
151. *Duke* above n 108, 43,057-43,058.

in that fashion would be 'blinkered',[152] and that there was no logic in excluding existing facilities from consideration in the determination of whether criterion (b) is satisfied.[153]

Since the *Duke* decision, the NCC has shifted ground on the meaning to be attributed to criterion (b). It said in the *AuIron* application that 'the term "develop" is sufficiently broad to encompass minor modifications or enhancements to an existing rail track. This means that criterion (b) is not met if another existing rail track can be economically expanded to provide the services under application.'[154] Also, in the *Freight Australia* application, the NCC considered that 'it is not necessary that the additional facility identically duplicate the first [facility] but rather that it be capable of providing substitute services.'[155] The NCC has encompassed these views in the following paragraph of its recent Declaration Guide:

> 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, then criterion (b) is not met.[156]

This represents a distinct modification of the NCC's previous approach.

- **Duplication of part of the facility**

A closely related provision to section 44G(2)(b) is section 44F(4) which states that, in deciding whether to recommend the declaration of a service, the NCC must consider whether it would be economical for anyone to develop another facility that could provide *part* of the service. The NCC has tended to treat these two sections together,[157] although it has recently acknowledged that the two considerations are distinct, and that section 44F(4) can be used to deny declaration in circumstances where the declaration criteria are satisfied.[158]

Carpentaria Transport Pty Ltd[159] neatly illustrates the effect of section 44F(4). In this matter, Carpentaria applied to have the Brisbane–Cairns rail freight service provided by Queensland Rail declared. The service involved the handling and transporting of freight, including, for example, its carriage, loading and unloading, and temporary storage. The facilities used to provide the service were

152. Ibid, 43,058.
153. Ibid.
154. NCC *Wirrida-Tarcoola Rail* above n 32, 13. In the result, no existing track could be expanded, nor was it economically feasible to develop other existing rail tracks in that decision.
155. NCC *Freight Australia* above n 31, 14.
156. *NCC Declaration Guide* above n 7, para 4.85.
157. *Australian Cargo Terminal Operations* above n 28, 70,123.
158. *NCC Declaration Guide* above n 7, para 4.94.
159. Above n 29.

identified as all rail infrastructure necessary to handle and transport freight from terminal to terminal. These facilities were grouped as track, above-track (including locomotives and rolling stock), and terminals (including loading and lifting equipment).[160] In the result, the NCC did not recommend declaration, and the designated minister (the Queensland Premier) decided not to declare the service. Both the NCC and the minister justified their conclusion on the basis that it would be economical for someone to develop another facility that provided *part* of the service – that is, it would be economically feasible for someone to develop or provide the above-track facilities and terminals that contributed to the provision of the rail freight service.[161]

This decision has been academically welcomed as a correct recognition that there can be no natural monopoly in readily reproducible and transferable railway assets (as opposed to railway infrastructure);[162] and that it represents the positive application of section 44F(4) where natural monopoly services and contestable services are inappropriately bundled together.[163] A finding that other facilities existed which could provide part of the service (eg, automatic deduction services provided by financial institutions) was similarly crucial to the NCC's recommendation in the *Austudy* application against declaration of the Austudy payroll deduction service.[164]

(ii) Productivity Commission's review

One of the goals of the Productivity Commission was to propose modifications to Part IIIA 'to help ensure that coverage of the regime would be more tightly confined to natural monopolies', so as to avoid inappropriate declarations of services.[165] The Commission was firmly of the view that duopolies and oligopolies should not fall within the purview of the generic regime in Part IIIA.[166] Criterion (b) was the principal focus of these proposals. The Commission considered that re-specification of the criterion in terms 'that it would be uneconomic for anyone to develop a *second facility* to provide the service' would confine the scope of Part IIIA more tightly to monopoly service provision.[167]

However, this proposal was not carried through for several reasons: many respondents to the inquiry did not approve of the proposed wording; the ACCC

160. Ibid, 70,269.
161. Ibid, 70,308 (NCC); 70,325 (minister).
162. S Joy 'Regulating Access to Railway Infrastructure' in M Arblaster & M Jamison (eds) *Infrastructure Regulation and Market Reform: Principles and Practice* (Canberra: AusInfo, 1998) 130.
163. Willett above n 144, 17.
164. *Australian Union of Students* above n 25, 2-3.
165. *PC Report* above n 5, 170.
166. Ibid, 171.
167. Ibid (emphasis added).

