# REGULATING ACCESS TO ESSENTIAL FACILITIES IN AUSTRALIA: REVIEW AND REFORM OF PART IIIA OF THE TRADE PRACTICES ACT

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# ABSTRACT

This dissertation critically evaluates the rationale for, and implementation of, the regulatory scheme governing third party access to essential infrastructure services (the 'national access regime') set out in Part IIIA of the *Trade Practices Act* 1974 (Cth). The analysis and synthesis of background reports, economic and legal theory, statutory provisions, existing case law, academic commentary and regulatory guidelines contained herein represents a useful and necessary contribution to this nascent area of Australian competition law. In particular, the comprehensive nature of the research has permitted informed assessment of the Productivity Commission's recent review of the national access regime and the Commonwealth Government's response to that inquiry. While the dissertation endorses both the Productivity Commission's finding that retention of the Part IIIA access regime is warranted and many of the (notably light-handed) recommendations advanced by the Commission to improve aspects of the regime's operation, it takes issue with the Commission's failure to propose a more substantial refashioning of the regime's architecture. Stepping into this breach, the dissertation specifies the systemic changes to Part IIIA that are imperative to enhancing the efficacy of the national access regime.

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The work contained in this dissertation has not been previously submitted for a degree or diploma at any other higher education institution. To the best of my knowledge and belief, the dissertation contains no material previously published or written by another person except where due reference is made.

Signed:

Date: 5 March 2004

# CHAPTER 1

# INTRODUCTION

## 1.1 ENACTMENT OF A NATIONAL ACCESS REGIME

In August 1993, the report of the Independent Committee of Inquiry into Competition Policy in Australia[1] (the 'Hilmer Report') recommended, as a key component of effective National Competition Policy,[2] the establishment of a legislative regime to facilitate third party access to 'essential facilities'.[3]

As explained in the Hilmer Report, essential facilities are facilities which exhibit natural monopoly[4] characteristics, in the sense that they cannot be duplicated economically.[5] Classic examples include electricity transmission grids, telecommunications networks, gas and water pipelines, railroad terminals and tracks, airports, ports and wharves.[6] Access to such facilities is *essential* for effective competition in upstream or downstream markets,[7] but can

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1 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*', in honour of the Committee's chair, Professor Fred Hilmer).

2 See the discussion of National Competition Policy in part 1.2 of this chapter.

3 *Hilmer Report* (above n 1) 248-249.

4 The concept of natural monopoly is explained fully in Chapter 2.

5 *Hilmer Report* (above n 1) 239. Australia's 'relatively small markets and dispersed population mean that natural monopoly characteristics are present in most physical distribution networks': A Fels, 'Regulating Access to Essential Facilities' (2001) 8 *Agenda* 195, 196.

6 *Hilmer Report* (ibid) 240. Infrastructure facilities play a pivotal role in the Australian economy. They generate crucial inputs to production processes (representing between 7-16% of production costs for most Australian industries and thereby significantly affecting firms' competitiveness), and provide essential services to society. It follows that the efficient use of, and continued investment in, such facilities will impact directly on Australia's productivity and growth, and ultimately on living standards. See G Samuel, 'Competition Reform and Infrastructure' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 1, 1.

7 Eg, effective competition in electricity generation and telecommunication services requires access to transmission grids and local telephone exchange networks, respectively: *Hilmer Report* (ibid) 239.

never be assured when the owner of the facility has monopoly power over whether, and at what price, access will be granted. Indeed, the tendency of facility owners to deny or inhibit access by would-be competitors represents the core of the 'access problem'.[8]

Consideration of this problem in the Hilmer Report concluded with a list of recommendations for ensuring access to essential facilities.[9] In 1995, the Commonwealth Parliament formalised its response to those recommendations by inserting a new Part IIIA, entitled 'Access to Services', into the *Trade Practices Act* 1974 (Cth).

The access arrangements set out in Part IIIA have now been in place for some eight years. Over this period, increasing interconnection of infrastructure facilities between States/Territories and corporatisation of government business enterprises[10] have seen the question of third party access to essential facilities emerge as an issue of considerable interest and importance in Australian competition law.[11] This dissertation seeks to contribute to the developing field of access law through a critical evaluation of the rationale for, and implementation of, the Part IIIA access regime. As subsequent chapters will demonstrate, the challenge inherent in this topic arises from the fact that here, perhaps more than in any other area of Australian trade practices, 'law, economics, politics, consumerism and the bureaucratic function' so fully interact.[12]

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8 W Tye, 'Competitive Access: A Comparative Industry Approach to the Essential Facility Doctrine' (1987) 8 *Energy Law Journal* 337, 344.

9 *Hilmer Report* (above n 1) 266-268.

10 Such changes are prevalent in 'gas, electricity, water, transport, telecommunications, and a host of other major infrastructure industries': S King, 'National Competition Policy' (1997) 73 *Economic Record* 270, 270.

11 Corones was one of the first academic commentators to identify third party access as an important issue in competition law: see S Corones, 'The Hilmer Report and its Potential Implementation' (1993) 21 *Australian Business Law Review* 451, 453. More recently, Zumbo has noted that 'the issue of access to essential facilities with natural monopoly characteristics has emerged as a key aspect of the debate concerning how best to promote competition in industries previously dominated by government monopolies': F Zumbo, 'Access to Essential Facilities in Australia' [2000] *New Zealand Law Journal* 13, 13.

## 1.2 EVOLUTION OF THE REGIME

The creation and implementation of a legislative regime governing third party access to essential infrastructure have involved considerable cerebration on the part of Australian policy-makers, legislators and regulators. Collectively, their documented efforts over the past decade confirm the growing prominence of the national access regime in Australia's competition reform agenda; individually, each represents an important milestone in the evolution of the regime. A brief chronology of the developments – detailed analysis features in subsequent chapters of this dissertation – now follows.

### A *Hilmer Report*

The origins of the national access regime may be traced to 1992 when the Commonwealth Government, with the support of the States and Territories, commissioned the Inquiry into Competition Policy in Australia, chaired by Professor Fred Hilmer.[13]

In its report of August 1993, the Hilmer Committee advocated, under the rubric of 'National Competition Policy', a more co-operative and co-ordinated Commonwealth-State/Territory approach to competition reform than had existed previously.[14] One of the Committee's principal recommendations was the introduction of a national access regime to address the issue of market foreclosure by owners of essential facilities.[15] In making this

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12 Extrapolating from W Pengilley, 'What's Wrong with Australia's Competition Law' (1993) 9 *Policy* 11, 17.

13 Then of the Australian Graduate School of Management, University of New South Wales. The other members of the Committee were Mr Mark Rayner and Mr Geoffrey Taperell.

14 *Hilmer Report* (above n 1) 13-16.

15 Ibid 248-249. The other key recommendations were extension of the competitive conduct rules of the *Trade Practices Act* to all business activity in Australia; facilitation of ongoing governmental review of regulatory restrictions on competition; and promotion of competitive neutrality between government and private businesses: ibid xxi. These policy prescriptions continue to be commended by economists: see, eg, F Argy, 'National Competition Policy: Some Issues' (2002) 9 *Agenda* 33, 44; and S King, 'The Economics of National Competition Policy' (2002) 20 *Law in Context* 6, 29-30.

recommendation, the Committee was concerned to curb any exploitation of market power by owners of core infrastructure facilities who might deny potential competitors in dependent markets access to vital inputs, or charge monopoly prices to would-be competitors seeking such access.[16]

The Hilmer Committee favoured the implementation of a generic access regime, promoting consistent approaches to access issues across the economy and administered by an economy-wide body, rather than leaving the regulation of access to either existing misuse of market power provisions or to a series of industry-specific regulators.[17]

### B *Competition Principles Agreement*

The Hilmer Report was discussed by the Council of Australian Governments (CoAG) in February 1994 and August 1994. This culminated in the historic CoAG meeting of 11 April 1995, at which the Commonwealth Government and all State/Territory Governments demonstrated their commitment to National Competition Policy[18] by signing the Competition

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16 *Hilmer Report* (above n 1) 240-241.

17 Ibid 248-249. G Bosman and R Baxt, 'Competition for Competition's Sake – An Overreaction by the ACCC!' (1996) 24 *Australian Business Law Review* 325, 328 contains a useful précis of the Hilmer Committee's access recommendations.

18 National Competition Policy may enjoy a 'hegemonic position' among policy-makers of all political persuasions in Australia: S Rix, 'National Competition Policy: Parliamentary Democracy, Public Policy and Utilities' (1999) 7 *Competition & Consumer Law Journal* 170, 170. Yet it is impossible to deny a level of public concern about the reforms involved. Eg, there has been some alarm that 'policies labelled as economic rationalisation policies are eroding the social cohesion of some communities and devaluing social objectives at the expense of economic objectives such as productivity and efficiency': Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, *Riding the Waves of Change* (AGPS, Canberra, 2000) xiii. Such fears are also acknowledged in P Charlton, 'Stiff Competition', *The Courier-Mail*, 17 February 2001, 26; Argy (above n 14) 37; and G Samuel, 'Competition and Policy Reform: The Way Forward', Paper presented at *Economic & Social Outlook Conference*, Melbourne, 4-5 April 2002, 4-5. Nevertheless, as Chapter 2 will establish, pro-competition policies remain the best means of delivering society's welfare goals.

Principles Agreement (CPA).[19] The Commonwealth Government's responsibility to establish a national access regime is detailed in cl 6(1) of the CPA.

### C *Competition Policy Reform Act*

Following the April 1995 CoAG meeting, the Commonwealth Government moved immediately to fulfil the vision of the Hilmer Committee and its own obligation under cl 6(1) of the CPA by overseeing passage of a comprehensive, codified regime to facilitate third party access to essential facilities – namely, Part IIIA of the *Trade Practices Act*.

Introduced pursuant to the *Competition Policy Reform Act* 1995 (Cth), Part IIIA took effect on 6 November 1995.[20] As a fundamental element of National Competition Policy – the so-called 'central plank of microeconomic reform'[21] in Australia – the national access regime constitutes a significant reform measure.[22]

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19 N Calleja, 'Access to Essential Services – Have the Hilmer Reforms Been Successfully Implemented?' (2000) 8 *Trade Practices Law Journal* 206, 207-208 discusses this intergovernmental agreement in more detail.

20 For a general overview of this reform legislation, see I Tonking, 'Competition Policy Reforms and Business in General' (1995) 33 *Law Society Journal* 62; and S Wisking, 'Far-Reaching Reform of National Competition Law' (1995) 17 *Law Society of South Australia Bulletin* 9.

21 R Steinwall, 'Australian Competition Policy – The New Initiatives' (1995) 9 *Commercial Law Quarterly* 11, 11. In simple terms, 'microeconomic reform' refers to policies that seek to improve the efficiency and competitiveness of an economy. This is done by focusing on particular areas of the economy and pursuing action aimed at removing market impediments, allocating resources to their most efficient use, and promoting more productive enterprises and industries. By maximising efficiency at the 'micro' level, efficiency can be maximised at the overall economy level. See Argy (above n 14) 35.

22 In most OECD countries, including Australia, microeconomic reform has been motivated by the belief that public ownership is associated with poor performance, and by faith in private ownership and the market mechanism as superior forms of institutional operation: L Carver, 'The Hilmer Report and Competition Policy: A Consumer Perspective', Paper presented at *Trade Practices: A New Regime in the Making*, University of New South Wales and Trade Practices Commission, Sydney, 3 November 1994, 1. Although such reform generally requires a reduction in government intervention in order to allow markets to work more efficiently, paradoxically, in the area of competition policy, there is often a need for greater government intervention in order to achieve improved efficiency: A Fels and J Walker, 'Competition Policy and Economic Rationalism' in S King and P Lloyd (eds), *Economic Rationalism: Dead End or Way Forward?* (Allen & Unwin, Sydney, 1993) 169, 189. Certainly, this is true of access reform, which demands active regulation of the entitlement to, and terms of, third party access to essential infrastructure: Tye (above n 8) 338.

### D *Productivity Commission's review*

In mid-October 2000, the Productivity Commission[23] was charged by the Commonwealth Government with the task of reviewing the national access regime.[24] Under the terms of reference for the review, the Commission was directed to examine the current arrangements established by Part IIIA for regulation of access, taking into account, inter alia, that legislation which restricts competition or which may be costly to business should be retained only if the benefits to the community as a whole outweigh the costs, and that there may be mechanisms which would improve Part IIIA processes.[25] In relation to the latter point, the Commission was specifically requested to propose any necessary improvements, possibly encompassing measures to engender greater certainty, transparency and accountability in Part IIIA decision-making, and to reduce complexity, costs and time for participants.[26]

In late October 2000, the Productivity Commission published an issues paper in connection with its inquiry into Part IIIA,[27] followed, on 29 March 2001, by a position paper, outlining its preliminary proposals.[28] Then, on 17 September 2002, the Commission's long-

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[23] The Productivity Commission, an independent statutory body established under the *Productivity Commission Act* 1998 (Cth), is the Commonwealth Government's principal review and advisory body on microeconomic policy and reform. For further information on the role of the Commission, see F Zumbo, 'Reviewing the Productivity Commission's Activities in the National Competition Policy Area' (2001) 9 *Trade Practices Law Journal* 33.

[24] Pursuant to cl 6 of the CPA, such an inquiry was required after five years of operation of the national access regime. The Commissioners for the inquiry were Mr Gary Banks (Chairman of the Productivity Commission) and Mr John Cosgrove.

[25] Commonwealth Treasury, 'Terms of Reference – Legislation Review of Clause 6 of the Competition Principles Agreement and Part IIIA of the Trade Practices Act', Canberra, 10 October 2000, 1-2.

[26] Ibid 2-3. For additional background to the review, see F Zumbo, 'Accessing Essential Facilities: Part IIIA of the Trade Practices Act' (2001) 39 *Law Society Journal* 54.

[27] Productivity Commission, *The National Access Regime* (Issues Paper, October 2000). This was intended to provide general assistance to those making submissions to the inquiry.

[28] Productivity Commission, *Review of the National Access Regime* (Position Paper, 29 March 2001). Twenty-nine proposals for change, summarised ibid 257-258, were put forward. The proposals were subsequently outlined in S Writer, 'Review of the National Access Regime: Productivity Commission Position Paper' (2001) 9 *Trade Practices Law Journal* 163. They are also listed in Table 7.1 in Chapter 7.

awaited final report, *Review of the National Access Regime*,[29] was released.[30] In that report, the Commission supports the retention of the Part IIIA access regime, but also makes 33 recommendations to improve aspects of the regime's operation.[31]

### E NCC's guide to Part IIIA

Part IIIA has also been the subject of recent scrutiny by the National Competition Council (NCC). Some three months after the Productivity Commission's final report was released, the NCC issued its *Guide to Part IIIA*.[32] Intended to assist parties interested in access issues, the Guide is a comprehensive document, produced in three parts: Part A of the Guide examines the rationale for access regulation and provides an overview of the different paths to access; while Parts B and C contain detailed information on those routes, namely declaration and certification, that involve the NCC directly.

### F Government's response to Productivity Commission's review

On the same day it released the Productivity Commission's *Review of the National Access Regime*, the Commonwealth Government unveiled its interim response[33] to the 33 specific recommendations contained in that report. Seventeen months later, this interim response was

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29 Productivity Commission, *Review of the National Access Regime* (AusInfo, Canberra, report dated 28 September 2001, released 17 September 2002) (hereafter, '*PC Report*'). For useful summaries of the report, see B Marshall and R Mulheron, 'Australia's National Access Regime: Review and Recommendations' (2003) 6 *Global Competition Review* 30; and L Thomson and S Writer, 'A Workable System of Access Regulation: The Productivity Commission's Review of the National Access Regime' (2003) 11 *Trade Practices Law Journal* 92.

30 Although prepared as at 28 September 2001, the report's release by the Commonwealth Government was delayed by almost a year, due, apparently innocently enough, to the amount of other business listed for Cabinet's attention, but a cause for criticism nonetheless. See, eg, S Marris, 'Release of PC Report Now Long Overdue', *The Australian*, 26 August 2002, 28.

31 See *PC Report* (above n 29) 426-427 for a summary of the recommendations. Refer, also, to Table 7.1 in Chapter 7.

32 National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act* (NCC, Melbourne, Parts A and B released December 2002, Part C released February 2003).

effectively reissued as the Government's final response[34] to the Productivity Commission's recommendations. It is plainly stated on the first page of the final response that the Government 'endorses the thrust of the majority of those recommendations'.[35]

The Commonwealth Government has also announced that the *Trade Practices Amendment Bill (No 4)* will be introduced into Parliament during 2004.[36] This bill will implement, inter alia, the Government's response to the Productivity Commission's review of the national access regime.

## 1.3 APPROACH TO DISSERTATION

### A *Research questions and evaluative criteria*

As noted in part 1.1 above, this dissertation seeks to contribute to the developing field of access law in Australia through a critical evaluation of the rationale for, and implementation of, the Part IIIA access regime. Somewhat sweeping in its terms, the preceding statement may be resolved into two specific research questions:

- Should the national access regime be retained?
- If so, can the operation of the regime be improved?

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33 Commonwealth Treasury, 'Government Response to Productivity Commission Report on the Review of the National Access Regime', Canberra, 17 September 2002.