(and others) maintained that there may be circumstances in which regulation of duopolistic or oligopolistic services is warranted; the wording tended to introduce a private rather than a social test of 'uneconomical', which ran counter to authority to date; the 'second facility' may be taken to mean another facility based upon the same technology when, indeed, what the Productivity Commission intended was another facility which could provide an equivalent service; and any change of wording was likely to introduce new uncertainties.[168] Given the possible interpretational problems associated with the use of 'a second facility' in the criterion, the Productivity Commission resolved not to pursue that proposal further.[169]

3. National significance

Section 44G(2)(c), which requires the facility to be of 'national significance', has been described by the NCC as a 'test of materiality'.[170] The test is intended to place less important facilities outside the scope of Part IIIA.[171] The NCC cannot recommend declaration of the service unless it judges the facility to be of national significance, having regard to: its size, or its importance to international trade and commerce, or its importance to the national economy. While the facility needs to satisfy only one of the three benchmarks,[172] it has been noted by the NCC that there is considerable overlap between those conditions.[173] The criterion focuses on the importance of the facility rather than the service to which the applicant is seeking access.[174]

(i) Issues arising under criterion (c)

- **How is the 'facility' to be described?**

The ease of satisfying criterion (c) will depend to some extent on whether all the facilities encompassed by the application (eg, the combination of rail track, locomotives and rolling stock, terminal facilities, and lifting and shunting equipment),[175] or each separate facility itself, must satisfy the test. Obviously, an access seeker will pursue the first of these options, while a service provider opposing access will prefer the view that national significance needs to be determined for each facility separately.

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168. Ibid, 184-186.
169. Ibid, 191.
170. *NCC Declaration Guide* above n 7, para 6.1.
171. See eg the statement of the Productivity Commission in *PC Issues Paper* above n 5, 26.
172. *NCC Declaration Guide* above n 7, para 6.2.
173. *Australian Cargo Terminal Operations* above n 28, 70,130.
174. Eg *Carpentaria Transport* above n 29, 70,308; *NSW Minerals Council* above n 30, 70,403; *Specialised Container Transport – Westrail* above n 27, 70,445.
175. As in *Carpentaria Transport* above n 29.

Facing such dichotomy of argument in the *Carpentaria* application,[176] the NCC concluded that whether the facilities should be considered separately depended upon whether those facilities can be economically duplicated. If they cannot, they ought to be considered in unison; but if certain of the facilities are economically feasible to duplicate (as in that case, in respect of the rolling stock and the terminals), then it is appropriate to consider the issue of national significance in relation to the separate facilities. On this basis, the NCC concluded that it was appropriate to consider the issue of national significance in relation to the 'above rail' and 'below rail' elements of the service separately, and that the track, but not the rolling stock or terminals, was of national significance.[177] However, although the minister followed the NCC's recommendation and declined to declare the freight service the subject of Carpentaria's application, he treated this criterion quite differently: 'In deciding that the facility is of national significance, I have considered the facility to be the whole of the service which was the subject of Carpentaria's application, and included in my deliberations the above and below track facilities as a whole.'[178] Notwithstanding this difference in reasoning, the NCC's approach of separating the facilities was repeated subsequently in respect of the *Kalgoorlie-Perth* rail application.[179]

The conundrum of how broadly to view the 'facility' also arose in the *SIA* application. The NCC asked itself:

> How broadly the criterion of national significance should be applied – should the criterion apply to the international freight handling facilities referred to in the application (the hard stand, freight and passenger apron, and space to provide storage and enable loading and unloading), or should the criterion apply more broadly to the airport?[180]

The NCC chose the latter which meant that it was a relatively simple matter to conclude that SIA was of national significance, given the volume of freight that passed through the airport which was dependent upon the freight handling facilities.[181] This was accepted by the ACT on further review.[182]

- **What sorts of facilities have satisfied the criterion, and why?**

To appreciate why some facilities satisfy the test of national significance and others fail, it is useful to consider the factors which have contributed to infrastructure

176. Ibid, 70,310-70,311.
177. Ibid, 70,313-70,314.
178. The minister's comment is reproduced ibid, 70,325. The minister disagreed with the NCC on the matter of criterion (c), but as he also disagreed with the finding on criterion (a), and considered that access would *not* promote competition in another market, the outcome was the same as the NCC had recommended.
179. *Specialised Container Transport – Westrail* above n 27, 70,446-70,449.
180. *Australian Cargo Terminal Operations* above n 28, 70,129.
181. Ibid, 70,134.
182. *Sydney International Airport* above n 34, 40,793.

being 'nationally significant'. On the basis of the cases to date, three relevant factors have emerged, which closely track the factors listed in the legislation itself.

First, the NCC will have regard to the physical dimensions of the infrastructure, taking note of its physical capacity and the throughput of goods and services using the facility.[183] On this basis, a rail track of some 1700 kilometres in length, servicing directly 11 ports along the route, was nationally significant, whereas rail terminals in regional Queensland, not large when compared in size to rail terminals in capital cities, were not.[184] Likewise, a computer network that was sizeable from the point of view of the quantity of information stored in its databases, but which was merely one of several hundred national databases, many of which were of comparable or even greater size, did not meet the criterion.[185]

Secondly, the volume or monetary value of trade provided by the facility may be considered nationally significant as a proportion of Australia's interstate or export trade or as a proportion of the nation's gross domestic product.[186] This was particularly relevant in the *Hunter Rail* application.[187] In contrast to the *Carpentaria* application, the Hunter railway line represented only a small proportion of the Australian rail network; however, it carried significant quantities of coal and non-coal freight each year, and on that basis, was considered to be nationally significant.[188] In an entirely different context, the ACT concluded in *Re Australian Union of Students* that, even if access were granted to the Austudy payroll deduction service and such access resulted in every Austudy recipient in Australia becoming a member of a student union, this would still only result in $1.5 million in union payments annually, a very small sum when viewed in relation to the Australian economy as a whole.[189] The service was not declared.

Thirdly, the criterion can be established by the importance of the facility to trade or commerce in related markets.[190] This was particularly important in the *Hunter Rail* application, as the NCC concluded that the railway line services provided by the facility, the Hunter Railway Line, were a key input into the production of

183. *NCC Declaration Guide* above n 7, para 6.3.
184. *Carpentaria Transport* above n 29, 70,311.
185. *Re Australian Union of Students* above n 33, 43,960. The computer network was the 'facility' in this case, and it contained approximately 485 000 student names.
186. Eg *Carpentaria Transport* above n 29, 70,312. See also *NCC Declaration Guide* above n 7, para 6.5.
187. *NSW Minerals Council* above n 30.
188. Ibid, 70,404. Similarly, in the *AuIron* application, the significance of the Wirrida-Tarcoola rail track to the exportation of AuIron's coal and iron ore, and the amount that the track added to the value of Australian exports, persuaded the NCC to consider the relatively small section of track as nationally significant: NCC *Wirrida-Tarcoola Rail* above n 32, 37.
189. *Re Australian Union of Students* above n 33, 43,959.
190. Eg *Carpentaria Transport* above n 29, 70,311. See also *NCC Declaration Guide* above n 7, para 6.6.

coal for local and export markets, and that, given that coal was Australia's largest single commodity export, the railway line was nationally significant.[191] It was similarly effective in the *SIA* application, in which it was argued that the performance of freight handling facilities at Sydney and Melbourne International Airports significantly influenced the performance of industries reliant upon international air freight, for example, markets in time-sensitive or perishable goods or which rely on 'just-in-time' inventory management.[192]

(ii) Productivity Commission's review

It was noted by the Productivity Commission that some respondents to its inquiry considered that criterion (c) should be more narrowly confined to facilities of 'major national significance'.[193] However, the Commission itself did not recommend such a stricture, thereby implicitly endorsing the view that the criterion is adequately designed to avoid the situation in the United States where sports stadiums[194] and ski fields[195] have been declared essential facilities.[196] In light of the factors determining national significance, discussed previously, fears that the provisions of Part IIIA could be applied to, for example, the MCG, as a stadium of national significance and size,[197] appear to have been ill-founded.

In the early days of Part IIIA's operation, there was much academic exhortation that Part IIIA should be invoked wherever denial of access to any essential facility was alleged by an access seeker, whether the facility was one of national importance or not.[198] The Productivity Commission also noted in its final report certain submissions to the effect that the emphasis on 'national significance' could result in facilities that are important on a regional, rather than on a national, level being ignored.[199] Nevertheless, no amendment to this criterion was recommended by the

191. *NSW Minerals Council* above n 30, 70,404.
192. *Australian Cargo Terminal Operations* above n 28, 70,130-70,131; confirmed by the ACT in *Sydney International Airport* above n 34, 40,793.
193. *PC Report* above n 5, 168.
194. *Hecht v Pro-Football Inc* 570 F 2d 982 (1977).
195. *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985).
196. For further discussion, see N Rochow 'Recent Reforms in Competition Law' (1998) 20 Law Soc Bull (SA) 28, 30.
197. L Griggs 'Access to Essential Facilities' (1997) 71(5) LIJ 40, 42.
198. The concern was that a party denied access to an essential facility may be just as disadvantaged if a relatively local market or small sector of the national economy were involved, as if a national industry were involved. See eg R Kewalram 'The Essential Facilities Doctrine and Section 46 of the Trade Practices Act: Fine-tuning the Hilmer Report on National Competition Policy' (1994) 2 TPLJ 188, 205; W Pengilley 'The National Competition Policy Draft Legislative Package: The Proposed Access Regime' (1995) 2 CCLJ 244, 251-253. Cf King & Maddock above n 111, 71: '[T]he test of "national significance" is clearly intended to better define the scope of the Australian access regime.'
199. *PC Report* above n 5, 168.

Commission in response to these concerns.[200]

An interesting conundrum under criterion (c) relates to exactly what should be significant – the facility or the service? Hood and Corones have argued that, contrary to the intention of the Hilmer Report,[201] the criterion is linked to the facility rather than to the service (provided by the facility) that is being declared.[202] This can lead to potential and perhaps unintended problems. For example, in the *SIA* review, while 'the predominant and pervasive role that SIA plays in Australia's commercial links with the rest of the world'[203] meant that it was clearly a facility of national significance, the cargo freight handling services the subject of the declaration were not nationally significant. The Productivity Commission took note of this criticism and recommended that any 'revamped declaration package' that may be contemplated for Part IIIA should incorporate a screening test 'to ensure that the service (rather than the facility) is of significance to the national economy.'[204] However, unless and until such a 'revamp' is undertaken, the Commission rather surprisingly did not recommend any change to the drafting of criterion (c) as it presently stands.