34 Commonwealth Treasury, 'Government Response to Productivity Commission Report on the Review of the National Access Regime', Canberra, 20 February 2004. (There are only minor phrasing differences between the Government's interim and final responses. Hereafter, the latter document will be cited in this dissertation.)

35 Ibid 1.

36 'Proposed Legislation' (2003) 539 *Australian Trade Practices News* 2, 2.

A set of six broad criteria, representing the attributes of an ideal access regime, has been distilled from the access literature[37] for the purposes of conducting the critical evaluation of these two issues. The six criteria, as they apply to Part IIIA, are explained in Table 1.1 below.[38]

**TABLE 1.1: Evaluative criteria**

| ***Criterion*** | ***Application to Part IIIA*** |
|---|---|
| **Rationale** | Does the enactment of Part IIIA represent a robust policy choice, compared to other possible policy responses to the access problem? |
| **Targeted outcomes** | Does Part IIIA promote decisions that are well-targeted to the access problem and which minimise unintended side-effects? |
| **Certainty** | Does Part IIIA generate certainty for current and prospective facility owners, access seekers and other interested parties? |
| **Consistency** | Does Part IIIA encourage consistency among policy-makers, and those responsible for its implementation and enforcement? |
| **Administrative efficiency** | Does Part IIIA deliver time/cost savings through its processes and procedures? |
| **Regulatory accountability** | Does Part IIIA foster accountability and transparency of regulatory decision-making? |

An assessment of the matters raised in Table 1.1 underpins the ensuing chapters of this dissertation.

## B *Motivation and objective*

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37 For a cross-section of this literature, see W Pengilley, 'The National Competition Policy Draft Legislative Package: The Proposed Access Regime' (1995) 2 *Competition & Consumer Law Journal* 244; S King and R Maddock, *Unlocking the Infrastructure: The Reform of Public Utilities in Australia* (Allen & Unwin, Sydney, 1996); A Abadee, 'The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?' (1997) 5 *Trade Practices Law Journal* 27; Calleja (above n 19); J Kench, 'Part IIIA: Unleashing a Monster' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 122; and *PC Report* (above n 29). The full list of source materials is contained in the Bibliography.

Facilitating third party access to essential infrastructure has been a central focus of microeconomic reform – a point clearly established by the discussion in part 1.2 above.[39] True, the national access regime enacted by Part IIIA of the *Trade Practices Act* is not the first attempt, either in Australia or overseas, to address access issues, but unquestionably it is an 'innovative … piece of economic regulation'.[40]

Initial optimism that Part IIIA heralded 'a new beginning, a clean, fresh start'[41] to access arrangements in Australia[42] has been tempered by the realisation, over the past eight years, of the legislation's reputation as the 'most complicated and complex'[43] of the National Competition Policy reforms. With the total value of Australian infrastructure currently the subject of access regulation standing at some A$50 billion,[44] it is imperative to ascertain whether the national access regime complies with the evaluative criteria set out in Table 1.1 above – and, where it does not, to remedy all identified defects.

Insofar as this objective overlaps with aspects of the Productivity Commission's review of the national access regime, it is perhaps important to point out that the author's interest in Part IIIA pre-dates the Commission's inquiry,[45] as does the topic of this dissertation. The Commission's work, while significant, does not constitute the 'final word' on the provisions of Part IIIA, nor should it. Rather, as academic tradition dictates, the Commission's final report,

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[38] The first criterion applies to the first research question, and the other five to the second research question.

[39] For further confirmation, see King and Maddock (above n 37) 2; Samuel (above n 6) 1; and Fels (above n 5) 195.

[40] *PC Report* (above n 29) xv.

[41] A Hood, 'Third Party Access in Queensland: Lessons for all Australian States' (1999) 7 *Trade Practices Law Journal* 4, 16.

[42] Historically, regulatory responses to ensuring access to essential facilities in Australia had developed on an industry-specific basis, such that there was 'no general mechanism capable of effectively dealing with these issues across the economy': *Hilmer Report* (above n 1) 7.

[43] Kench (above n 37) 123.

[44] Writer (above n 28) 164.

[45] See, eg, B Marshall and R Mulheron, 'Access to "Essential Facilities" under Part IIIA of the Trade Practices Act: Implementing the Legislative Regime' (1998) 10 *Bond Law Review* 99.

and the Government's response to the recommendations contained therein, are themselves subjected to critical analysis and commentary in this dissertation.

### C *Scope*

The focus of this dissertation is squarely on the generic access regime in Part IIIA of the *Trade Practices Act* (with subsidiary consideration of the interrelationship between Part IIIA and s 46 of the *Trade Practices Act*). Discussion of industry-specific regimes approved under the certification or undertakings mechanisms in Part IIIA[46] is included merely to illustrate the operation of those particular routes to access.[47] Other industry-specific regimes, outside the Part IIIA umbrella,[48] are referenced incidentally to support points of comment and criticism about the national access regime.

### D *Structure*

Chapter 2 draws on economic theory to explain a range of concepts and issues fundamental to regulatory initiatives promoting third party access to essential facilities. Important matters elucidated in this chapter include the nature of the access problem, the defining characteristics of an essential facility, and the rationale for, and objectives of, a legislative access regime.

The initial focus of Chapter 3 is the use overseas of refusal to deal principles as a surrogate for access regulation. With that discussion as background, the chapter concentrates on justifying Australia's decision to eschew reliance on general competitive conduct rules governing misuse of market power (here, s 46 of the *Trade Practices Act*) and enact a separate access regime.

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46 Eg, the access regimes relating to gas and electricity.

47 Related developments, such as the Productivity Commission's current review of the gas access regime, are not considered.

Chapter 4 investigates the three paths to access under Part IIIA of the *Trade Practices Act*. The chapter begins with a detailed consideration of the procedures for achieving declaration of an infrastructure service, including the threshold matters relevant to determining whether the declaration process may be invoked and the substantive criteria that must be satisfied in order for a service to be declared, before moving on to discuss Part IIIA's negotiate-arbitrate framework for setting terms and conditions of access to a declared service. Following this, the chapter examines the mechanism by which an existing State/Territory access regime may be certified as an effective regime under Part IIIA, and the scheme allowing a service provider to voluntarily submit a written undertaking in connection with the provision of access to a service.

Access pricing issues are addressed in Chapter 5. The complexity of the access pricing process, the objectives that pricing decisions should seek to advance, the pricing principles proposed for Part IIIA, and a selection of practical pricing approaches are all elaborated in this chapter.

Chapter 6 returns to s 46 of the *Trade Practices Act*, exploring the residual role now played by that provision in the resolution of access disputes. There is no question that s 46 remains potentially relevant to cases falling outside the ambit of Part IIIA, but, as in all instances where misuse of market power is alleged, the stringent requirements of the provision must be met. The chapter covers these requirements comprehensively.

A mix of case law, academic commentary, and/or the reports and legislation described in part 1.2[49] informs the substantive analysis in each of Chapters 2-6. To recapitulate the

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[48] Eg, the telecommunications access regime in Part XIC of the *Trade Practices Act*.

[49] Chapter 6 also cites these reports: Trade Practices Act Review Committee (Dawson Committee), *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth

essence of these chapters: Chapters 3 and 6 expose limitations in the use of s 46 of the *Trade Practices Act* as a means of resolving access disputes, thereby supporting the enactment of Part IIIA; and Chapters 2, 4 and 5 expound the current operation of the Part IIIA access regime and the author's proposals for improving the regime's processes.

In conclusion, Chapter 7 reviews the contribution of the dissertation and summarises the necessary reforms that will allow the national access regime to fulfil its intended role in National Competition Policy.

The law is stated as at 1 March 2004.

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of Australia, Canberra, report dated 31 January 2003, released 16 April 2003); and Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (Commonwealth of Australia, Canberra, March 2004).

# *CHAPTER 2*

## ACCESS REGULATION: THEORY AND OBJECTIVES

### 2.1 INTRODUCTION

The discipline of economics provides the theoretical underpinnings for access reform.[1] Accordingly, this chapter draws on economic theory[2] to illuminate the motivation for, and objectives of, regulatory initiatives in this area of Australian competition law. An economic perspective is applied to a range of base concepts and issues, including:

- *The nature of the access problem*

  Part 2.2 of this chapter examines the incentives of owners of essential facilities, whether vertically integrated or vertically separate, to exercise their market power to charge monopoly prices to third parties seeking access to vital inputs, or to deny such access altogether.

- *Identifying an essential facility*

  Part 2.3 argues that consideration of access regulation should be confined to specific cases where facilities are truly essential. In delineating the characteristics which identify such facilities, this part dissects the separate elements of the combined natural monopoly-bottleneck concept.

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1 This is not surprising, as 'trade practices law is ostensibly economic in its thrust and purpose': N Norman, 'Economics and Competition Law: How Far Have We Come?' in R Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, Sydney, 2000) 83, 84. Hay has similarly remarked that 'antitrust is fundamentally about economics': G Hay, 'The Past, Present, and Future of Law and Economics' (1996) 3 *Agenda* 71, 72.

2 Specifically, neoclassical economic theory – that orthodox economics paradigm predicated on the rationality of market participants, and their maximisation of utility and profits. All

- *The rationale for an access regime*

  The introduction of a dedicated access regime is justified in part 2.4, against a backdrop of shortcomings in alternative policy responses. Ensuing discussion positions access legislation within the theory of regulation; undertakes a cost/benefit analysis of such legislation; and considers the advantages and disadvantages of generic versus industry-specific approaches to access laws.

- *Specific access objectives*

  Part 2.5 focuses on the goal of economic efficiency, explaining clearly the different types of efficiency, and the need to prioritise between static and dynamic optimisation. Based on that analysis and earlier discussion in part 2.4, this part also incorporates an assessment of the objects clause which the Productivity Commission has proposed for Part IIIA.

As mentioned above, much of the discussion in this chapter is informed by economic principles, and due acknowledgement is made of relevant economics literature.[3] However, legal viewpoints remain relevant too. As Duns has noted, where economic objectives and content are employed in a legislative context, they 'invite comment from *legal* as well as economic commentators'.[4]

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references in this chapter, and throughout the dissertation, to 'economics', and derivatives of that term, should be taken as references to the neoclassical school.

3 The numerous references in this chapter to economics-based articles bear witness to this.

4 J Duns, 'Competition Law and Public Benefits' (1994) 16 *Adelaide Law Review* 245, 247 (emphasis added).

## 2.2 THE ACCESS PROBLEM

### A *What is the concern?*

The Hilmer Committee recognised that certain facilities 'exhibit natural monopoly characteristics, and hence cannot be duplicated economically'.[5] Moreover, some facilities exhibiting these characteristics 'occupy strategic positions in an industry, and are thus "essential facilities" in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets.'[6]

The owner of such a facility may seek to exploit its market power by charging monopoly prices to businesses using the facility and/or, where the facility is vertically integrated into dependent markets,[7] by engaging in strategic behaviour designed to leverage[8] its power into those markets. This is the core of the access problem, encapsulated by the Hilmer Committee as follows:

> An 'essential facility' is, by definition, a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole. In addition, where the owner of the facility is also competing in markets that are dependent on access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets.[9]

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5 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*') 239.

6 Ibid 240. As Kewalram explains, the facility is a 'link' in the productive chain, such that upstream or downstream producers 'cannot fulfil their role without access to that facility': 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 *Trade Practices Law Journal* 188, 189. For this reason, upstream/downstream markets are often termed 'dependent markets'.

7 See n 6 above.

8 In simple terms, 'market leverage' refers to the situation in which 'a firm controls the supply of an input that is critical in the production of another "downstream" product, but refuses to supply that input to certain potential suppliers of the downstream product or does so only on terms that render it impossible for those downstream firms to be effective competitors': G Hay and K McMahon, 'Duty to Deal under Section 46: Panacea or Pandora's Box?' (1994) 17 *University of New South Wales Law Journal* 54, 54.

9 *Hilmer Report* (above n 5) 239

Where the owner of an essential facility wishes to discourage entry into a dependent market or to place competitors in that market at a disadvantage, it has a number of practices at its disposal.[10] It might foreclose the market directly, by refusing to provide access to the facility;[11] or indirectly, by offering preferential pricing to its affiliates at the expense of independent competitors.[12] Even if the essential facility owner supplies a competitor in a dependent market on a non-discriminatory basis, the facility owner may 'squeeze' the profit margin available to that competitor, such that its entry or continuing business is not viable.[13] A price squeeze[14] occurs when the facility owner's upstream supply price is too high, or its downstream market price too low, for the competitor to survive. This strategy is possible because the downstream entity of the essential facility owner need not earn a reasonable rate of return, being subsidised by monopoly profits from the essential facility.[15]

Access regulation aims to break down monopoly power and to introduce competition into dependent markets by allowing third party access seekers reasonable access to essential facilities.[16]

### B *Integrated or non-integrated monopolist?*

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10 A Fels, 'Regulating Access to Essential Facilities' (2001) 8 *Agenda* 195, 195.

11 The denial of access may be partial, in that certain users may be allowed, but not all that desire to use the facility; or it may be a total denial, whereby the owner is the sole user: Kewalram (above n 6) 189.

12 Fels and Walker also make the point that 'problems of interconnection' can severely affect the level of service which a 'second carrier' can offer in competition with a vertically integrated monopolist: A Fels and J Walker, 'Competition Policy and Economic Rationalism' in S King and P Lloyd (eds), *Economic Rationalism: Dead End or Way Forward?* (Allen & Unwin, Sydney, 1993) 169, 177.

13 M O'Bryan, 'Access Pricing: Law Before Economics?' (1996) 4 *Competition & Consumer Law Journal* 85, 93. The conduct is a potential misuse of market power under s 46 of the *Trade Practices Act*, as recognised in, eg, *O'Keeffe Nominees Pty Ltd v BP Australia Ltd* [1990] ATPR 41-057.

14 The practice is also commonly described as a 'supply or vertical squeeze'.

15 A Abadee, 'The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?' (1997) 5 *Trade Practices Law Journal* 27, 36.

As reflected in submissions to the Productivity Commission's recent inquiry into the national access regime,[17] a divergence of opinion exists as to whether access regulation should target only vertically integrated essential facilities, or both vertically integrated and vertically separate facilities.[18] Addressing this issue requires consideration of the incentive the owner of an essential facility has to deny access where the owner is integrated into dependent markets, and where it is not.

Economic theory suggests that a profit-maximising monopolist (owner of the essential facility), whether integrated or not, will not directly deny access to any party seeking it.[19] The monopolist's incentive is to earn maximum profit. This is achieved not by turning business away, but by raising price.[20] Some access seekers may be discouraged, but this is conceptually different to a direct denial of access.[21]

Where the monopolist is not vertically integrated, it will have little incentive to deny access to firms in related markets (although it will still charge 'unnecessarily high prices at the expense of consumers and economic efficiency').[22] Acting rationally, it will seek to maximise

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16 S King, 'Guaranteeing Access to Essential Infrastructure' (1995) 2 *Agenda* 423, 424.

17 See, eg, the submissions cited in Productivity Commission, *Review of the National Access Regime* (AusInfo, Canberra, report dated 28 September 2001, released 17 September 2002) (hereafter, '*PC Report*') 144-145. All submissions received by the Productivity Commission are available from the Commission's website at www.pc.gov.au.

18 This question was also raised in A Hood and S Corones, 'Third Party Access to Australian Infrastructure', Paper presented at *Access Symposium*, Business Law Section of the Law Council of Australia, Melbourne, 28 July 2000, 21.

19 J Ratner, 'Should There be an Essential Facility Doctrine?' (1988) 21 *University of California Davis Law Reports* 327, 348-349; A Duncan, 'Natural Monopolies and the Commerce Act' in A Bollard (ed), *The Economics of the Commerce Act* (New Zealand Institute of Economic Research, Wellington, 1989) 166, 167; and D Reiffen and A Kleit, 'Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?' (1990) 33 *Journal of Law and Economics* 419, 420.

20 A monopolist 'does not have to refuse access to an essential facility to continue to earn monopoly profits'; it simply sets a monopoly access price: Kewalram (above n 6) 197. See, also, D Gerber, 'Rethinking the Monopolist's Duty to Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"' (1988) 74 *Virginia Law Review* 1069, 1084.

21 The monopolist's motive is to reduce output and raise prices; its purpose is not to limit or exclude competition.

22 Fels (above n 10) 196. See, also, *Hilmer Report* (above n 5) 241.

the competitiveness of dependent markets in order to maximise the monopoly rents that can be earned from the facility.[23] By maximising use of its facility, a vertically separate monopolist maximises its own profits.[24]

Where the monopolist is vertically integrated into competitive upstream or downstream markets, the potential to charge monopoly prices *may* be combined with a greater incentive to restrict competitors' access to the facility, or to offer terms and conditions of access which discriminate against them.[25] This is because the monopolist is now 'competing with those who require access to its facilities'.[26]

In normal circumstances, however, a profit-maximising vertically integrated monopolist has no incentive to deny access because it can still extract monopoly profits from access seekers.[27] An unrelated firm that is more efficient in the vertically related market, and can therefore earn more monopoly profit for the monopolist, will not be excluded.[28] Alternatively, if the monopolist's integrated operation is more efficient in the vertically related market, then the related firm will be preferred as this allows greater rents to be earned.[29] Either way, in adhering to a profit-maximising strategy, the monopolist's actions will not be anti-competitive.[30]

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23 W Tye, 'Competitive Access: A Comparative Industry Approach to the Essential Facility Doctrine' (1987) 8 *Energy Law Journal* 337, 359; *Hilmer Report* (ibid); and Hood and Corones (above n 18) 17

24 *PC Report* (above n 17) 50-51.