4. Human health and safety

Section 44G(2)(d) stipulates that it must be possible to provide access to the service without undue risk to human health and safety. Infrastructure operators who seek to deny access on safety grounds bear the onus of proving to the NCC (in the first instance) that access to the service would compromise safety.[205]

(i) Issues arising under criterion (d)

- **Access or increased access?**

As a matter of drafting, it is notable that section 44(G)(2)(d) does not word the relevant test as whether *increased access* could be provided without undue risk to human health or safety, but rather, whether *access* could be so provided. In this respect, the criterion differs from paragraphs (a) and (f). What significance attaches to this difference in terminology? In the *SIA* review, it was argued that, as it was apparent that access to the service had been provided for some considerable time to various organisations such as Qantas and Ansett, access was already provided

200. In any event, action under s 46 may be taken in respect of access disputes involving non-nationally significant infrastructure.
201. See above n 1, 251-252.
202. Hood & Corones above n 60, 70-72. See also on this point, Corones above n 115.
203. *Sydney International Airport* above n 34, 40,793.
204. *PC Report* above n 5, 192.
205. *NSW Minerals Council* above n 30, 70,404.

without undue risk to human health and safety, which, in and of itself, satisfied the criterion.[206] The ACT disagreed, and proceeded to treat the criterion as if the section contained the words, 'increased access'.[207] It confirmed the NCC's view that the introduction of further ramp handlers would not bring about an undue risk to human health or safety at Sydney International Airport.[208]

- **Access seekers able to satisfy criterion**

The existence of legislative or regulatory instruments or licences governing the operation of the service (including matters of safety and security), and providing appropriate and enforceable sanctions for non-compliance, have tended to ensure that access seekers have been able to satisfy criterion (d) quite easily.[209] Even the argument that increasing access to a rail service would improve human health and safety by transferring freight from road to rail, thereby significantly improving the environment due to less emissions from road vehicles, has been cited with approval to justify this criterion.[210]

Close attention was paid to criterion (d) in the *SIA* application, given that '[h]uman health and safety is a key concern in relation to airports because of the significant potential for accidents'.[211] In the end, however, neither the NCC nor the minister was prepared to accept that the access seeker's proposed methods of operation, or the presence of another ramp handler, posed any safety concerns additional to those that were inherent in ramp handling operations.[212] Before the ACT, it was submitted that small ramp handlers were ipso facto likely to be unsafe, and that the likelihood of risky behaviour and a lack of concern for safety might be properly attributed to small ramp operators by analogy with the experience of the Australian aviation industry with small, financially struggling airline operators.[213] The ACT considered that there was no evidence to support such a contention, and rejected the argument.[214]

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206. *Sydney International Airport* above n 34, 40,794.
207. Ibid, 40,794-40,795; since reiterated in eg NCC *Wirrida-Tarcoola Rail* above n 32, 38.
208. Above n 34, 40,795.
209. Eg *NSW Minerals Council* above n 30, 70,404-70,405; *Specialised Container Transport* above n 26, 70,358; *Specialised Container Transport – Westrail* above n 27, 70,450; *Sydney International Airport* above n 34, 40,794; NCC *Wirrida-Tarcoola Rail* above n 32, 38.
210. *Specialised Container Transport – Westrail* above n 27, 70,450. Ultimately, the WA Premier decided not to declare Westrail's rail line service, contrary to the NCC's recommendations, for reasons unrelated to health and safety.
211. *Australian Cargo Terminal Operations* above n 28, 70,134.
212. Ibid, 70,141 (NCC) and 70,160 (minister).
213. *Sydney International Airport* above n 34, 40,794.
214. Ibid.

In the *SIA* application, the NCC also made the useful point that, in situations where health and safety issues were of genuine concern, it might be possible to satisfy section 44G(2)(d) by imposing safety requirements as part of the terms and conditions of access contracts with third parties.[215] This point was confirmed on review by the ACT.[216] Since that decision, the NCC has also noted that, while some facilities require a degree of spare capacity to provide appropriate safety margins,[217] safety and creditworthiness requirements should not be used as a barrier to entry.[218]

(ii) Productivity Commission's review

Criterion (d) has attracted little debate since the enactment of Pt IIIA,[219] and has not proved a deciding factor in any decision to date. The Productivity Commission made no recommendation to alter or remove the criterion,[220] and it looks set to continue as a little-used, but cautionary, element of the declaration matrix.

5. Effective existing access regime

Pursuant to section 44G(2)(e), a service cannot be declared if it is already the subject of an effective access regime. As the ACT has noted, the expression 'effective access regime', although not defined in the Part IIIA, is a reference to an existing State/Territory access regime.[221] If the Federal Treasurer has previously certified a State/Territory regime as an effective access regime,[222] the NCC must follow that decision unless it believes that a substantial modification of the regime has occurred during the intervening period.[223] If the State/Territory regime has not already been certified, the NCC must determine the effectiveness of the regime for itself.[224]

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215. *Australian Cargo Terminal Operations* above n 28, 70,141. See also *NCC Declaration Guide* above n 7, para 7.7.
216. *Sydney International Airport* above n 34, 40,794.
217. NCC *Freight Australia* above n 31, 29.
218. *NSW Minerals Council* above n 30, 70,406.
219. *PC Report* above n 5, 162.
220. Other than the possibility of incorporating this criterion within a 'public interest' test, should the declaration package be revamped in the future: ibid, 193.
221. *Sydney International Airport* above n 34, 40,795.
222. Ss 44M & 44N dictate the procedure to be followed by the Federal Treasurer in deciding whether or not a State/Territory regime is an 'effective' access regime.
223. S 44G(4). For further discussion see F Zumbo 'Access to Essential Facilities in Australia' [2000] NZLJ 13, 14.
224. S 44G(3). Pt C of *NCC Certification Guide* above n 7, details its approach to certification matters.

(i) Issues arising under criterion (e)

• Rationale

The rationale for the inclusion of criterion (e) may be traced to the Hilmer Report's view that existing State-based regimes[225] were 'incapable of effectively dealing with access issues affecting interstate or national facilities, and different approaches or pricing principles adopted in different States have the potential to impede the development of efficient national markets for electricity, gas, rail and other key industries.'[226] Therefore, the NCC should determine whether, in circumstances where a State/Territory regime was already in place, it should recommend declaration under the national regime which would then prevail over the existing access regime.

To take account of this recommendation, the legislature provided that, when determining whether a State/Territory has established an effective access regime, the NCC must have regard to the principles set out in the CPA.[227] These principles are listed in clause 6(4)(a)-(q) of that document.[228] However, by means of amendment,[229] the NCC was subsequently permitted, when deciding whether a regime is an effective access regime, to apply the principles of the CPA as guidelines rather than as binding rules.[230] The provision was designed to give the NCC greater discretion in considering the effectiveness of State/Territory regimes, by enabling the NCC to regard a State/Territory regime as effective even though aspects of the regime may not strictly comply with the principles in the CPA. In this regard, Steinwall has made the reasonable suggestion that a regime will be effective if there is substantial compliance with a number of the principles contained in the CPA.[231]

• Application

To date, several regimes have been certified and accepted by the Federal Treasurer as 'effective' – certain State gas regimes,[232] the rail regime in New South

225. Eg *Petroleum Pipelines Act* 1969 (WA) s 21.
226. Hilmer Report above n 1, 249.
227. S 44G(3).
228. Eg cl 6(4)(b) provides that governments should establish a right for persons to negotiate access to a service provided by means of a facility; cl 6(4)(g) provides that where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve that dispute; and cl 6(4)(p) provides that where more than one State or Territory regime applies to a service, those regimes should be consistent.
229. S 44DA(1).
230. See further *NCC Declaration Guide* above n 7, para 8.8.
231. R Steinwall 'Competition Developments on Access and Mergers and their Impact on State and Territory Governments' (1998) 14 TPLB 85, 86.
232. Eg *NSW Government* [1997] ATPR (NCC) para 70-002 (NSW Access Regime for Natural Gas Distribution Network).

Wales (since lapsed), and the regimes covering the Tarcoola to Darwin rail line and the Victorian shipping channels.[233]

Otherwise, the NCC has variously determined that all the following were 'ineffective' regimes, for the purposes of criterion (e): the Western Australian rail access regime,[234] the Australasian railway access regime,[235] and the Victorian rail access regime.[236] However, the first of these decisions was overturned by the Premier of Western Australia, who declined to follow the NCC's recommendation of declaration on the basis that there *was* an effective access regime in place.[237]

(ii) Productivity Commission's review

The Productivity Commission's review of the certification procedure, to which criterion (e) alludes, was comprehensive and detailed.[238] However, the Commission's recommendations in respect of certification are not considered here, given this article's focus on the declaration process.

6. Not against the public interest

Section 44G(2)(f) provides that access (or increased access) to the service would not be contrary to the 'public interest'. As discussed below, despite the broad scope of the term 'public interest', the various arguments that service providers have raised in seeking to refute the criterion have almost uniformly met with rejection.

(i) Issues arising under criterion (f)

• Meaning of 'public interest'

There is no attempt to define the term 'public interest' in Part IIIA, because, as the NCC has explained, public interest considerations are likely to 'vary from one application to another'.[239] The criterion was always intended to be assessed on a case-by-case basis.