25 Ratner (above n 19) 350; Duncan (above n 19) 170-171; *Hilmer Report* (above n 5) 241; and Kewalram (above n 6) 189.

26 B Owen, 'Determining Optimal Access to Regulated Essential Facilities' (1990) 58 *Antitrust Law Journal* 887, 888-889.

27 See n 19 above.

28 Ratner (above n 19) 350; and Duncan (above n 19) 171.

29 G Werden, 'The Law and Economics of the Essential Facility Doctrine' (1987) 32 *Saint Louis University Journal* 433, 462; and Gerber (above n 20) 1085.

30 Ibid.

Nevertheless, at least two scenarios in which a vertically integrated monopolist is likely to engage in anti-competitive access denial have been identified.[31] The first arises when the monopolist is regulated in such a way as to deny the monopolist the ability to earn a monopoly profit in the market in which it owns the essential facility.[32] In this situation, the monopolist has an incentive to foreclose competitors' entry to the vertically related market by denying access, so that it can reap monopoly profits in the unregulated market.[33] The second occurs when the monopolist's ability to price discriminate is limited by competitors in the related market. For example, where such competitors can trade among themselves the service[34] the monopolist provides, the monopolist has an incentive to deny access to the lower value users of the service. In this way, the monopolist can continue to reap the maximum rent from the higher value users.[35]

The fact that there are conditions under which a vertically integrated monopolist does have an incentive to deny access to an essential facility underpins the argument that access regimes should be confined to vertically integrated facilities.[36] Proponents of this view contend that, in contrast, the issue for non-integrated facilities is primarily one of monopoly pricing, which can be addressed adequately via price oversight mechanisms.[37]

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31 These are summarised in *Hilmer Report* (above n 5) 241, fn 4.

32 In other words, the monopolist is unable to charge high prices for access to the facility.

33 Ratner (above n 19) 354; Gerber (above n 20) 1085; Duncan (above n 19) 172; and Owen (above n 26) 889.

34 Consistent with the terminology in Part IIIA, this chapter also refers to the *services* (as opposed to products) provided by essential facilities. See the definition of 'service' in s 44B of the *Trade Practices Act*.

35 Ratner (above n 19) 353; and Duncan (above n 19) 171.

36 This was the model proposed by the Hilmer Committee: *Hilmer Report* (above n 5) 241, but see fn 3, where the Committee noted the access regime as a possible alternative to the prices oversight process for non-integrated facilities.

37 See, eg, the following submissions to the Productivity Commission's review of the national access regime: Australian Pacific Airports Corporation (sub 10, December 2000) 2; Australian Council for Infrastructure Development (sub 11, December 2000) 11; and Freight Australia (sub 19, December 2000) 6. Where denial of access is potentially an issue, the argument in these submissions is that s 46 of the *Trade Practices Act* provides sufficient protection to access seekers.

However, this would mean that different instruments would be used to address monopoly pricing by essential facilities – an access regime for integrated facilities and prices oversight for non-integrated facilities.[38] Apart from this inconsistency of approach, limiting access regulation to integrated facilities may encourage such facilities to separate merely to avoid coverage,[39] while causing non-integrated facilities to re-evaluate the efficiency advantages arising from possible involvement in vertically related markets.[40]

Moreover, submissions to the Productivity Commission's inquiry asserting that access denial is just as much an issue for non-integrated as for integrated monopolists suggest that theoretical attempts to delineate incentives to deny access on the basis of firm structure may not translate into practice.[41] In dealing with the access problem, drawing a distinction between integrated and non-integrated monopolists may therefore be 'misleading'.[42]

Indeed, King and Maddock have said that the interesting issue about access is not that it involves a monopoly provider of an input, nor even that the provider is a natural monopoly, but rather that the monopoly market is inextricably linked to another market.[43] In their view, the fundamental concern is the link between the natural monopoly market and the potentially

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38 *PC Report* (above n 17) 145.

39 Productivity Commission, *Review of the National Access Regime* (Position Paper, 29 March 2001) (hereafter, '*PC Position Paper*') 106. See, also, the National Competition Council's submission to the review: (sub 43, January 2001) 24.

40 G Hay, 'Reflections on Clear' (1996) 3 *Competition & Consumer Law Journal* 231, 233; and M Pickford, 'Pricing Access to Essential Facilities' (1996) 3 *Agenda* 165, 167.

41 Eg, the Law Council of Australia claimed in its submission that 'there are non-vertically integrated natural monopolists in Australia who have denied in the past, and continue to deny, access to their essential facilities even though it would be profit-maximising to grant access': (sub 37, January 2001) 7. See, also, the following submissions: Network Economics Consulting Group (sub 39, January 2001) 10; and National Competition Council (sub 43, January 2001) 58.

42 *PC Report* (above n 17) 51.

43 S King and R Maddock, *Unlocking the Infrastructure: The Reform of Public Utilities in Australia* (Allen & Unwin, Sydney, 1996) 87-88.

competitive market.[44] Obviously, this link is present whether the monopolist is vertically integrated or not.

From a pragmatic perspective, there is little to be gained from any dichotomy between non-integrated and integrated monopolists. Even if owners of essential facilities do not have reasons to deny access, they clearly will have incentives to exploit their market power when setting terms and conditions of access. The practical impact of monopoly pricing may barely differ from an absolute denial of access.[45]

For the reasons given above, it is submitted that access regulation should apply to all essential facilities[46] regardless of whether the monopolist owner seeks to compete in a vertically related market.[47] Accordingly, the author supports both the Australian Competition Tribunal's decision that the provisions of Part IIIA are not limited in their application to vertically integrated monopolists,[48] and the Productivity Commission's finding that Part IIIA should continue to cover eligible services provided by both vertically integrated and non-integrated essential facilities.[49]

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44 As they explain, 'This linkage of a natural monopoly market with a potentially competitive market lay at the heart of the Hilmer Report's concerns about access': King and Maddock (ibid) 87.

45 *PC Report* (above n 17) 52-53.

46 Referring, of course, to true essential facilities according to the criteria set out in part 2.3 below.

47 Hay (above n 40) 243.

48 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,756. The case is comprehensively analysed in Chapter 4.

49 *PC Report* (above n 17) Finding 6.2.

## 2.3 IDENTIFYING AN ESSENTIAL FACILITY

### A *A restrictive approach*

A basic element of a well-functioning market economy is the right of asset owners to deal with whom they choose, and to use and dispose of their assets at any point in time. The Hilmer Committee recognised this as a 'fundamental principle based on notions of private property and freedom to contract'[50] and noted that it is 'one not to be disturbed lightly'.[51] Access regulation represents a major departure from this important principle. As a highly intrusive form of regulation, which can entail a significant attenuation of private property rights, it should, in the author's view, be applied cautiously.[52]

The Hilmer Committee's position was that the scope of its proposed access regime was to be limited and 'applied sparingly, focusing on key sectors of strategic significance to the nation'.[53] The Committee was conscious of 'the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another.'[54]

The underlying concern is that if facility owners anticipate that their property rights will be abrogated, incentives for investment and innovation will be reduced as the returns from, and the viability of, such activity will be uncertain.[55] Given this concern, the appropriate policy response is to endeavour to eliminate any possibility that access regulation could apply to facilities that should not in fact be regulated.[56]

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50 *Hilmer Report* (above n 5) 242.
51 Ibid.
52 See, also, Hood and Corones (above n 18) 95; and *PC Report* (above n 17) 94.
53 *Hilmer Report* (above n 5) 260.
54 Ibid 248.
55 Ibid.
56 In other words, as explained in Table 1.1 in Chapter 1, access regulation must be 'well-targeted'.

## B Economic concepts

In setting parameters for the application of access regulation, there must be a clear framework, preferably within the regime itself, for identifying essential facilities. Under Part IIIA, where the term ‘essential facility’ is not used, the starting point is the notion of a combined natural monopoly-bottleneck facility.[57] However, this simply reflects the Hilmer Committee’s observation that an essential facility exhibits natural monopoly characteristics *and* creates a bottleneck:[58]

> Some facilities that exhibit these [natural monopoly] characteristics occupy strategic positions in an industry, and are thus ‘essential facilities’ in the sense that access to the facility is required if business is to be able to compete effectively in upstream or downstream markets. For example, competition in electricity generation and in the provision of rail services requires access to transmission grids and rail tracks respectively.[59]

Chapter 4 of this dissertation contains a comprehensive analysis of Part IIIA’s natural monopoly and bottleneck criteria, contained, respectively, in ss 44G(2)(b) and 44G(2)(a) of the *Trade Practices Act*.[60] In laying the foundations for that analysis, the ensuing discussion adopts a theoretical perspective (informed largely by the discipline of economics) to explore two vital issues: first, when is a facility a *natural monopoly*; and, second, when is access to such a facility *essential*?

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57 Although Part IIIA makes no specific reference to either ‘natural monopoly’ or ‘bottleneck’, those concepts are incorporated by the wording of the declaration criteria in s 44G(2) of the *Trade Practices Act*. As explained in detail in Chapter 4, s 44G(2)(b) tests whether a facility exhibits natural monopoly characteristics, and s 44G(2)(a) addresses whether a facility that exhibits natural monopoly characteristics is also a bottleneck facility.

58 The term ‘bottleneck’ signifies that the facility occupies a strategic position in the service delivery chain.

59 *Hilmer Report* (above n 5) 240.

60 Chapter 4 examines each of the six declaration criteria in s 44G(2) of the *Trade Practices Act* in depth.

### (1) *Natural monopoly*

As indicated above, the concept of *natural monopoly* is central to an understanding of an essential facility.[61] The economics literature refers, more familiarly, to natural monopoly markets[62] or natural monopoly industries,[63] than natural monopoly facilities.[64] However, the terms of s 44G(2)(b) of the *Trade Practices Act* (Part IIIA's natural monopoly criterion), that it would be uneconomical to develop 'another facility to provide the service', will be satisfied where the provision of the service is a natural monopoly.[65] In these circumstances, the facility that provides the service can be described as a natural monopoly facility.[66] The author regards this particular construction of natural monopoly – that is, natural monopoly *facility* – as providing the best fit with the language and purposes of Part IIIA.[67]

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61 Hence the Productivity Commission's uncontroversial finding that 'Part IIIA should continue to focus on addressing market power arising from *natural monopoly* that leads to the denial or monopoly pricing of access to essential infrastructure services': *PC Report* (above n 17) Finding 6.3 (emphasis added).

62 Natural monopoly markets engaged the Full Federal Court's attention in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-783. In concluding that the market for the provision of towage services in the Port of Bunbury was a natural monopoly, Burchett and Hely JJ remained true to economic principles in stating that 'the volume of towage services required at the port … is incapable of supporting more than one towage operator having regard to the costs of establishing and operating towage services at the port': ibid 41,267-41,268, upholding the conclusion of French J in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-752, 40,732. Carr J did likewise in agreeing that '[t]he market was a natural monopoly, that is, a market which could only support one supplier of the relevant services': ibid 41,279. The case is discussed at length in H Ergas, 'Stirling Harbour Services v Bunbury Port Authority: A Review of Some Economic Issues' (2002) 10 *Competition & Consumer Law Journal* 27.

63 See, eg, J Quiggin, 'The Premature Burial of Natural Monopoly: Telecommunications Reform in Australia' (1998) 5 *Agenda* 427.

64 Some economists also argue that 'natural monopoly' refers to a cost-minimising technology or production method: see, eg, King and Maddock (above n 43) 72. However, in its submission to the Productivity Commission's review of the national access regime, the Law Council of Australia argued persuasively that '"[n]atural monopoly" should not be defined to mean "natural monopoly technology"', explaining that 'for example, rail technology may be natural monopoly technology even though the owner of the technology may have no market power because road and planes are effective substitutes for rail': (sub 37, January 2001) 5-6.

65 Section 44G(2)(b) is analysed in detail in Chapter 4.

66 National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act – Part B Declaration* (NCC, Melbourne, December 2002) (hereafter, '*NCC Declaration Guide*') [4.57].

67 The NCC has undertaken a thorough review of the alternative constructions of natural monopoly: see *NCC Declaration Guide* (ibid) [4.46-4.75]. It finds that natural monopoly industry is a 'dated concept' in economics: ibid [4.47]. The remaining alternatives, a natural monopoly market or a natural monopoly facility interpretation of s 44G(2)(b), will give the same outcome, since 'the only effective substitute for the service provided by means of a

Although the concept of natural monopoly is 'difficult to define precisely',[68] economists agree that subaddivity of the cost function is the characteristic by which to identify a natural monopoly.[69] When applied in the context of facilities, the subadditivity requirement specifies that a natural monopoly exists where the range of relevant output can be served at lower cost by one facility than by two or more facilities.[70] Assuming the natural monopoly is sustainable, it will generally be economically efficient and socially desirable to allow one facility to supply all the services required.[71] In these circumstances, competition between facilities would be an inefficient outcome, and would lead to the wasteful use of society's resources.[72]

Obviously the range of relevant output over which single-facility production must be cheaper is not exogenously determined, but depends on the level of demand for the service provided by means of the facility. For ease of analysis, this demand is taken to be the range of

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facility of the type usually the subject of an application for declaration is generally the *same* service': ibid [4.67] (emphasis in original). However, the NCC prefers 'natural monopoly facility' to 'natural monopoly market' because it is more consistent with the terminology of s 44G(2)(b): ibid [4.58].

68 *Hilmer Report* (above n 5) 240. For discussion of the history of the concept of natural monopoly, see P Williams, 'What Prices Should Public Utilities Charge? The Case of Victoria's Electricity Reforms' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 86, 88.

69 Eg, Duncan (above n 19) 167; S King and R Maddock, 'Competition and Almost Essential Facilities: Making the Right Policy Choices' (1996) 15 *Economic Papers* 28, 28; and S King, 'National Competition Policy' (1997) 73 *Economic Record* 270, 272. The seminal work on subadditivity is attributed to W Baumol, J Panzar and R Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace Jovanovich, New York, 1982); and W Sharkey, *The Theory of Natural Monopoly* (Cambridge University Press, Cambridge, 1982).

70 For a more technical exposition, see J Church and R Ware, *Industrial Organization: A Strategic Approach* (McGraw-Hill, Boston, 2000) 781. In addition, in determining whether a natural monopoly exists, the NCC also considers any incumbency advantages that confer a monopoly on a service provider. (An incumbency advantage is a natural, economic or technological advantage associated with the initial establishment of a facility.) See *NCC Declaration Guide* (above n 66) [4.29].

71 Hood and Corones (above n 18) 11; and Law Council of Australia (above n 41) 5.

72 Ibid.

reasonably foreseeable demand for the particular service, or, in other words, the maximum demand that the facility might be called on to serve.[73]

Under what conditions, then, will the subadditivity requirement for natural monopoly be satisfied? The answer depends on whether the facility provides a single service or multiple services.

- In the case of a single-service facility, a sufficient condition for the cost function to be subadditive is if the facility exhibits economies of scale over the range of reasonably foreseeable demand for the service. Economies of scale occur if average costs per unit of output decrease as output expands.[74]

- In the case of a multi-service facility, sufficient conditions for the cost function to be subadditive are if the facility exhibits economies of scale in the provision of every service provided by the facility, particularly over the range of reasonably foreseeable demand for the particular service to which access is sought,[75] *and* economies of scope in the provision of all services. In this context, economies of scale imply that the provision of each service by a single facility is cost efficient, while economies of scope (which exist where the joint provision of two or more services is less costly than providing the services individually)[76] imply that it is cost efficient for a single facility to provide the entire set of services.[77]

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73 *NCC Declaration Guide* (above n 66) [4.54].

74 Economies of scale tend to arise where the costs of production comprise a high proportion of fixed costs and a small proportion of variable costs. Under these conditions, the average cost of production will decline as production expands because fixed costs will be spread over a larger output. High fixed costs are therefore one source of the cost advantage of single facility production, as more than one facility would involve duplication of these fixed costs. See Sharkey (above n 69) 5.

75 In the presence of economies of scope, if the facility exhibits economies of scale in providing the service subject to declaration over the range of reasonably foreseeable demand for that service, then it is generally reasonable to assume that the facility exhibits economies of scale in providing each and every one of the multiple services it provides over the range of demand that it may be called on to meet: *NCC Declaration Guide* (above n 66) [4.78].

76 R Sherman, *The Regulation of Monopoly* (Cambridge University Press, Cambridge, 1990) 6. The standard examples used to illustrate economies of scope involve cases of joint production,

### (2) *Essentiality*

Natural monopoly is a necessary but not sufficient condition for a facility to be deemed essential. A second characteristic is required: the facility must provide an input that is *essential* for the production of another good or service.[78]

Following King and Maddock, a test of essentiality should specify that an input is essential to the production of a specific product or service if:

- no alternative (ie, substitutable) input or process exists which would enable a competitor to produce an equivalent final good or service at a comparable cost; *and*
- no alternative final product can be made available at a comparable price, without that input.[79]

This two-part test is a familiar one in Australian trade practices law. In effect, the test seeks to identify whether substitution possibilities are available both in production *and*

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such as with wool and mutton. As Bailey and Freidlander explain, if a producer is raising sheep for wool production, it is usually cheaper to use the same sheep to produce mutton, rather than have two flocks of sheep. In other words, economies of scope arise because of the joint utilisation of inputs. See E Bailey and A Freidlander, 'Market Structure and Multiproduct Industries' (1982) 20 *Journal of Economic Literature* 1024, 1026. Such joint utilisation of inputs is not uncommon in utility industries; consider, for instance, the supply of water for consumption and sewage purposes.