In making this assessment, it has been repeatedly pointed out by the NCC that criterion (f) is expressed in the negative ('would not be contrary to the public interest'), rather than the positive ('would be in the public interest'), because the

233. *Victorian Government* [1997] ATPR (NCC) para 70-001.
234. *Specialised Container Transport – Westrail* above n 27, 70,451.
235. NCC *Wirrida-Tarcoola Rail* above n 32, 40-41.
236. NCC *Freight Australia* above n 31, 30.
237. *Specialised Container Transport – Westrail* above n 27. The minister's decision is reproduced ibid 70,456.
238. See *PC Report* above n 5, ch 9.
239. *NCC Declaration Guide* above n 7, para 9.1.

preceding declaration criteria already address a number of positive elements in the public interest.[240] Thus, the public interest criterion is not meant to call into question the findings in the previous criteria, but enquires whether there are *any other matters* relevant to a declaration being contrary to the public interest.[241]

The NCC accepts that a key public interest consideration is the effect that declaration would have on economic efficiency,[242] but also considers a wider range of factors, including the matters listed in clause 1(3) of the CPA,[243] to be potentially relevant.[244]

- **Service providers unable to refute the criterion**

Since Part IIIA's enactment, it is evident that the construction of the section 44G(2) declaration criteria has involved a legislatively-unspoken presumption: where criteria (a)-(e) are met, the presumption arises that a declaration of access would be in the public interest.[245] Accordingly, in applying criterion (f), the NCC is concerned with whether any argument would displace that presumption. That much has been made plain by the NCC both in its decisions[246] and elsewhere.[247]

In none of the applications for declaration under Part IIIA to date have criteria (a)-(e) been satisfied. Where any or all of criteria (a)-(e) failed, in only one case did the outcome of the public interest enquiry favour the granting of an access declaration;[248] in the remainder, criterion (f) reflected the adverse outcomes of the earlier criteria. In that regard, Hole's observation in 1998 that 'none of the [public interest] issues raised by participants has apparently had a deciding influence in terms of their effect on access decisions'[249] is as true now as it was then.

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240. Eg *Carpentaria Transport* above n 29, 70,316; *NSW Minerals Council* above n 30, 70,409; *Specialised Container Transport – Westrail* above n 27, 70,451.
241. This point was made by the ACT in *Duke* above n 108, 43,072. The Tribunal was considering criterion (d) of the National Gas Code, which is the equivalent provision to the public interest criterion in s 44G(2)(f). The point was reiterated in NCC *Wirrida-Tarcoola Rail* above n 32, 43.
242. *NCC Declaration Guide* above n 7, para 9.9.
243. These are: ecologically sustainable development; social welfare and equity considerations; occupational health and safety, and industrial relations; economic and regional development, including employment and investment growth; the interests of consumers, or a class of consumers; the competitiveness of Australian businesses; and the efficient allocation of resources.
244. *NCC Declaration Guide* above n 7, para 9.20.
245. J Hole, A Bradley & P Corrie 'Public Interest Tests and Access to Essential Facilities' (Industry Commission Staff Working Paper, Mar 1998) xii.
246. Eg *NSW Minerals Council* above n 30, 70,409.
247. See *NCC Declaration Guide* above n 7, para 9.4.
248. *Carpentaria Transport* above n 29.
249. Hole, Bradley & Corrie above n 245, xii.

Moreover, in those cases in which the service provider sought to demonstrate that a declaration of access would be contrary to the public interest, the arguments have usually failed,[250] with only one decision to date registering any success for the service provider. The latter occurred in the *Austudy Payroll Deduction* review,[251] in which the ACT determined that the Australian Union of Students was improperly attempting to use the coercive powers of the Federal government to gain access to the Austudy database in order to direct its recruitment activities towards students who were given loans or grants by DEETYA as opposed to the general student body.[252]

(ii) Productivity Commission's review

On the question of whether the legislation should spell out the matters to be considered under criterion (f),[253] a Senate Select Committee recommended in 2000 'that the NCC publish a detailed explanation of the public interest test and how it can be applied, and produce a listing of case histories where the public interest test has been applied.'[254] However, in its final report, the Productivity Commission made no comment on criterion (f), other than to note that if the package of declaration criteria were to be revamped in the future, the public interest test ought to be retained, 'to assess whether there are non-efficiency considerations that should have a bearing on the declaration decision.'[255]

Despite the Productivity Commission's support for criterion (f),[256] the outcomes described previously raise serious doubts about whether inclusion of a specific public interest test in the declaration matrix is warranted, given the other criteria upon which declaration depends.[257]

7. Residual discretion not to declare

A rather curious interpretation of the declaration criteria was advanced, and accepted by the ACT, in the *SIA* review. There, the facility owner, SACL, submitted

250. Eg *Carpentaria Transport* above n 29, 70,321; *Specialised Container Transport* above n 26, 70,373; *NSW Minerals Council* above n 30, 70,409-70,411; *Sydney International Airport* above n 34, 40,795; NCC *Wirrida-Tarcoola Rail* above n 32, 43-45.
251. *Re Australian Union of Students* above n 33, 43,960, confirming the earlier decision of the NCC.
252. Ibid.
253. One of the matters raised by the Productivity Commission in *PC Issues Paper* above n 5, 28.
254. Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy *Riding the Waves of Change* (Canberra: AGPS, 2000) 43.
255. *PC Report* above n 5, 193.
256. Ibid.
257. See also Tonking above n 51, 3.

that, even if the ACT were satisfied of all the matters specified in section 44H(4), it nevertheless had a 'residual discretion' to decline to make a declaration.[258] The ACT responded as follows:

> The Tribunal is prepared to accept that the statutory scheme is such that it does have such a residual discretion. However, when one has regard to the nature and content of the specific matters in respect of which the Tribunal must be satisfied pursuant to section 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 section 44H(4).[259]

However, notwithstanding the ACT's acceptance of a residual discretion on its part, none of SACL's submissions seeking to invoke such discretion met with any success.[260] In particular, the ACT noted that it was not for it to challenge or criticise the policy which lay behind particular legislative provisions in Part IIIA, and any suggestion that the declaration process was flawed or against public policy was not a contention which the Tribunal was prepared to entertain.[261]

Other references to a residual discretion have been scant. In the *Freight Australia* application, the NCC stated that the matters in section 44F(4) comprised part of its residual discretion.[262] That is, where the NCC was satisfied of all the declaration criteria, it could still recommend that the service not be declared if it considered it economical to develop another facility that provided part of the service.[263] As explained previously, this matter has usually been included as part of the determination of criterion (b).

In its Issues Paper, the Productivity Commission described criterion (f) as the provision that 'picks up matters bearing upon the decision to declare a service which are not covered in the other criteria'.[264] However, no mention of a residual discretion on the part of either the NCC or the ACT was made by the Commission at that time, nor was there any reference to such a discretion in the Final Report. Perhaps the most that can be said is that any residual discretion not to declare does not appear to have served any manifest purpose under the legislation to date, nor to have been endorsed by the most recent pronouncements of the Productivity Commission.

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258. *Sydney International Airport* above n 34, 40,796.
259. Ibid.
260. Ibid, 40,798.
261. Ibid, 40,796.
262. NCC *Freight Australia* above n 31, 11. See also *NCC Declaration Guide* above n 7, para 10.2.
263. Ibid.
264. *PC Issues Paper* above n 5, 27.

V ANCILLARY MATTERS ASSOCIATED WITH DECLARATIONS

1. Role of the minister

As the Productivity Commission noted in its final report, in examining ways to improve the national access regime, it was important to focus on some 'higher level issues'[265] likely to impinge upon the effectiveness and timeliness of the Part IIIA processes. One of those issues, considered by the Commission in some detail, was the role played by the minister in the declaration of services under the regime.

The Hilmer Report proposed that, because a decision to grant a right of access inevitably involves trade-offs between the interests of different groups (ie, firms, groups of consumers, industries, investors or regions), at least the most significant trade-offs should be made by elected representatives, rather than by a court, tribunal or other unelected body.[266] Subsequently, Professor Hilmer explained that the mechanisms his Committee developed were designed to facilitate and improve the political process by emphasising transparency and providing political decision-makers with high quality, expert, pragmatic advice that highlighted the trade-offs to be made.[267]

Be that as it may, the requirement for ministerial decision-making, over and above that of the NCC, has drawn trenchant criticism. Remarks have included the following: that the politicisation of the decision whether or not to grant access has no objectivity, no forum for hearing and no certainty;[268] that the involvement of both the NCC and the minister, with examination of the same criteria, involves double-handling and consequential inefficiencies;[269] that in cases under Part IIIA to date, the ministers have either failed to make any decision within the 60 day time period, have provided brief or poorly explained reasons, and in the case of State ministers, have ignored the NCC's recommendations in any event;[270] that ministerial involvement has added to the uncertainty, unpredictability and time-consuming nature of the Part IIIA declaration process;[271] that inherent conflicts of interest have been exposed, in that three applications to date have resulted in NCC recommendations for the declaration of services provided by State-owned rail

265. *PC Report* above n 5, 369.
266. Hilmer Report above n 1, 250. Discussed further in A Abadee 'Hilmer's National Focus: Interpreting Part IIIA of the Trade Practices Act' (1998) 6 TPLJ 103.
267. F Hilmer 'The Bases and Impact of Competition Policy' (1995) 25 Econ Analysis & Policy 19, 25.
268. Pengilley above n 76, 4.
269. Pengilley above n 198, 249.
270. *PC Report* above n 5, 371, citing a submission by the Law Council of Australia.
271. Ibid, citing a submission by AAPT Limited.

systems but none have been declared;[272] and that ministerial involvement in declarations (and certifications) but not in undertakings, introduces an element of inconsistency in the access regime.[273]

However, following an exhaustive study of the arguments for and against ministerial involvement, the Productivity Commission concluded in a fashion that closely reflected the sentiments of the Hilmer Committee several years before it – that the trade-offs required to be assessed in circumstances where the private property rights of facility owners will be interfered with are generally more appropriately made by elected officials rather than by regulators.[274] This conclusion will disappoint a great many respondents to the inquiry, and indeed, other participants in the Part IIIA process. It remains to be seen whether the deficiencies in the ministers' decision-making alluded to above are rectified in future declarations under Part IIIA.