77 *NCC Declaration Guide* (above n 66) [4.27].

78 King and Maddock (above n 69) 28; and King and Maddock (above n 43) 76. Note that the natural monopoly facility must be *essential* for competition and not merely convenient for a (potential) competitor. Cf Seelen's view that essential facilities should be those 'where the public's need for access to the facility justifies treating that facility as a public utility': C Seelen, 'The Essential Facility Doctrine: What Does it Mean to be Essential?' (1997) 80 *Marquette Law Review* 1117, 1130. Cf also, Troy's argument that a facility is essential when the effect of the monopolist's otherwise lawful behaviour denies the foreclosed party 'commercial existence': D Troy, 'Unclogging the Bottleneck: A New Essential Facility Doctrine' (1983) 83 *Columbia Law Review* 441, 459

79 King and Maddock (above n 69) 29; and King and Maddock (above n 43) 76.

consumption.[80] The courts have adopted a similar approach in interpreting the definition of 'market' in s 4E of the *Trade Practices Act*. Wilcox J's reasoning in *TPC v Australia Meat Holdings Pty Ltd*[81] is typical:

> A market is the field of activity in which buyers and sellers interact and the identification of market boundaries requires consideration of both the demand and supply side. The ideal definition of a market must take into account *substitution possibilities in both consumption and production*. The existence of price differentials between different products, reflecting differences in quality or other characteristics of the products, does not by itself place the products in different markets. The test of whether or not there are different markets is based on what happens (or would happen) on either the demand or the supply side in response to a change in relative price.[82]

The following examples illustrate the sorts of issues that arise under the essentiality test:[83]

- Consider a factory that is supplied with gas via a natural monopoly transmission/distribution system. If the factory could switch easily from gas to another fuel source (such as electricity, coal or oil) and the alternative fuel was available at a comparable cost to gas, then the gas transmission/distribution system would not be an essential facility. The system fails the first part of the essentiality test.

- Alternatively, consider rail transport. Access to a natural monopoly rail network would be necessary for any producer who wishes to provide urban rail passenger transport services. However, the rail network would not be an essential facility for passenger transport, as it fails the second part of the essentiality test. There are a variety of cost-effective alternatives to urban rail transport, including private cars, taxis and buses.

**(3) *Taxonomy of facilities***

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80 N Haralambopoulos and CW Cheah, 'Identifying Essential Facilities', Working Paper, Department of Treasury and Finance, Victoria, 1998, 6.

81 [1988] ATPR 40-876.

82 Ibid 49,480 (emphasis added).

Application of the natural monopoly and essentiality requirements gives rise to four possible scenarios. These are summarised in Table 2.1 below.[84]

**TABLE 2.1: Four-part taxonomy of facilities**

| | ***Natural monopoly*** | ***Non-natural monopoly*** |
|---|---|---|
| ***Essential input*** | Type A: Essential facility | Type B: Regulatory monopoly |
| ***Non-essential input*** | Type C: Convenient facility | Type D: Competitive facility |

Type A facilities are true essential facilities: they are natural monopoly facilities and they provide an input that is essential for competition in related markets. Type D (competitive) facilities display neither of these characteristics and, as their name suggests, are most amenable to open market competition. Type B facilities are not natural monopoly facilities, but they are the sole provider of an essential input.[85] They are termed regulatory monopolies because their monopoly status is maintained through government policy or action.[86] Type C (convenient) facilities are natural monopoly facilities, but there are cost-effective alternatives to the inputs they provide.

Consistent with King and Maddock,[87] it is submitted that only Type A facilities should qualify as potential candidates for an access regime.[88] Being natural monopoly facilities, it is

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83 These examples are derived from King (above n 69) 273.

84 Table 2.1 is adapted from King and Maddock (above n 69) 32.

85 King and Maddock cite, as a relevant example, components of Australia's telecommunications infrastructure that are unlikely to involve natural monopoly elements, such as Telstra's local call network: ibid 32-33.

86 In this particular taxonomy, Type B facilities are distinguished from Type A facilities, which are typically subject to government regulation as well, by being non-natural monopoly facilities.

87 King and Maddock (above n 69) 31.

undesirable from an economic perspective to duplicate them, but access to the inputs they provide is essential for competition in dependent markets.[89] Type B facilities are monopolies by virtue of government regulation, so the appropriate response is to remove any artificial impediments that inhibit or prevent market entry.[90] In the case of Type C facilities, there are economic substitutes for the inputs they provide, which should act as a discipline on monopoly behaviour. Finally, for Type D facilities, which are neither natural monopoly facilities nor providers of essential inputs, no form of regulation should be necessary.

The design of Table 2.1 helps to illustrate the point that regulators may commit two types of policy errors:[91]

- The first type of error ('Error 1') involves declaring a non-essential facility. This represents an abrogation of property rights and contravenes a fundamental principle of private property. It can create severe disincentives for infrastructure investment and innovation.
- The second type of error ('Error 2') involves not declaring an essential facility when it is in fact essential. If this occurs, the owner of the essential facility will be able to exercise its market power and this will entail the conventional monopoly problems of restriction of output, higher prices and appropriation of monopoly rents. In addition, without an access regime, there will be limited opportunity for competition to develop

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88 Although it cannot immediately be assumed that owners of essential facilities will invariably deny access.

89 The OECD considers that Part IIIA can apply to natural monopoly facilities generally, implying that Type C facilities can be covered as well: Organisation for Economic Co-operation and Development, 'The Essential Facilities Concept' OCDE/GD(96)113, Roundtables on Competition Policy, Paris, 1996, 42.

90 However, access can be a short-term tool to reduce barriers to entry and speed the transition to a competitive market. By allowing firms to have access to the services of the existing monopoly infrastructure, competitors can quickly establish a market presence and develop their product lines and reputation while building their own infrastructure. See King and Maddock (above n 69) 34.

91 The explanations that follow are based on Haralambopoulos and Cheah (above n 80) 5.

in downstream markets, so that the economic benefits of such competition will be foregone.[92]

In the author's opinion, greater weight should be placed on avoiding Error 1.[93] Monopoly concerns can always be addressed (to some extent, at least) through general competition law.[94] However, if non-essential facilities are subjected to an access regime, no immediate remedy is available, while the disincentive effects on investment may be direct and severe.[95]

That the potential costs of committing Error 1 are considered by this author to be greater than the potential costs of committing Error 2 is, ultimately, a value judgment. Nevertheless, the conclusion is logically consistent with the argument advanced in part 2.3(A) of this chapter – namely, that access regulation should be applied sparingly, so as not to reduce incentives for investment and innovation on the part of facility owners. Moreover, the author's preference for priority to be given to the avoidance of Error 1 finds implicit support in the following observation of the Industry Commission:

> … widening the potential infrastructure eligible for declaration … could have deleterious effects on risk-taking in the Australian economy. In particular, investment incentives may be reduced if firms operating non-natural monopoly infrastructure are concerned that their property rights could be eroded.[96]

All this suggests that the natural monopoly and essentiality criteria in Part IIIA must be suitably worded and strictly applied. As mentioned previously, these provisions are examined in detail in Chapter 4. An assessment of the adequacy of their terms, and the interpretation of those terms, is deferred until that chapter.

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92 Although not necessarily forever, as technological developments may permit downstream competition in the future.
93 This view is also taken in Haralambopoulos and Cheah (above n 80) 5.
94 Ibid.
95 Ibid.

## 2.4 RATIONALE FOR AN ACCESS REGIME

### A *The preferred policy response*

If natural monopoly facilities provide an input that is essential in order to operate in another market, then the facility owner can abuse its monopoly status with impunity.[97] Access regimes are recognised as an effective policy instrument in limiting such abuses of market power. As King and Maddock say, regulation is a 'good solution'[98] to the access problem.[99] Typically, such regulation involves control over when, and at what price, third party access to an essential facility will be granted.[100]

Other policy responses to the access problem include those identified in Table 2.2.[101] However, in the author's view, the limitations (also explained in Table 2.2) associated with each of these alternative solutions support the case for access regulation.

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96 Industry Commission, *Industry Commission Submission to the NCC on 'The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act'* (AGPS, Canberra, 1997) 12.

97 King and Maddock (above n 69) 29.

98 King and Maddock (above n 43) 95.

99 For further support for this conclusion, see Tye (above n 23) 338; Fels and Walker (above n 12) 189; and L Evans, 'Access under the Trade Practices Act' (2000) 8 *Competition & Consumer Law Journal* 45, 47.

100 Tye (ibid); and Fels and Walker (ibid).

101 The information in Table 2.2 is drawn from Owen (above n 26) 890-891; R Ahdar, 'Battles in New Zealand's Deregulated Telecommunications Industry' (1995) 23 *Australian Business Law Review* 77, 113-115; King and Maddock (above n 69) 29-30; M Trebilcock and M Gal, 'Deregulation of Public Utilities: Experience of the Ontario Natural Gas and Electricity Industries' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne,

This is not to say that access regulation cannot be complemented by other measures for addressing monopoly power in the delivery of essential infrastructure services.[102] As the Productivity Commission noted, for example: structural separation of integrated service providers makes the job of access regulators easier; industry access regimes for a number of infrastructure services mesh with price controls in retail markets; and general laws against anti-competitive conduct in the *Trade Practices Act* still apply to access arrangements, notwithstanding the existence of Part IIIA and various industry-specific access regimes.[103] The important point, however, is that other policy instruments do not diminish the need for access regulation itself.

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1996) 14, 23-24; P Williams, 'Comments on "Deregulation of Public Utilities: Experience of the Ontario Natural Gas and Electricity Industries": Australian and New Zealand Perspectives' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 75, 76; and Hood and Corones (above n 18) 19.

102 Indeed, the Productivity Commission has stated that '[t]here is no reason for a significant change in the balance between the use of access regulation and other policy instruments available for promoting efficient access to essential infrastructure': *PC Report* (above n 17) Finding 5.1.

103 *PC Report* (ibid) 96.

**TABLE 2.2: Alternatives to access regulation**

| *Alternative policy response* | *Limitations* |
|---|---|
| **Stimulating new entry** | Where natural monopoly is involved, profit-induced entry is unlikely to occur. While the threat of potential entry may create some limits on monopoly pricing, this threat is unlikely to be a significant influence.[104] |
| **Substitution of alternative inputs** | Substitution of alternative inputs may limit the range of feasible access prices. However, if the service produced by the facility is really an essential input, these substitution possibilities will be limited.[105] |
| **Encouraging by-pass** | By-pass of the upstream facility by downstream producers or final market customers may impose some small constraint on the ability of the facility owner to reap maximum profits. However, even if the threat of by-pass were a realistic one, any actual duplication of the upstream facility would be socially wasteful by definition.[106] |
| **Structural separation** | The structural separation of vertically integrated monopolists ensures that the monopolist does not compete with those who require access.[107] Because it alters the incentives for anti-competitive behaviour by incumbent monopolists, structural separation has been implemented as part of the access arrangements in several industries including electricity, gas, rail and airports.[108] The Hilmer Committee supported this,[109] but did not favour the introduction of a general power of divestiture in Australia in view of the disruptive effects it would engender, the involvement of the courts in a process with inevitable political implications, and the undoubted strenuous opposition by the firm facing break-up.[110] |
| **Prices oversight** | The 'bite' in most access regulation comes from the power of a regulator to determine prices and conditions if the service provider and access seeker are unable to agree to terms.[111] However, conventional price controls contain no obligation to supply. |
| **Reliance on general competitive conduct rules** | There is general acceptance that s 46 of the *Trade Practices Act* could be used to address the sorts of access issues that arise in relation to essential facilities.[112] However, there is also considerable doubt about the efficacy of s 46 as a 'stand-alone' mechanism for delivering access to essential infrastructure services.[113] It is perhaps not insignificant that no major developed country relies solely on general competitive conduct rules in this area.[114] |

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104 King and Maddock (above n 69) 29.

105 Ibid.

106 Ibid 29-30.

107 Ahdar (above n 101) 113-115. However, Owen warns that '[a]n absolute ban on vertical extensions into competitive activities comes at the expense of possible economies of partial integration': Owen (above n 26) 890-891.

108 S Dounoukos and A Henderson, 'Structural Separation in Telecommunications: A Review of Some Issues' (2003) 10 *Agenda* 43, 43.

109 *Hilmer Report* (above n 5) 221.

110 Ibid 163-164.

111 *PC Report* (above n 17) 103

112 Chapter 6 addresses the residual role of s 46 in access disputes.

113 *PC Report* (above n 17) 112.

114 *PC Position Paper* (above n 39) 86.

## B *Theoretical basis*

Regulation refers to 'governmental legislation or agency rules, having force of law, issued for the purpose of altering or controlling the manner in which private and public enterprises conduct their operations.'[115] Two distinct theoretical frameworks seek to explain its existence: the public interest theory of regulation, and the economic theory of regulation. The discussion below explores these theories and examines where access regulation fits.

### (1) *Public interest theory of regulation*

The public interest theory of regulation is based on the premise that government intervention to remedy market failure is justified 'in the public interest'. Regulation in this view is a legitimate response to market failure.[116]

The theory of market failure[117] thus forms the basis of the public interest theory of regulation. Economists identify four main sources of market failure:[118] *natural monopoly*, information asymmetries between producers and consumers,[119] the under-provision of public goods,[120] and negative externalities.[121]

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115 R Litan and W Nordhaus, *Reforming Federal Regulation* (Yale University Press, New Haven, 1983) 5-6. There is broad consensus as to this definition – for similar statements, see M Reagan, *Regulation: The Politics of Policy* (Little, Brown & Co, Boston, 1987) 15; Office of Regulation Review, *A Guide to Regulation*, 2nd ed (AusInfo, Canberra, 1998) [A1]; and Church and Ware (above n 70) 749.

116 The Office of Regulation Review expressly acknowledges that 'Government action has often been justified in cases of "market failure"': Office of Regulation Review (ibid) [D1].

117 As to which, see, generally, J Davis and J Hulett, *An Analysis of Market Failure: Externalities, Public Goods and Mixed Goods* (University of Florida Press, Gainesville, 1977).

118 Office of Regulation Review (above n 115) [E1].

119 Although some economists view asymmetric information merely as a market 'imperfection': see, eg, R Pindyck and D Rubinfeld, *Microeconomics*, 5th ed (Prentice Hall, New Jersey, 2000) Chapter 17.

120 Eg, lighthouses and defence.

### (2) *Economic theory of regulation*

The economic (or private interest) theory of regulation[122] rejects the notion that regulation is imposed on certain sectors in the wider public interest, and argues that such regulation is in fact desired by those groups 'influential in the enactment of the legislation setting up the regulatory scheme'.[123]

Under this theory, regulation arises because of demand for, and supply of, the government's legal monopoly on the scarce resource of legal coercion. The coercive power of government is sought by firms as a potential resource to control entry over rivals, grant subsidies, regulate substitutes and complements, and fix prices.[124] Politicians are willing to supply such regulation in return for help in attaining and maintaining political power; and firms are able to provide politicians and political parties with the money and votes they need to win elections. This analysis provides the theoretical underpinnings for the notion that regulators are 'captured' by the very firms that they are supposed to control. In return for votes, financial resources, or the promise of future employment, regulators often exercise their power in a way that serves the interests of firms.[125]

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121 Eg, pollution as a side-effect of production.

122 The theory is based on the seminal work of Stigler, as developed by Posner and Peltzman. See G Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics* 3; R Posner, 'Theories of Economic Regulation' (1974) 5 *Bell Journal of Economics* 335; and S Peltzman, 'Toward a More General Theory of Regulation' (1976) 19 *Journal of Law and Economics* 211.

123 Posner (ibid) 337.

124 A Fels, 'The Political Economy of Regulation' (1982) 5 *University of New South Wales Law Journal* 29, 36.

125 Owen (above n 26) 894; Fels and Walker (above n 12) 178; and Ahdar (above n 101) 109.

The economic theory of regulation may reasonably be viewed as a subset of public choice theory.[126] It was the public choice school that first criticised the assumption that government was a 'benevolent despot' – an entity that would, without question and in good faith, routinely implement policies that were in the public interest – and argued that politicians should be viewed as self-interested utility maximisers, whose primary motivation in formulating policies is to maximise votes.[127]

### (3) *Where does access regulation fit?*

Market failure arising from natural monopoly provides the public interest rationale for the introduction of access regulation.[128] Indeed, the public interest theory underpins most 'horizontal' regulation, such as trade practices legislation.[129] Where regulation extends across a range of industries, 'it does not generally work principally in the interest of the regulated, whatever else it does or does not do.'[130]

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126 As Fels has noted, 'Stigler's theory of economic regulation has its "general antecedents" in the work of Downs, and Buchanan and Tullock': Fels (above n 124) 36. The references are to these classic works: A Downs, *An Economic Theory of Democracy* (Harper & Row, New York, 1957); and J Buchanan and G Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, Ann Arbor, 1962).

127 See, further, J Novak, 'Public Choice Theory: An Introduction' (1998) 14 *Policy* 58.

128 D Clough, 'Economic Duplication and Access to Essential Facilities in Australia' (2000) 28 *Australian Business Law Review* 325, 327; and Evans (above n 99) 47.

129 Gow's regulatory matrix distinguishes between vertical regulation, which is industry-specific, and horizontal regulation, which goes across industries. See D Gow, 'Business and Government as Regulation' in H Colebatch, S Prasser and J Nethercote (eds), *Business-Government Relations: Concepts and Issues* (Nelson, South Melbourne, 1997) 101, 105.

130 Fels (above n 124) 57.

However, market failure alone is insufficient justification for government intervention, unless it can be demonstrated that the benefits of such intervention outweigh the costs.[131] As Fels warns, 'There may be massive government failure in place of market failure'.[132] The costs and benefits of access regulation are examined below in part 2.4(C) of this chapter.[133]

However, Tomasic argues that it is essential to look beyond the enabling legislation to the agency charged with its oversight.[134] In the context of Part IIIA, this approach focuses attention on the National Competition Council (NCC) and the Australian Competition and Consumer Commission (ACCC). Public choice theorists would hypothesise an empire building scenario, in which regulators seek to enhance personal utility by maximising the budgets of their respective agencies, since it is expected that their personal incomes and power status would increase correspondingly.[135] Consistent with this view, Holmes contends that regulators have clear tendencies to amass whatever powers they can, and to plead for the discretion and the flexibility they regard as necessary to address the task they have been given.[136]

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131 Office of Regulation Review (above n 115) [A1].

132 Fels (above n 124) 33.

133 Useful guidance in assessing the costs and benefits of regulation is contained in Office of Regulation Review (above n 115) [B4].

134 R Tomasic, 'Formalised Consultation, Delegated Legislation and Guidelines: "New" Directions in Australian Administrative Law?' (1989) 58 *Canberra Bulletin of Public Administration* 158, 160.

135 See, eg, W Niskanen, *Bureaucracy – Servant or Master? Lessons from America* (Institute of Economic Affaris, London, 1973).

136 J Holmes, 'Comments on "Deregulation of Public Utilities: Experience of the Ontario Natural Gas and Electricity Industries": Australian and New Zealand Perspectives' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 69, 73.

Pengilley agrees that power aggregation frequently accompanies regulation, and argues that the ACCC has been the chief beneficiary of power aggregation in Australia.[137] Noting that the ACCC's allocation increased from $48 million to $75 million in the 2000-2001 Budget,[138] Pengilley says that '[i]f one judges the success of bureaucratic departments by their ability to aggregate power and resources, the ACCC is a huge success story.'[139]

In summary, then, the enactment of Part IIIA of the *Trade Practices Act* can be explained by the public interest theory of regulation. However, there are aspects of the economic theory of regulation (such as regulatory capture) and public choice theory (relating to the incentives of access regulators) that potentially impinge on the implementation of the legislation. The notion of regulatory capture will be amplified in subsequent discussion in this chapter, and the role of access regulators is encompassed in the detailed analysis of Part IIIA in Chapter 4.

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137 W Pengilley, 'Competition Regulation in Australia: A Discussion of a Spider Web and its Weaving' (2001) 8 *Competition & Consumer Law Journal* 255, 261.

138 This represented a '56% increase in resources': Pengilley (ibid) 264. See, also, 'ACCC Welcomes Budget Allocations', ACCC Media Release, 9 May 2000.

139 Pengilley (ibid).

## C Cost/benefit analysis

### (1) A range of costs

The costs emanating from the alteration of property rights under access regulation[140] can take a number of forms, including:[141]

- administrative costs for government;[142]
- compliance costs for business;[143]
- constraints on the scope for infrastructure providers to deliver and price their services efficiently;[144]

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[140] As a general rule, the costs of regulation include costs to 'government, businesses, consumers and the community': Office of Regulation Review (above n 115) [B4]. Consistent with public choice theory, Goddard warns that regulatory bodies typically do much more than is needed, and do it in such a way that those costs are greater than they should be, and the benefits correspondingly less. See D Goddard, 'Comments on "Deregulation of Public Utilities: Experience of the Ontario Natural Gas and Electricity Industries": Australian and New Zealand Perspectives' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 81, 84.

[141] Information on the costs of access regulation has been derived from A Bollard and M Pickford, 'New Zealand's "Light-Handed" Approach to Utility Regulation' (1995) 2 *Agenda* 411, 417; King and Maddock (above n 43) 95; G Samuel, 'Competition Reform and Infrastructure' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 1, 1; *PC Position Paper* (above n 39) 53; and *PC Report* (above n 17) 59.

[142] In the Productivity Commission's view, the costs of administering the national access regime probably would 'not be large', given the limited number of declaration, certification and undertaking applications under Part IIIA to date: *PC Position Paper* (ibid) 54. No attempt was made by the Commission to estimate these costs, but certain submissions evidencing modest government expenditure were highlighted: *PC Report* (ibid) 60. Among these was the submission by the Western Australian Government detailing that the costs of assessing gas access arrangements in that State have averaged around $260,000, or less than 0.6 cents per GJ of regulated pipeline throughput: (sub 69, June 2001) 8.

[143] Citing a range of submissions commenting on this issue, the Productivity Commission acknowledged that compliance with access regulation 'can be costly' for both access seekers and service providers: *PC Report* (ibid) 60-64. Freight Australia's submission, for instance, indicated that each application for access to its rail network would involve a one-off cost to the company of approximately $150,000 to set up the necessary accounting and recording systems, with ongoing system maintenance expenditure of $50,000-$100,000 per year: (sub 82, June 2001) 2.

[144] In practice, regulation of access prices and conditions will inevitably have some adverse impacts on pricing and operating efficiency. This will reflect the imperfect information and instruments available to regulators and the trade-offs they face between competing short run and long run objectives. These adverse effects may manifest as cost-padding, not being

- inefficient investment in related markets;[145]
- wasteful strategic behaviour by both service providers and access seekers;[146]
- losses associated with the possible corruption of the system through regulatory capture;[147] and
- reduced incentives to invest in infrastructure facilities.

In its recent inquiry report, the 'paramount concern'[148] voiced by the Productivity Commission was the potential for access regulation to deter investment in essential infrastructure. The potential 'chilling' effect of access regulation on investment in essential facilities was also an important theme in the Hilmer Report. There, special emphasis was placed on the need to ensure that access rights do 'not undermine the viability of long-term investment decisions, and hence risk deterring future investment in important infrastructure projects.'[149]

Economic theory highlights the adverse consequences of forcing shared access on the incentives to invest and innovate when other firms can free ride on already developed infrastructure.[150] A regulatory framework that allows for considerable regulatory discretion

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permitted to price discriminate, and reduced incentives for cost-efficient service delivery. See *PC Position Paper* (above n 39) 57.

145 Granting access to the services of a vertically integrated provider at an artificially low access price could lead to investment by other businesses to deliver the downstream service, even though they are less efficient at doing so than the access provider. In these circumstances, increased investment in related markets based on inappropriate access prices will be a cost of access regulation, not a benefit. See *PC Position Paper* (ibid) 66.

146 Where the underlying access pricing rules are cost-based, providers will have an incentive to pad their reported costs and to shift costs on to services subject to the access regime. Moreover, given that mandated access is normally subject to capacity being available, there may be an incentive for service providers to build smaller than optimal facilities and/or to make economically inefficient decisions about how a facility's capacity is used. See King (above n 16) 429; Hood and Corones (above n 18) 39; and *PC Position Paper* (ibid) 66.

147 As the regulator 'will gradually adopt a posture of serving and defending the regulated group': Ahdar (above n 101) 109. If significant administrative discretion is involved in the application of a regulation, there may also be a tendency for regulators to bring 'their own values and predilections' to the decision-making process: *PC Position Paper* (ibid) 69.

148 *PC Report* (above n 17) xii.

149 *Hilmer Report* (above n 5) 251.

150 This is the theme of J Gans and P Williams, 'Efficient Investment Pricing Rules and Access Regulation' (1999) 27 *Australian Business Law Review* 267; and J Gans and P Williams,

further reduces incentives to invest by increasing regulatory risk.[151] As the Productivity Commission sought to explain:

> The inevitable regulatory discretion involved in the implementation of [access] regulation, and perceptions that regulatory decisions are likely to be biased in favour of service users, are among the factors that contribute to regulatory risk. These sorts of risks attach to investment in any regulated activity. However, the scale of investment in essential infrastructure, and the fact that, once in place, the assets are 'sunk' with few alternative uses, mean that regulatory risk can be a more critical factor in the investment decision and may sometimes deter projects.[152]

Certain submissions to the Productivity Commission's inquiry identified specific examples of the negative impact of access regulation on infrastructure investment.[153] It is fair to say, however, that for every negative account, there is another submission arguing that the current access arrangements are providing a healthy investment environment.[154] This point is pursued below.

### (2) *Greater benefits*

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'Access Regulation and the Timing of Infrastructure Investment' (1999) 75 *Economic Record* 127. See, also, S King, 'Pricing for Infrastructure Access' (1997) 4 *Competition & Consumer Law Journal* 203.

151 Church and Ware (above n 70) 860. All regulated firms are subject to regulatory risk. In simple terms, this risk refers to the potential for the regulator to act against the interests of the firm after it has made its sunk investments: ibid 776.

152 *PC Report* (above n 17) xix. Regulatory risk will be minimised where the regulator's decision-making is predictable, consistent, accountable and transparent: A Asher, 'The Status of National Gas Reform', Paper presented at *North Australia and PNG Gas Summit*, Darwin, 28 September 1999, 5.

153 See the submissions cited in *PC Report* (above n 17) 76-78. Eg, Queensland Treasury's submission noted that a number of tenders to construct and operate new infrastructure had been affected by investor uncertainty about access regulation, including the construction and operation of the Brisbane Light Rail and the Nathan Dam: (sub 105, July 2001) 11.

154 Ibid 78-81. Eg, BHP Billiton stated in its submission that access regulation 'has had no negative impact on pipeline investment in Australia'; on the contrary, certain pipelines 'would not have been built without access': (sub 48, February 2001) 62.

At the macroeconomic level, Australia's productivity growth accelerated over the 1990s.[155] While some of the gains are attributable to improvements in technology and better macroeconomic management, there is broad acceptance among economists that microeconomic reform, including access regulation,[156] is an important part of the explanation for the observed productivity improvement.[157] Putting it simply, enhanced competitive pressures have provided incentives for firms to improve efficiency, and the efficiency gains have driven productivity growth.[158]

Falling retail prices in infrastructure industries (including telecommunications, electricity and gas),[159] for example, reflect the achievement of production efficiencies as a result of increased competition and, in some cases, the transfer of above-normal profits from infrastructure owners to their wholesale and retail customers.[160]

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155 Productivity growth rose from a long-term historical average of only 1.2% since the mid-1960s, to an average annual rate of 2.4% in the 1990s: T Makin, 'Prioritising Policies for Prosperity' (1999) 15 *Policy* 19, 20.

156 The Hilmer reforms as a whole, and in particular access reforms, seek to achieve decreases in the extraction of monopoly rents, and increases in cost reflective pricing, capital and labour productivity, innovation, and efficient production and distribution methods. See, further, Industry Commission, *The Growth and Revenue Implications of Hilmer and Related Reforms: A Report by the Industry Commission to the Council of Australian Governments* (AGPS, Canberra, 1995).

157 See, eg, Makin (above n 155); D Parham, 'A More Productive Australian Economy' (2000) 7 *Agenda* 3; G Banks, 'Get it Right on Productivity Growth', *The Australian Financial Review*, 6 March 2001, 51; S Dowrick, 'Productivity Boom: Miracle or Mirage?' in J Nieuwenhuysen, P Lloyd and M Mead (eds), *Reshaping Australia's Economy* (Cambridge University Press, Cambridge, 2001) 19; and F Argy, 'National Competition Policy: Some Issues' (2002) 9 *Agenda* 33.

158 Parham (ibid) 13. The efficiency gains associated with regulation are likely to be 'orders of magnitude larger' than the direct costs of regulation, but the focus is often on the costs of the regulatory process because the gains are not as readily observable or concentrated: Church and Ware (above n 70) 861.

159 Fels (above n 10) 201-202. In the case of electricity, household charges in Brisbane, Melbourne and Sydney fell in real terms by 1-7% between 1990-1991 and 2000-2001, representing a saving to households in 2000-2001 of around A$70 million: National Competition Council, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms: Volume One – Overview of the National Competition Policy and Related Reforms* (AusInfo, Canberra, 2003) x.

160 Fels (ibid) 202. Staying with this theme, freight rates for rail freight transport between Melbourne and Perth fell by around 40% following the entry of new freight haulers, including SCT, on that route in 1995-1996: Samuel (above n 141) 4-5.

Moreover, rather than access regulation having an inhibiting effect on infrastructure investment, there is evidence that investment in regulated industries is continuing at robust levels.[161] This suggests that the regime has not been causing undue uncertainty for infrastructure owners, but, rather, that the prospect of access to previously 'locked-up' markets may be supporting investment in infrastructure facilities.[162] In the ACCC's view, opposition to access regulation is no more than simple rent seeking:

> Arguments suggesting that regulation is 'chilling' investment are clearly motivated by a desire to earn the sort of pre-regulation returns enjoyed by regulated firms. They also provide a very good indicator that regulation of natural monopoly infrastructure in Australia is having the desired effect that was always intended: replacing monopoly prices with prices that are cost-reflective and fair, but at the same time allowing the regulated business to earn a commercial rate of return.[163]

Australia's limited experience with access regimes makes the task of weighing the costs of such regulation against the benefits a difficult and imprecise exercise. However, on the basis of the available evidence (which, admittedly, at this point is largely anecdotal), this author concurs with the Productivity Commission's conclusion that critics of access regulation have tended to overstate its actual/potential costs relative to its realised/expected benefits, particularly when compared to the counterfactual of no access regulation.[164] For this reason,

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161 See, eg, the submissions cited in *PC Report* (above n 17) 78-81; Fels (ibid) 205-206; and S Writer, 'Recent Developments in Access Reform and Regulation in the Energy Sector' (2002) 10 *Trade Practices Law Journal* 113, 114, where 'increased investment and development' in the energy sector is explicitly acknowledged. The experience of the gas industry is instructive – since 1995, over A$1 billion has been invested each year in upstream, transmission and distribution assets, and transmission pipeline infrastructure grew from 9000 to 17,000 kilometres between 1989-2001: NCC (above n 159) x.

162 Samuel (above n 141) 5.

163 'ACCC Launches Post-Tax Revenue Model for Utility Industries', ACCC Media Release, 25 October 2001 (quoting R Shogren). In 2000, the ACCC commissioned National Economic Research Associates (NERA) to provide an assessment of how regulatory rates of return for energy businesses in Australia compared with those approved by North American and United Kingdom energy regulators. NERA's conclusion was that the investment incentives offered by Australian regulators are generous in international terms. See National Economic Research Associates, 'International Comparison of Utilities' Regulated Post-Tax Rates of Return in North America, the United Kingdom and Australia', Report prepared for the ACCC, Sydney, March 2001. Chapter 5 contains further discussion of the NERA report.

164 *PC Report* (above n 17) 93. As Bollard has explained, it is important to weigh-up the costs and benefits of a regulatory regime 'against the background of a realistic counterfactual, rather than some sort of … socially-optimal nirvana': A Bollard, 'Utility Regulation in New Zealand' in M

the author supports the Commission's finding that it would be inappropriate to abandon access regulation at this stage, especially given 'the in principle case for some curbs on the exercise of monopoly power in the provision of essential infrastructure services.'[165]

### D *Generic or industry-specific regulation?*

Access arrangements in Australia are complex. They comprise a mix of general[166] and industry-specific[167] access regimes implemented by both the Commonwealth and the States/Territories,[168] and overseen by the relevant access and/or price regulator in each jurisdiction.[169] Although opposed by the Hilmer Committee,[170] the development of State/Territory-based access regimes is viewed by this author as an expected by-product of Australia's federal system of government.[171]

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Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 27, 30.

165 *PC Report* (ibid) Finding 4.1.

166 Eg, Part IIIA of the *Trade Practices Act* (general Commonwealth access regime); and Part 5 of the *Queensland Competition Authority Act* 1997 (Qld) (general State access regime).

167 Eg, Part XIC of the *Trade Practices Act* (industry-specific Commonwealth access regime relating to telecommunications); and *Gas Pipelines Access (Queensland) Act* 1998 (Qld) (industry-specific State access regime, although passed to give effect in Queensland to the National Gas Code).

168 The States and Territories, in particular, have brought into existence 'a raft of price setting and access regimes': Pengilley (above n 137) 255.

169 At the State/Territory level, these regulatory bodies include: Queensland Competition Authority, Independent Pricing and Regulatory Tribunal of New South Wales, Victorian Essential Services Commission, Tasmanian Government Prices Oversight Commission, Office of the Tasmanian Electricity Regulator, Essential Services Commission of South Australia, Western Australian Independent Pricing and Regulatory Commission, Western Australian Office of Water Regulation, Independent Pricing and Regulatory Commission of the Australian Capital Territory, and Northern Territory Utilities Commission. For further discussion of these bodies and their roles, see F Zumbo, 'Reviewing the Role of the State and Territory Competition Regulators' (2000) 8 *Trade Practices Law Journal* 175.