2. Timeliness of declaration processes

The Hilmer Report evinced a strong intention to keep access disputes away from the courts.[275] This was not only because of the judiciary's general lack of expertise in setting terms and conditions (including price) of access, but also because reliance on a national access regime was expected to avoid the kinds of delays and difficulties inherent in litigation to establish a purported contravention of section 46 of the Trade Practices Act.[276]

However, under Part IIIA, a third party seeking declaration of particular services faces the daunting prospect of its application passing through two authorities (NCC and designated minister); which increases to three if a review of the minister's decision is sought from the ACT; and four, if an application is made to the Federal Court. Inherent in such a structure is considerable scope for unwarranted duplication and delay. Moreover, the only time limit upon decision-making anywhere in the declaration process is that which applies to ministerial decisions from declaration recommendations made by the NCC, 60 days.[277] The NCC originally indicated that it expected to complete its inquiries and deliver its declaration recommendation to the designated minister within eight weeks of receiving the application, with 16 weeks nominated as the intended upper limit in particularly complex matters.[278]

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272. Ibid, citing a submission by Rio Tinto.
273. This was the Productivity Commission's own view: *PC Report* above n 5, 372.
274. Ibid 376, and see Finding 14.1.
275. Hilmer Report above n 1, 243-244.
276. Ibid.
277. S 44H(9).
278. NCC *The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act* (Melbourne: NCC, 1996) 15.

However, it appears that this timetable has been difficult to adhere to, undoubtedly for reasons associated with the complexity of the issues, the newness of the regime, and the resources available to that body.

The lack of time-limits has (with limited exception)[279] drawn criticism, both academically[280] and from those involved in the Part IIIA declaration process.[281] The *SIA* review provides a perfectly imperfect illustration. The initial application for declaration of the services was made in November 1996. On 30 June 1997, the designated minister declared the services. Some 25 months later, in December 1998, the ACT heard SACL's appeal. It was then a further 15 months before the ACT handed down its decision, a delay which was unexplained. Of course, at that stage, the applicant did not yet have access to the facilities, merely a right to negotiate access. As Hood warns, the delays involved in this matter indicate that Part IIIA is becoming an impractical option of last resort for most access seekers.[282]

Against this background, the Productivity Commission indicated that the imposition of time limits in the declaration process would be desirable. It has recommended that the target time limit for assessment of declaration applications by the NCC should be four months, and that the processing of any appeal by the ACT should similarly be heard and decided within four months.[283] No doubt the implementation of these recommendations will be welcomed by those frustrated by the processes to date.

In another welcome move, the Productivity Commission has recommended that if a Minister fails to make a decision on a declaration recommendation within the 60 day time limit, this should be deemed an *acceptance* of the NCC's recommendation.[284] The rationale for the Commission's decision was that a deemed decision reflecting the NCC's detailed assessment of the issues was preferable to an automatic presumption against declaration without regard to the facts of the matter.[285] It would surely be expected that such a change would increase the incentive for Ministers to make their decisions within the 60 day period.

279. See eg A Fels 'Regulating Access to Essential Facilities' (2001) 8 Agenda 195, 201. Note also the Productivity Commission's comment that 'avoiding a rush to judgment is no bad thing': *PC Report* above n 5, 400.
280. Eg Hood & Corones above n 60, 49; Calleja above n 60, 221; I Tonking '2000 – The Year in Review' (2001) 499 Aust Trade Practices News 1, 5-6.
281. See *PC Report* above n 5, 397-399.
282. Hood above n 73, 118.
283. *PC Report* above n 5, 404-405, and see Recommendation 15.3.
284. Ibid, 409, and see Recommendation 15.5.
285. Ibid, 408.

VI CONCLUSION

The review of Part IIIA's declaration process, undertaken by the Productivity Commission as part of its recent inquiry into the national access regime, is sure to draw the ire of those who were seeking a more substantial reworking of the statutory provisions. One change, merely being the insertion into criterion (a) of the word 'substantial', does not go nearly as far as many respondents to the inquiry and the Productivity Commission's own Position Paper, suggested should occur. Apart from the light-handed suggestion in respect of the matrix of declaration criteria, the failure of the Commission to recommend the abolition of the minister's role in the declaration process is to be lamented, for if any development over the first five years of Part IIIA's operation was marked, it was the failure of the designated minister to achieve anything more than the NCC had already delivered – careful, considered recommendations, treating each criterion, and the threshold requirements, in accordance with sound principles and precedent.

The fact that there has been limited decision-making under Part IIIA's declaration process to date, due to the more prevalent use of the certification and undertakings procedures, has perhaps prevented the declaration criteria from attaining clarity through application, as may have been envisaged at the inception of the regime. There is still much 'bedding-down' required. The next five years of the regime's operation will serve to consolidate the existing declaration criteria, and will demonstrate whether the sole amendment to criterion (a), recommended by the Productivity Commission, has the desirable effect it contended, or the uncertain and difficult-to-apply effect which the NCC alleged.[286]

For the present, however, the Productivity Commission's inquiry has at least confirmed the national access regime to be worthy of pursuit.[287] That, in and of itself, undoubtedly vindicates the radical vision of the Hilmer Committee as to why an explicit mechanism for facilitating efficient third party access to essential facilities was warranted.

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286. A further independent review of the national access regime has been recommended for five years after the first group of changes to Pt IIIA resulting from this inquiry are put in place: *PC Report* above n 5, Recommendation 16.2.

287. Ibid, 94, and see Finding 4.1.