170 The Committee considered State/Territory-based regimes incapable of dealing effectively with access issues affecting interstate or national facilities, and was concerned that different regulatory approaches or pricing principles would impede the development of efficient national markets: *Hilmer Report* (above n 5) 249

171 Which risks, of course, 'an increasingly fragmented, costly and confusing approach to third party access in Australia': A Hood, 'Third Party Access in Queensland: Lessons for all Australian States' (1999) 7 *Trade Practices Law Journal* 4, 16. To an avowed centralist (see B Marshall, 'Time to Question Role of the States', *The Weekend Independent*, 11-24 November,

Hood and Corones see certain benefits in the co-existence of separate Commonwealth and State/Territory access regimes, including the ability to tailor an access regime to local conditions, preservation of the autonomy of the States/Territories, and development of a broader and deeper range of regulatory experience Australia-wide.[172] However, these must be balanced against the increased transaction and regulatory costs, potential for inconsistency, and obstacles to interstate trade that arise from the fragmentation of access and price regulation among Australian jurisdictions.[173]

Of course, the Competition Principles Agreement (CPA) itself envisages participation by both the Commonwealth and States/Territories in this area. The Commonwealth fulfilled its obligations under cl 6 of the CPA by enacting, as Part IIIA of the *Trade Practices Act*, a generic access regime applying to all services provided by infrastructure facilities of national significance. However, the CPA also contemplates that the States/Territories will develop their own access regimes for services provided by significant infrastructure facilities in their jurisdictions.[174] If the State/Territory access regime conforms with the principles set out in cl 6 of the CPA, the State/Territory government may apply, under the certification provisions of Part IIIA, to have the regime certified as 'effective', in which case the relevant infrastructure may not be declared under that Part.[175] The focus of the certification route was intended to be on regimes established by State/Territory governments for particular infrastructure services.[176]

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1994, 19), this situation is obviously unsatisfactory. However, there are many other equally dispiriting examples – think no further than industrial relations.

172 Hood and Corones (above n 18) 47.

173 J Tamblyn, 'Pricing Criteria for Determining Access' (1996) 3 *ACCC Journal* 3, 8. These drawbacks are also acknowledged in Hood and Corones (ibid).

174 Hood (above n 171) 6.

175 B Reid and E Burrows, 'Access to Infrastructure – Potential Passages to Remorse' (1997) 16 *Australian Mining and Petroleum Law Journal* 212, 222.

176 *PC Report* (above n 17) 21.

Several industry-specific State and Territory regimes have now been certified under Part IIIA in respect of, for example, gas, rail and shipping channels.[177] Industry-specific regimes have also proliferated outside the ambit of Part IIIA, such as those relating to airport services and telecommunications. Table 2.3 summarises the main features of the relevant access regimes which apply in particular industry sectors.[178]

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177 However, a State/Territory government is able to implement an access regime without seeking, or having failed to obtain, certification of the regime under Part IIIA. The absence of certification in no way limits the enforceability of the regime as a law of that State/Territory. See National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act – Part C Certification of Access Regimes* (NCC, Melbourne, February 2003) [1.4].

178 Table 2.3 is adapted from B Marshall and R Mulheron, 'Australia's National Access Regime: Review and Recommendations' (2003) 6 *Global Competition Review* 30, 31. Kench would argue that the 'real progress' in access reform has been achieved via these 'specific access regimes dealing with complex subject matter': J Kench, Part IIIA: Unleashing a Monster' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 122, 133.

**TABLE 2.3: Industry-specific access regimes**

| *Industry* | *Access arrangements* |
|---|---|
| **Airports** | Prior to September 2003, there were two separate legislative instruments regulating access to airport services in Australia: the airports-specific access regime in s 192 of the *Airports Act* 1996 (Cth), which applied to services at 'core' privatised airports; and the generic access regime in Part IIIA of the *Trade Practices Act*, which applied to services at other airports. However, in 2002, the Productivity Commission recommended that services at all Australian airports be subject to the generic provisions of Part IIIA. The Commonwealth Government accepted this recommendation – legislation repealing s 192 of the *Airports Act* was enacted on 6 September 2003. |
| **Electricity** | Access to electricity transmission and distribution networks in most Australian States and Territories is provided for by the National Electricity Code (NEC). The NEC operates as an industry code approved as an undertaking under Part IIIA, and is administered jointly by the ACCC, the NEC administrator and State/Territory regulators. Network operators participating in the national electricity market are required to comply with the access arrangements in the NEC, and regulators are responsible for setting terms and conditions of access to transmission/distribution networks in certain areas, which includes approving prices for the use of electricity networks by third parties. |
| **Gas** | Access arrangements for gas are defined in the National Third Party Access Code for Natural Gas Pipeline Systems (the National Gas Code, or NGC). Implemented in each Australian State and Territory by supporting legislation in those jurisdictions, the NGC provides for third party access to natural gas pipelines under terms and conditions approved by an independent regulator (the ACCC, or the State-based regulator in Western Australia), and for binding arbitration to resolve disputes. Each State/Territory submitted its 'gas access' legislation for certification as an effective access regime under Part IIIA, but not all have achieved this. |
| **Postal Services** | Postal services are exempt from the Part IIIA regime. The *Australian Postal Corporation Act* 1989 (Cth) establishes specific access arrangements for a limited number of postal services. |
| **Rail** | Various State rail access regimes have been certified as effective under Part IIIA; and one rail line has been found to satisfy the declaration criteria in Part IIIA. An access undertaking for the Australian interstate rail network, setting out terms and conditions on which rail operators can gain access to that network, is expected to be lodged under Part IIIA when negotiations are complete. |
| **Shipping** | Access to certain Victorian shipping channels is governed by a State regime that has been certified as effective under Part IIIA. The regime obliges a shipping channel operator to make all reasonable endeavours to meet the requirements of a third party seeking access to a prescribed channel; if a negotiated outcome cannot be reached, the dispute may then be referred to arbitration. |
| **Telecommunications** | The telecommunications access regime is not governed by Part IIIA, but by Part XIC of the *Trade Practices Act*. Like Part IIIA, the telecommunications regime involves a declaration process and uses a negotiate-arbitrate approach to establish terms and conditions of access |

A welcome development in industries with an interstate or national market, and associated cross-border trade, has been the trend towards a single regime, applying nationally and administered by the national regulator, the ACCC.[179] Already this has been achieved via intergovernmental agreement in the gas and electricity industries;[180] and by the Commonwealth's own initiative in telecommunications.[181]

The Hilmer Committee was firmly against industry-specific regulation. It insisted that access regulation required a common legal framework which would promote consistent approaches to access issues across the economy, and permit expertise and insights gained in one sector to be applied to analogous situations in other sectors.[182] Somewhat paradoxically, however, the Committee also acknowledged that each industry has its own 'peculiar characteristics', and that a general access regime would require 'some flexibility' to adapt to differences between industries.[183] Thus, industry-specific access regimes with national application are not altogether incompatible with the position the Committee articulated, as follows:

> … there are sufficient common features between access issues in the key network industries to administer them through a common body. As well as the administrative savings involved, there are undoubted advantages in ensuring regulators take an economy-wide perspective and have sufficient distance from the particular industries to form objective views on often difficult issues … [T]he establishment of a range of industry-specific bodies would fragment Australian expertise and experience in this

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179 Samuel (above n 141) 4; and Pengilley (above n 137) 256. As Tamblyn explains, this is the primary way of ensuring that a fragmented regulatory framework does not distort competition between the industry participants, or distort the market price signals available for investment, production and consumption decisions: Tamblyn (above n 173) 7.

180 The Hilmer Committee advocated a co-operative approach as the preferred method of making progress in interstate matters: *Hilmer Report* (above n 5) 268.

181 These national access regimes have evolved via different paths: gas has followed the certification avenue under Part IIIA; access to electricity services has been implemented through Part IIIA's undertakings route; and a specific regime in Part XIC of the *Trade Practices Act* governs access to telecommunications services. According to Samuel, the differences in approach reflect differences in the structure of the industries and the way reform has evolved: Samuel (above n 141) 4.

182 *Hilmer Report* (above n 5) 248-249.

183 Ibid.

> area, and represent lost opportunities to ensure that lessons learned introducing competition in one industry were applied in other sectors.[184]

In its submission to the Productivity Commission's review of the national access regime, the New South Wales Government argued that '[t]he current system, which involves a generic national regime alongside a network of national and state based industry-specific regimes, provides a good balance between regulatory flexibility and national consistency.'[185] This perspective was embraced by the Productivity Commission in its final report. Rather than choosing between two discrete approaches, the Commission found it advantageous to have a generic access regime operating in tandem with industry-specific regimes.[186] As the Commission recognised, this 'dual legislative approach' is able to draw on the strengths of both generic and industry-specific access regimes, 'while avoiding some of the pitfalls of a one-dimensional solution'.[187] Table 2.4 provides a useful comparison of the advantages and disadvantages of these different approaches.

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184 Ibid 327-328.
185 New South Wales Government (sub 44, February 2001) 2.
186 *PC Report* (above n 17) Finding 5.2.
187 Ibid 119.

**TABLE 2.4: Industry-specific versus generic access regulation**

| ***Advantages of industry-specific regulation/ Disadvantages of generic regulation*** | ***Disadvantages of industry-specific regulation/ Advantages of generic regulation*** |
|---|---|
| Industry-specific regimes can be tailored to reflect 'the different technologies, market arrangements, ownership structures and historical regulatory experience of each sector.'[188] | Industry-specific regimes risk the development of inconsistent approaches to the regulation of different industries.[194] |
| A generalist regulator is unlikely to have sufficient specialised technical knowledge to conduct an ongoing regulation of a variety of industries.[189] | Industry-specific regulators may have extensive experience and expertise with respect to their client industries,[195] but 'they lack the breadth of experience that comes from analysis of disparate industries'.[196] |
| If an incorrect decision or policy line is taken, and the regulator only controls one industry, there will be less severe consequences for the economy as a whole.[190] | The prospects for error are possibly exacerbated when a regulator only controls one particular industry.[197] |
| Industry-specific regulation allows for greater policy flexibility.[191] | Industry-specific regulators are more susceptible to regulatory capture[198] and 'tend to develop a systematic bias against underrepresented interest groups, such as consumers'.[199] |
| Diversity of decision-making by disparate industry-specific regulators protects the community from the limitations of human wisdom.[192] | The existence of numerous industry-specific regulators is 'at odds with the very reason for microeconomic reform'.[200] |
| Where industry-specific access arrangements are achieved via inter-governmental agreement, the regulatory cost burden will be shared among the Commonwealth and the States/Territories.[193] | There are administrative costs in maintaining many industry-specific regulators.[201] |

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188 Fels (above n 10) 198. See, also, V Nagarajan, 'Reform of Public Utilities: What about the Consumer?' (1994) 2 *Competition & Consumer Law Journal* 155, 166; P Rose and C Moore, 'Competition Issues in the Australian Gas Industry: An Overview' (1995) 14 *Australian Mining and Petroleum Law Association Bulletin* 76, 85; and *PC Report* (ibid) xx.

189 W Pengilley, 'The National Competition Policy Draft Legislative Package: The Proposed Access Regime' (1995) 2 *Competition & Consumer Law Journal* 244, 269; and R Shogren, 'Convergence of General Competition Law with Telecommunications Specific Regulation – The Australian Experience' (1998) 1 *TeleMedia* 153, 156. However, this concern is arguably more of a resource issue than anything else: Shogren (ibid).

190 W Pengilley, 'Hilmer and "Essential Facilities"' (1994) 17 *University of New South Wales Law Journal* 1, 42.

191 Ibid 45.

192 Ibid 43; repeated in Pengilley (above n 189) 258-259.

193 Hood and Corones (above n 18) 47.

194 Fels and Walker (above n 12) 178; and F Hilmer, 'The Bases of Competition Policy' (1994) 17 *University of New South Wales Law Journal* viii, xii. This is a particular concern as industries begin to 'converge' due to rapid technological advances. As Fels explains, there is 'convergence between the utilities, especially between gas and electricity, but more broadly between the energy sector and the telecommunications sector', making industry-specific regulation a difficult task: A Fels, 'The Trade Practices Act – Past, Present and Future' (2001) 9 *Trade Practices Law Journal* 5, 18.

195 Although industry-specific regulators may well need ongoing education to keep up with the latest technological developments: Shogren (above n 189) 156.

## 2.5 ACCESS OBJECTIVES

### A *Competition as a means to efficiency*

Debate over the fundamental objective of Australian competition law flares periodically.[202] However, the consensus is that its purpose is to facilitate competitive markets, so as to promote economic efficiency, thereby generating increased productivity and greater economic growth, and thus enhance the welfare of the general community.[203]

The second reading speech for the *Competition Policy Reform Bill* identifies the objective of Part IIIA as being linked to the promotion of competition:[204]

> The notion underlying the regime is that access to certain facilities with natural monopoly characteristics, such as electricity grids or gas pipelines, is needed to

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196 Owen (above n 26) 893.

197 Ahdar (above n 101) 109.

198 Fels and Walker (above n 12) 178; Hilmer (above n 194) xii; Nagarajan (above n 188) 167; Pengilley (above n 190) 44; and Ahdar (ibid) 109. The Hilmer Committee acknowledged, but downplayed, the risk of regulatory capture: *Hilmer Report* (above n 5) 326 and 328. Nevertheless, agencies with jurisdictions cutting across many industries are seldom accused of being captured by special interests: Owen (above n 26) 894.

199 Owen (ibid) 893.

200 Nagarajan (above n 188) 167.

201 Fels and Walker (above n 12) 178; Hilmer (above n 194) xii; Kewalram (above n 6) 205; and Nagarajan (ibid) 167.

202 See V Nagarajan, 'The Accommodating Act: Reflections on Competition Policy and the Trade Practices Act' (2002) 20 *Law in Context* 34; as well as Kewalram (above n 6) 197, and P Prince, 'Queensland Wire and Efficiency – What Can Australia Learn From US and New Zealand Refusal to Deal Cases?' (1998) 5 *Competition & Consumer Law Journal* 237, 237.

203 Eg, *Hilmer Report* (above n 5) xvi; King and Maddock (above n 43) 6; O'Bryan (above n 13) 90; N Rochow, 'Recent Reforms in Competition Law' (1998) 20 *Law Society of South Australia Bulletin* 28, 28; and R Smith, 'Competition Law and Policy – Theoretical Underpinnings' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 16, 17. As the Productivity Commission notes, experience in a wide range of circumstances has shown that 'the promotion of competition is usually compatible with improved community welfare': *PC Report* (above n 17) 128.

204 This point is also recognised in W Pengilley, 'Access to Essential Facilities: A Unique Antitrust Experiment in Australia' (1998) 43 *Antitrust Bulletin* 519, 527; N Calleja, 'Access to Essential Services – Have the Hilmer Reforms Been Successfully Implemented?' (2000) 8 *Trade Practices Law Journal* 206, 208; and Evans (above n 99) 47.

> *encourage competition* in related markets, such as electricity generation or gas production.[205]

It must be appreciated, however, that, consistent with the broad thrust of national competition policy,[206] greater competition is employed simply as a proxy for the ultimate objective of access legislation, namely, improving community welfare.[207]

Section 2 of the *Trade Practices Act*[208] provides that '[t]he object of this Act is to enhance *the welfare of Australians* through the promotion of competition and fair trading and provision for consumer protection.'[209] Hood and Corones argue that the term 'the welfare of Australians' is difficult to define, suggesting, in the context of s 2, that the phrase may mean only 'benefits to consumers'.[210] In contrast, mindful of the views expressed in the opening paragraph to this part of the chapter, the author submits that a broader macroeconomic perspective should be adopted in interpreting s 2. On this approach, which follows standard macroeconomic principles,[211] 'the welfare of Australians' is equated to 'economic growth in Australia'.

Importantly, competition is a means to that end, not an end in itself.[212] As mentioned previously, competitive markets promote efficiency, and efficiency boosts productivity.[213] In

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205 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 June 1995, 2794 (G Gear, Assistant Treasurer) (emphasis added).

206 As encapsulated in the *Hilmer Report* (above n 5) 4-6.

207 *PC Report* (above n 17) 128. Cf L Carver, 'The Hilmer Report and Competition Policy: A Consumer Perspective', Paper presented at *Trade Practices: A New Regime in the Making*, University of New South Wales and Trade Practices Commission, Sydney, 3 November 1994, 3, where the Hilmer Report is condemned for its 'uncritical assumption' that the introduction of competition into regulated sectors of the economy will enhance efficiency and the general welfare of the community. Similar criticism is found in E McCoy, 'A Competition Policy for Australia' (1994) 70 *Current Affairs Bulletin* 4, 6.

208 As amended by the *Competition Policy Reform Act* 1995 (Cth).

209 Emphasis added.

210 Hood and Corones (above n 18) 22. Smith is more definitive, stating that s 2 'has generally been interpreted as imposing a welfare standard that focuses on consumers': R Smith, 'Authorisation and the Trade Practices Act: More About Public Benefit' (2003) 11 *Competition & Consumer Law Journal* 21, 25.

211 See, eg, NG Mankiw, *Macroeconomics*, 5th ed (Worth Publishers, New York, 2002) Chapter 7.

212 *PC Report* (above n 17) 128.

213 Makin (above n 155) 20; and Parham (above n 157) 13.

turn, increased productivity drives the rate of economic growth, as measured by the percentage rise in average income.[214] Accordingly, the author submits that the primary purpose in seeking to maximise competition is to increase economic efficiency, as this will lead to improvements in productivity and (via economic growth) community welfare.[215] Indeed, the Hilmer Committee expressly recognised that '[c]ompetition policy is not about the pursuit of competition for its own sake';[216] rather, competition is promoted 'in the interests of economic efficiency'.[217]

However, the concept of efficiency does not have regard to distributional issues.[218] In fact, given the 'real tension between these two strands of thought',[219] it is submitted that competition policy is poorly suited to the pursuit of distributional objectives.[220] In the author's view, the proper focus of competition policy is the realisation of potential gains, not their distribution.[221] Concerns about the latter are best dealt with through the taxation and welfare systems.[222] These arguments hold for access regulation as well.[223] Thus, the Productivity

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214 Productivity growth is the 'most important source' of sustained growth in a country's average income: Banks (above n 157) 51. See, also, Makin (ibid) 19; and Parham (ibid) 10.

215 For support, see n 203 above.

216 *Hilmer Report* (above n 5) 6.

217 Ibid. See, also, S Begg and S Jennings, 'Assessment of the Commerce Act in Terms of Economic Principles' in A Bollard (ed), *The Economics of the Commerce Act* (New Zealand Institute of Economic Research, Wellington, 1989) 1, 12.

218 Parham (above n 157) 14-15; submission to the Productivity Commission's review of the national access regime by the ACCC (sub 93, June 2001) 5; and Argy (above n 157) 39. Distributional effects, which alter the distribution of society's total stock of produced goods and services or income without altering its volume, can be regarded 'as making some people better off, while others are made correspondingly worse off': Office of Regulation Review (above n 115) [E3].

219 Goddard (above n 142) 82. However, the Productivity Commission suggests that there will often be congruence between the pursuit of efficiency and distributional outcomes. Curbing monopoly power for efficiency reasons has the effect of reducing transfers from final users of infrastructure services to facility owners. See *PC Report* (above n 17) 134.

220 This conclusion finds support in, eg, R Officer, 'The Role of Trade Practices Legislation' (1978) 6 *Australian Business Law Review* 2, 9-10; Begg and Jennings (above n 217) 13; and Tamblyn (above n 173) 9. In other words, competition policy (including access regulation) should primarily satisfy efficiency goals rather than social or other goals.

221 See, also, K Vautier, 'Competition Policy and Competition Law in New Zealand' in A Bollard and E Buckle (eds), *Economic Liberalisation in New Zealand* (Allen & Unwin, Wellington, 1988) 46, 62.

222 For further support, see Bollard and Pickford (above n 141) 414; Tamblyn (above n 173) 9; G Samuel, 'Reform Needs Some Help', *The Australian Financial Review*, 22 February 2001, 54; Argy (above 157) 43; and the submissions cited in *PC Report* (above n 17) 134-135.

Commission's finding that '[t]he national access regime is not an appropriate vehicle for pursuing distributional outcomes'[224] is not disputed by this author.

### B *Dynamic over static efficiency*

Economic efficiency is a multi-dimensional concept, encompassing:

- *productive efficiency* – requiring the production of relevant outputs at least cost;
- *allocative efficiency* – ensuring that resources are allocated to those who value them most highly; and
- *dynamic efficiency* – preserving the incentives for investment and innovation.[225]

Both productive and allocative efficiency are static efficiency concepts. They involve making optimal use of society's resources at any one point in time.[226] Dynamic efficiency, on the other hand, is an inter-temporal concept. It is concerned with the optimal use of society's resources through time.[227]

Unfortunately, it is rare that any regulatory policy can simultaneously promote all three aspects of economic efficiency.[228] Usually a trade-off must be made between the promotion of

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223 See the discussion in *PC Report* (ibid).

224 *PC Report* (ibid) Finding 6.1.

225 In the access context, the tripartite nature of economic efficiency has been recognised by the Australian Competition Tribunal in *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821, 43,059. Further elucidation of its three strands is contained in *Hilmer Report* (above n 5) 4; King (above n 69) 276-277; Smith (above n 203) 16; Productivity Commission, *Microeconomic Reform and Australian Productivity: Exploring the Links* (AusInfo, Canberra, 1999) 54-59; and G Edwards, 'Going Long: Regulating Local Telecommunications for Dynamic Efficiency' (2001) 9 *Competition & Consumer Law Journal* 146, 147.

226 Edwards (ibid) 148.

227 Ibid.

228 As Hanks puts it, 'efficiency is not a unitary goal': F Hanks, 'The Competition Law Framework for Deregulation of Public Utilities in Australia' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 2, 9. See, also, Edwards (ibid) 147.

static efficiency and dynamic efficiency.[229] In the access context, this means a trade-off between reductions in access prices, and the need to provide sufficient returns to facility owners to ensure ongoing investment in, and maintenance of, essential infrastructure. Parry explains the difficulty thus:

> There will be inevitably conflicting objectives in any set of specific access arrangements. On the one hand, the main purpose of third-party access rights is to facilitate competition in upstream or downstream markets for which use of the 'essential facility' infrastructure is required. This suggests that access to the infrastructure needs to be on terms and conditions, including prices, which facilitate competition. On the other hand, the rights and interests of the infrastructure owner need to be protected, including the commercial interests of the owner and the interests of new investors.[230]

Providing access on terms and conditions that are too favourable to third parties may result in *too many* competitors. This can promote wasteful activity in related markets and impact negatively on dynamic efficiency gains.[231] It is important to avoid applying Part IIIA in ways which may yield short-term static gains in productive and allocative efficiency, but which constrain the realisation of longer-term dynamic efficiency gains.[232] While static optimisation is important, such gains will be 'dwarfed' by gains from the promotion of dynamic efficiency in an economy over the long run.[233] Dynamic efficiency is the key factor driving productivity improvements in an economy. Over the long term, the greater the productivity improvements in an economy, the greater the advance in economic growth. Thus, dynamic efficiency is

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229 Hanks (ibid); D Ridyard, 'Essential Facilities and the Obligation to Supply Competitors under UK and EC Competition Law' [1996] *European Competition Law Review* 438, 440; and T Parry, 'Access Regulation: Are We Going Down the Right Track?' in R Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, Sydney, 2002) 128, 138.

230 Parry (ibid). This is not to say that the goals of promoting competition and fostering infrastructure investment can never be mutually supportive. Eg, new investment in infrastructure helps to promote access by making new capacity available. At the same time, access can expand opportunities for investment by facilitating market growth upstream and downstream. See National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act – Part A Overview* (NCC, Melbourne, December 2002) [2.15].

231 Eg, by deterring investment in new essential infrastructure: *PC Report* (above n 17) 129.

232 NCC (above n 39) 84-85. The importance of dynamic effects has also been acknowledged by the Australian Competition Tribunal: see *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821, 43,059.

central to enhancing long-term economic welfare, and the trade-off 'should always be in favour of dynamic efficiency'.[234]

Nagarajan contends that the primary focus on economic efficiency under Part IIIA has been at the expense of giving any serious consideration to general consumer issues.[235] In disputing this, the author points out that: (i) access seekers can be expected to act as a 'powerful agent' for consumer interests;[236] and (ii) it is reasonable to assume that by promoting competition in dependent markets, access regulation will enhance consumer welfare.[237] However, the author also acknowledges the concerns of Hylton, and King, that consumer welfare may be disadvantaged if forced access encourages collusion between firms to the detriment of consumers, or if incentives to develop cost-reducing facilities are reduced, or if inefficient sharing reduces the facility's cost advantage.[238]

On balance, the author does not support any suggestion that there should be a requirement to demonstrate and quantify enhanced consumer welfare before access can be granted.[239] As Ridyard says, 'Any competition policy action that focuses exclusively on the

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233 Edwards (above n 225) 148. For an overview of the importance of dynamic efficiency in achieving compound productivity growth, see F Scherer and D Ross, *Industrial Market Structure and Economic Performance*, 3rd ed (Houghton Mifflin, Boston, 1990) 613-614.

234 Edwards (ibid). Smith also identifies dynamic efficiency as the 'priority', while McEwin suggests it should be 'paramount': Smith (above n 203) 17; and I McEwin, 'S 46: Whence and Whither?', Paper presented at *Trade Practices Workshop*, Business Law Section of the Law Council of Australia, Surfers Paradise, 13-15 August 1999, 13.

235 Nagarajan (above n 188) 170.

236 *PC Position Paper* (above n 39) 250.

237 Indeed, the latter point was explicitly recognised by the NCC in *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,392 ('[t]angible benefits usually take the form of reduced prices').

238 K Hylton, 'Economic Rents and Essential Facilities' [1991] *Brigham Young University Law Review* 1243, 1245; and King (above n 16) 430.

239 Cf s 152AB(1) in Part XIC of the *Trade Practices Act* (the telecommunications access regime) which provides that '[t]he object of this Part is to promote the long-term interests of end users of carriage services or of services provided by means of carriage services.' However, Evans has pointed out that 'Part XIC of the Act was designed to deliver immediate outcomes for the benefit of consumers and … reflects that policy objective': Evans (above n 99) 47. It is the author's view that Parts IIIA and XIC of the *Trade Practices Act* have different policy objectives.

immediate short-term impact on consumers, whether in essential facility or other circumstances, stands to do considerable economic damage.'[240]

### C *Proposed objects clause*

At present, Part IIIA of the *Trade Practices Act* contains no separate statement of the objectives it is meant to serve. This is by no means anomalous, as only a minority of other Parts of the Act have such a provision.[241] Nevertheless, among those submissions to the Productivity Commission's review of the national access regime that commented on this issue, there was widespread support[242] for the suggestion that Part IIIA should incorporate an over-arching objects clause to provide greater certainty for infrastructure owners and access seekers.[243]

Specifically, the Productivity Commission has recommended that the following clause be included in Part IIIA:

> The object of this Part is to:
>
> (a) promote economically efficient use of, and investment in, essential infrastructure services; and
>
> (b) provide a framework and guiding principles to discourage unwarranted divergence in industry-specific access regimes.[244]

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[240] Ridyard (above n 229) 447. The author would therefore dismiss Gerber's suggestion that the focus should always be on consumer markets and maximising consumer welfare: see Gerber (above n 20) 1071.

[241] These are s 10.01 in Part X, s 150B in Part XIA, s 150M in Part XIAA, and s 150AB in Part XIC of the *Trade Practices Act*.

[242] See, eg, the submissions cited in *PC Report* (above n 17) 125-126. The ACCC's submission did caution, however, that such a clause is 'no substitute for clear legislative provisions': (sub 93, June 2001) 1.

[243] First raised by the Productivity Commission in *PC Position Paper* (above n 39) 102; and reiterated in *PC Report* (above n 17) xxii.

[244] *PC Report* (ibid) Recommendation 6.1. To promote consistency in the application of the regime by various decision-makers and enhance regulatory accountability, Recommendation 6.2 provides: 'For all coverage decisions and determinations under Part IIIA, the relevant decision-maker should be required to have regard to the objects clause.' In contrast to its reaction to Recommendation 6.1 (see text accompanying n 251ff below), the Commonwealth Government's agreement with Recommendation 6.2 is unqualified: see Commonwealth

Paragraph (a) above identifies efficiency as the explicit objective of Part IIIA, and refers to legitimate short-term and long-term considerations – in the form of user (with flow-on benefits to consumer) interests and investment decisions, respectively.[245] However, it will recalled from the discussion in part 2.5(B) of this chapter that inevitably a trade-off must be made between short-term static gains in productive and allocative efficiency (achieved through reductions in access prices), and longer-term dynamic efficiency gains (achieved through ongoing investment in essential infrastructure). The weakness with paragraph (a) is that it does not indicate where Part IIIA's priority lies.[246] As presently worded, the paragraph, although cast in terms of efficiency rather than competition, is fundamentally little different to the high level objects clause contained in s 2 of the *Trade Practices Act*.[247]

If paragraph (a) of the proposed objects clause is to be value-adding, then, consistent with the author's argument in part 2.5(B) of this chapter, it should be amended to reflect a greater concern under Part IIIA with the promotion of dynamic efficiency, rather than the promotion of productive and allocative efficiency.[248] Despite omitting this point from paragraph (a), the Productivity Commission's own policy judgment is that 'it is appropriate to give particular *weight* to ensuring that investment in essential facilities is not jeopardised.'[249] It is not disputed that Part IIIA seeks to promote competition in dependent markets through the efficient use of essential infrastructure, while also encouraging efficient investment in such infrastructure.[250] However, the trade-off in favour of dynamic efficiency must be made clear.

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Treasury, 'Government Response to Productivity Commission Report on the Review of the National Access Regime', Canberra, 20 February 2004 (hereafter, '*Final Response*') 4.

245 *PC Report* (ibid) 130.

246 Indeed, paragraph (a) gives 'efficient use and investment "equal billing"': *PC Report* (ibid) 131.

247 This caused the ACCC to query, in its submission to the Productivity Commission's review of the national access regime, whether s 2 already provides sufficient guidance: (sub 93, June 2001) 4.

248 As Hood and Corones recognise, where a choice must be made between conflicting policy objectives, the selection should be specified 'in order to lead to interpretations that properly reflect that policy objective': Hood and Corones (above n 18) 3.

249 *PC Report* (above n 17) 128 (emphasis added).

250 *Hilmer Report* (above n 5) 279; and Evans (above n 99) 47.

Only this will ensure that proper regard is had to investment issues as a threshold matter under Part IIIA.

In its response to the Productivity Commission's recommendations in respect of Part IIIA, the Commonwealth Government indicated that paragraph (a) of the proposed objects clause should be expanded, as follows: 'promote the economically efficient operation and use of, and investment in, essential infrastructure services, thereby promoting effective competition in upstream and downstream markets.'[251] This change runs counter to the author's argument above and is strongly opposed on that basis. Specifically, the author contends that the phrase 'thereby promoting effective competition in upstream and downstream markets' allows priority to be given to short-term static efficiency gains,[252] diluting Part IIIA's concern with longer-term dynamic efficiency gains achieved through ongoing infrastructure investment.[253]

Given the proliferation of industry-specific regimes throughout Australia, paragraph (b) of the proposed objects clause signals an attempt to position Part IIIA as the dominant access framework. As a centralist,[254] the author supports all endeavours to bring State/Territory access regimes under the Part IIIA umbrella. However, the nature of Australia's federal compact means that success in this area, like so many others, will depend substantially on the co-operation of the States/Territories themselves. At a practical level, advances in uniformity, or at least consistency, between State/Territory access regimes will most likely

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[251] *Final Response* (above n 244) 3. The term 'effective competition' generally proxies for 'workable competition', which indicates 'a market in which no firm has a substantial degree of market power': *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] ATPR 41-886, 45,167 (Parker J).

[252] Arguably, the Productivity Commission's own casting of paragraph (a), which sought 'to focus the objectives for the regime on improving efficiency' (and therefore contained no reference to promoting competition in dependent markets), was intended to redress the potential for such interpretations: see *PC Report* (above n 17) 129.

[253] Expressing similar criticism, Thomson and Writer have complained that the Commonwealth Government's planned amendment to paragraph (a) 'reveals that promoting effective competition in upstream and downstream markets is still a broader policy objective' than encouraging ongoing investment in essential infrastructure: L Thomson and S Writer, 'A Workable System of Access Regulation: The Productivity Commission's Review of the National Access Regime' (2003) 11 *Trade Practices Law Journal* 92, 97.

continue to be achieved via inter-governmental negotiation and agreement. Nevertheless, as a statement of aspiration, the author takes no issue with the spirit of paragraph (b).

As to the wording of this paragraph, the Commonwealth Government's view is that paragraph (b) should be expressed in the positive, as follows: 'provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.'[255] In the author's opinion, this is mere semantics[256] – basically, it comes down to a preference for positive or negative statements. However, the author's own inclination is towards the Government's phrasing.

## 2.6 CONCLUSION

This chapter has applied an economic perspective to a broad range of issues fundamental to an understanding of access regulation. The specific conclusions reached in the chapter are logically inter-related, as the following ten-point summary seeks to demonstrate:

- The existence of the 'access problem' establishes an in-principle case for regulatory intervention.
- Access regulation represents a robust policy choice, compared to other possible responses to the access problem.
- The introduction of an access regime is justified under the public interest theory of regulation (although aspects of the economic theory of regulation and public choice theory impinge on the implementation of the regime).

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254 See Marshall (above n 171).
255 *Final Response* (above n 244) 3.
256 Cf Thomson and Writer's view that the Government has opted for 'softer wording' for paragraph (b): Thomson and Writer (above n 253) 94.

- However, access regulation represents a significant intrusion into private property rights, and is warranted only if its expected benefits to the community outweigh its costs.

- Regulatory costs will be minimised where the application of access laws is confined to true essential facilities – namely, natural monopoly facilities, where the facility also provides an input that is essential for the production of another good or service.

- Access regulation should apply to all such facilities, irrespective of whether the monopolist owner seeks to compete in a vertically related market.

- Ideally, an access regime will seek to promote competition in dependent markets through the efficient use of essential infrastructure, while also encouraging efficient investment in such infrastructure. To ensure long-term dynamic efficiency gains, any trade-off must be in favour of efficient investment.

- Access regulation is fundamentally concerned with efficiency. It is not an appropriate vehicle for pursuing distributional objectives.

- There are advantages in having a generic access regime operating in tandem with industry-specific regimes.

- However, the generic regime represents the benchmark on which industry-specific regimes should be modelled.

# *CHAPTER 3*

## LEGISLATING FOR ACCESS: LESSONS FROM ABROAD AND AT HOME

### 3.1 INTRODUCTION

As a general rule, the law does not impose a duty on one person to deal with another; instead, owners of property and/or suppliers of services are free to transact with others when, and in the manner, they choose.[1] However, when a monopoly is involved, freedom to contract must be balanced against the possible misuse of market power.[2]

Thus, in Australian competition law, s 46 of the *Trade Practices Act* 1974 (Cth) has long prohibited the taking advantage of a substantial degree of power in a market for the purpose of: (a) eliminating or substantially damaging a competitor; (b) preventing the entry of a person into a market; or (c) deterring or preventing a person from engaging in competitive conduct in a market.[3] Contravention of this provision can effectively result in the imposition of a duty to deal.[4]

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1 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*') 242.

2 Ibid. As Nagarajan has noted, 'One way of fostering competition in the economy is to ensure that established corporations are not allowed to misuse their market power in order to retain their market share by deterring new entrants or preventing effective competition in the market': V Nagarajan, 'The Regulation of Competition by Section 46 of the Trade Practices Act' (1993) 1 *Competition & Consumer Law Journal* 127, 127.

3 Section 46(1). Although the term is not used in the section itself, the marginal note to s 46 reads 'Misuse of market power'.

4 Eg, as in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

The Hilmer Committee accepted the potential application of s 46 to essential facility issues[5] (although, for reasons discussed later in this chapter, continued reliance on that section was deemed problematic). Such acknowledgement was unavoidable, given the use overseas of provisions equivalent to s 46 as a means of resolving access disputes.[6]

The treatment of essential facilities cases as a category of refusal to deal (or refusal to supply) cases under the general competitive conduct rules governing misuse of market power is common to a range of jurisdictions, including the United States, the European Union and New Zealand.[7] Under the relevant antitrust statute, the question is whether a denial of access constitutes monopolisation (US), abuse of a dominant position (EU) or misuse of market power (New Zealand). Although that question is taken as the primary focus of this chapter, it must be noted that none of the above-mentioned jurisdictions relies solely on its competition law as the basis for making access orders. Instead, court-based regimes involving general competition legislation are supplemented by regulatory access regimes applying to particular industries.[8]

Practices in the US, the EU and New Zealand provide a valuable source of information and a useful point of comparison for developments in Australian competition law.[9] Accordingly, this chapter reviews the use, in those three jurisdictions, of refusal to deal principles as a surrogate for access regulation, and reconsiders the lessons Australian policy-

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5 *Hilmer Report* (above n 1) 243.

6 Ibid 244-245.

7 See, generally, JT Lang, 'Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities' (1994) 18 *Fordham International Law Journal* 437; and D Clough 'Economic Duplication and Access to Essential Facilities in Australia' (2000) 28 *Australian Business Law Review* 325, 330-333.

8 See Productivity Commission, *Review of the National Access Regime* (AusInfo, Canberra, report dated 28 September 2001, released 17 September 2002) (hereafter, '*PC Report*') Appendix C for a useful summary of the court-based rights and industry-specific regimes that govern access to essential infrastructure services in the US, the EU and New Zealand. To date, however, the Australian approach of a legislated generic access regime operating in tandem with legislated industry-specific regimes has not been employed in those jurisdictions.

9 There is no question that modern Australian competition policy is informed by 'the experiences of the United States and Europe': A Fels, 'The Trade Practices Act – Past, Present and Future' (2001) 9 *Trade Practices Law Journal* 5, 5. Indeed, the relevance of such overseas jurisprudence has been explicitly recognised by Australian courts: see, eg, *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* [2000] ATPR 41-768, 41,062 (Gyles J); and *Boral Besser Masonry Ltd v ACCC* [2003] ATPR 41-915, 46,709 (McHugh J). As for comparisons

makers distilled from such international experience. In so doing, there is no attempt to conduct a case-by-case study of all relevant decisions; rather, a sample of illustrative cases is examined,[10] and salient conclusions drawn. The matters highlighted in this chapter constitute necessary background to the analysis, in Chapter 6, of the residual role now played by s 46 in the resolution of Australian access disputes.

## 3.2 THE ESSENTIAL FACILITIES DOCTRINE IN THE UNITED STATES

### A *A 'gloss' on the Sherman Act*

The US uses both a court-based system and industry-specific regulatory agencies to facilitate access to essential infrastructure services. Although the focus of the present discussion is on the former method, many of the main essential facilities in the US (such as telecommunications, gas, railways and electricity) are now covered by industry-specific access regulation.[11]

Of course, the very term 'essential facilities' was contributed by the antitrust jurisprudence of the US, where third party access to facilities which are essential to competition in a particular industry has been governed by the essential facilities doctrine for over ninety years.[12] The doctrine applies to a subset of refusal to deal cases under the *Sherman Act* 1890 (US) – specifically, cases in which the owner of an essential facility is refusing, for some anti-competitive or exclusionary purpose, to grant access to the facility on reasonable

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with New Zealand, it is useful to observe the evolution of its Australian-inspired competition statute.

10 This sample comprises a series of touchstone decisions selected from the access jurisprudence of each of the focus jurisdictions, so as to permit the abridged chronologies in parts 3.2-3.4 of the chapter.

11 See *PC Report* (above n 8) 477-480 for a brief description of access arrangements in those sectors. Reliance on industry-specific regimes leaves the essential facilities doctrine to play a similar role to s 46 of the *Trade Practices Act* – namely addressing residual access claims.

12 Also known as the 'bottleneck doctrine', it continues to evolve via judicial pronouncement: K Glazer and A Lipsky Jr, 'Unilateral Refusals to Deal under Section 2 of the Sherman Act' (1995) 63 *Antitrust Law Journal* 749, 757.

terms.[13] The doctrine refers to the ability that US courts have to grant competitors access to facilities which are essential to competition in the relevant industry.[14]

It is fair to say, as Australian judges have, that the essential facilities doctrine 'evolved as a "gloss" upon the succinct terms of the *Sherman Act*'.[15] However, it would be wrong to interpret that description in a pejorative sense. As Pengilley has remarked, '[A]s if all judicial interpretations are not glosses and, in any event, what is wrong with a gloss?'[16] Perhaps the OECD's description of the essential facilities doctrine as an 'outgrowth and specific application of the theory and policy underlying ss 1 and 2 of the *Sherman Act*'[17] is less likely to be misconstrued.

Section 1 of that statute prohibits any contract, combination or conspiracy that restrains trade or commerce within the US; and s 2 prohibits any person from monopolising or attempting to monopolise, or combining or conspiring with others to monopolise, such trade or commerce. Typically, s 1 is invoked in cases[18] where the refusal of access on reasonable terms has resulted from concerted action among a group of competitors who collectively control an essential facility; while s 2 is raised in cases[19] where the refusal was arrived at by a monopolist acting unilaterally.[20]

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13 Thus it has been contended that the doctrine is merely the 'theory of monopoly in another guise': C Pleatsikas and D Teece, 'Economic Fallacies Encountered in the Law of Antitrust: Illustrations from Australia and New Zealand' (2001) 9 *Trade Practices Law Journal* 73, 81.

14 See W Pengilley, 'Hilmer and "Essential Facilities"' (1994) 17 *University of New South Wales Law Journal* 1, 6-14 for general discussion of the US essential facilities doctrine.

15 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1988] ATPR 40-841, 49,076 (Bowen CJ, Morling and Gummow JJ).

16 W Pengilley, 'The "Essential Facilities" Doctrine and the Federal Court' (1988) 4 *Australian & New Zealand Trade Practices, Advertising and Marketing Law Bulletin* 57, 61.

17 Organisation for Economic Co-operation and Development, 'The Essential Facilities Concept', OCDE/GD(96)113, Roundtables on Competition Policy, Paris, 1996, 87.

18 Eg, *United States v Terminal Railroad Association* 224 US 383 (1912).

19 Eg, *MCI Communications Corp v American Telephone & Telegraph Co* 708 F 2d 1081 (1983).

20 Some commentators consider the distinction important, arguing that the essential facilities doctrine ought to be applied less readily to unilateral conduct cases than to concerted action (or combination) cases. Their reasons for this include: forcing a combination to admit others to the collaboration requires less ongoing day-to-day judicial supervision than requiring a firm to supply its good and services; a combination is more likely to be able to take in additional users without either displacing existing users or having to add significantly to existing facilities; admission to a combination is less likely to impair any efficiencies whereas one cannot require a monopolist to deal without attention to the monopolist's own need for its facilities. See, eg, F

## B *Development of the doctrine*

*United States v Terminal Railroad Association*[21] is the decision from which the essential facilities doctrine originates. There, the Terminal Railroad Association (TRA), a consortium of some, but not all, of the railroads transiting St Louis, acquired the ownership of the railroad terminal that provided the sole means of access to the city.[22] The TRA then used its monopoly power to exclude or disadvantage competitors needing to pass through St Louis. It was held that the TRA had acted improperly in denying its competitors access to the railroad terminal on reasonable terms because such access was essential to their ability to compete.[23] In these circumstances, the Supreme Court concluded that the most efficient remedy was to order the admission of non-member competitors to the consortium.[24]

In *Otter Tail Power Co v United States*,[25] Otter Tail had a local area monopoly over an electric power transmission service.[26] Upstream, it generated power which it supplied over its transmission grid; downstream, it held local area monopoly franchises for distribution of electricity, supplied by the transmission grid, to customers within the area. When several municipalities attempted to establish their own retail distribution systems and sought to acquire cheaper power from other sources for transmission over Otter Tail's electricity network, Otter Tail refused either to supply its own generated power at wholesale rates or to transmit power over its monopoly transmission grid, sourced from independent power generators, to these municipalities. In finding a breach of s 2 of the *Sherman Act*, the Supreme Court ruled that

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Edgar, 'The Essential Facilities Doctrine and Public Utilities: Another Layer of Regulation' (1993) 29 *Idaho Law Review* 283, 304, citing P Areeda and H Hovenkamp, *Antitrust Laws: An Analysis of Antitrust Principles and their Application*, 1991 Supplement (Little, Brown & Co, Boston, 1991) 790.

21 224 US 383 (1912).

22 The case provides an example of the concerted action category of essential facilities decisions.

23 224 US 383 (1912), 405.

24 Ibid.

25 410 US 366 (1973).

26 The company, a single firm public utility, was the sole means by which electricity could be transmitted to local municipalities. Thus, the case provides an example of the 'monopolist' category of decisions.

Otter Tail – being, on the one hand, a competitor in the downstream market for retail electricity distribution and, on the other hand, owner of the network facility – had to grant access to the municipalities on equal terms.[27] The Court decreed that the company must sell its power to the municipalities at wholesale rates and transmit other wholesale power to those municipalities that desired it for their distribution systems.[28]

*Otter Tail* illustrates the willingness of US courts to invoke the essential facilities doctrine when they see monopolists seeking to reap the advantages of vertical integration.[29] Anti-competitive motives are readily ascribed to monopolists engaged in leveraging their power from one market to another.[30]

*Hecht v Pro-Football Inc*,[31] in which the term 'essential facilities' was used for the first time, is noteworthy for encapsulating the doctrine in the following succinct way:

> … where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility ... To be 'essential', a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.[32]

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27 410 US 366 (1973), 377.

28 Ibid 381-382.

29 P Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 *Antitrust Law Journal* 841, 847. See, further, the note 'Refusals to Deal by Vertically Integrated Monopolies' (1974) 87 *Harvard Law Review* 1720. In cases involving a refusal by a vertically integrated firm with a monopoly in one market to deal with its competitors in an upstream or downstream market, the essential facility is said to represent a bottleneck by which the monopolist 'can extend monopoly power from one stage of production to another, and from one market into another': *MCI Communications Corp v American Telephone and Telegraph Co* 708 F 2d 1081 (1983), 1132 (Court of Appeals, Seventh Circuit)

30 As the Court of Appeals (Second Circuit) said in *Berkey Photo Inc v Eastman Kodak Co* 603 F 2d 263 (1979), 291, '[I]t is improper … for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolised goods or services he needs to compete effectively in the second market.' However, market leverage theory is not without its critics, who complain that it involves a double counting of the same degree of market power. According to this argument, there is only one monopoly profit to be made in a chain of production, so that a firm which monopolises one market cannot increase its profits by extending or leveraging into a vertically adjacent market. See, eg, R Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, New York, 1978) 141.

31 570 F 2d 982 (1977).

32 Ibid 992 (Court of Appeals, Sixth Circuit).

In *Hecht*, the promoters of a new professional football team challenged a restrictive covenant in a lease agreement that prevented the use of a football stadium by any team other than the Washington Red Skins. Based on the fact that a stadium of such size could not easily be duplicated by potential competitors and that use of the stadium by another team was possible without interference to the Washington Red Skins, the restrictive covenant was held to amount to illegal restraint of trade.[33] In effect, the use of the stadium was considered essential to the operation of the new professional football team.[34]

*MCI Communications Corp v American Telephone & Telegraph Co*[35] continues to be widely cited for its identification of the four elements necessary to establish liability under the essential facilities doctrine.[36] These elements are:

- control of the essential facility by a monopolist;
- a competitor's inability practically or reasonably to duplicate the essential facility;
- the denial of the use of the facility to a competitor; and
- the feasibility of providing the facility.[37]

Subsequent decisions have confirmed that the first two elements should be addressed concurrently, as the 'second element is effectively part of the definition of what is an essential

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33 Ibid 993.

34 Similarly, in *Fishman v Wirtz* 807 F 2d 520 (1986), a sports stadium, because of its unique facilities, was held to be 'essential'. In this case, access to the stadium was necessary in order physically to enter the market. The stadium was the only stadium in the Chicago area during the relevant time period that was suitable for the exhibition of professional basketball. The Court of Appeals (Seventh Circuit) said, 'Here the defendants, through the economic leverage provided by their stadium monopoly, succeeded in driving out all competition for ownership of the Bulls. They used a monopoly in one market to foreclose competition in another – a classic violation of the antitrust laws. The potential competition … consisted of all those who might have bid for the Bulls had they not faced the insuperable obstacle of the defendants' stadium monopoly': ibid 536.

35 708 F 2d 1081 (1983).

36 These elements received specific endorsement in the *Hilmer Report* (above n 1) 244. See, also, W Pengilley, 'The National Competition Policy Draft Legislative Package: The Proposed Access Regime' (1995) 2 *Competition & Consumer Law Journal* 244, 248, where the *MCI* criteria are described as 'extremely workable'.

37 708 F 2d 1081 (1983), 1132-1133.

facility in the first place';[38] that the third element does not require that access be denied absolutely, since 'unreasonable terms and conditions of access … may result in practical denial of access';[39] and that the fourth element raises the question of whether there is a legitimate business justification for the refusal to provide the facility.[40]

In the *MCI* case itself, MCI complained that AT&T had unlawfully refused to let MCI connect its telephone lines to AT&T's nation-wide telephone network, so that MCI might be able to compete in the long-distance calls market. On the facts, the four elements listed above were all found to be satisfied: AT&T, a monopolist in control of an essential facility which could not be duplicated economically, had denied MCI interconnection with that facility when it was technically and economically feasible for AT&T to have provided the interconnection. The following conclusion was inevitable:

> A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine ... [A] monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one market to another. Thus the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.[41]

It is clear from the *MCI* case that whether a facility can be practically or reasonably duplicated is a vital consideration. If it can be, 'it is highly unlikely, even impossible, that it will be found to be essential at all'.[42] However, the emphasis in *MCI* on the practicality of duplication by a *competitor* has been criticised as running counter to the underlying rationale of competition law, namely the protection and promotion of the competitive process and not competitors.[43] That is to say, the concern is that the essential facilities doctrine will be applied 'to protect competitors rather than competition'.[44]

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38 *City of Anaheim v Southern California Edison Co* 955 F 2d 1373 (1992), 1380.

39 *MetroNet Services Corp v US West Communications* 329 F 3d 986 (2003), 1012.

40 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985), 597.

41 708 F 2d 1081 (1983), 1132 (Court of Appeals, Seventh Circuit).

42 *City of Anaheim v Southern California Edison Co* 955 F 2d 1373 (1992), 1380. Thus, the first two elements from *MCI* must be taken together.

43 See, eg, D Robertson, 'Government Business Enterprises and Access to Essential Facilities' (1994) 2 *Competition & Consumer Law Journal* 98, 131; and A Kezsbom, 'No Shortcut to

To avoid this outcome, it is imperative that alternatives to the facility should not be merely inconvenient or costly or troublesome;[45] a plaintiff should not be granted access in an essential facilities case unless they can show that an alternative to the facility is not feasible.[46] As to whether the proposed alternative must be physically impossible or just uneconomic, it is the magnitude of the cost of bypassing the essential facility, not physical impossibility, which typically permits the foreclosure of effective competition in the upstream or downstream market.[47]

The requirement that the facility be truly essential was clearly grasped in *Alaska Airlines Inc v United Airlines Inc*.[48] In this case, the plaintiff claimed that the defendant was charging excessive prices for use of its computer-reservation system, thereby denying the plaintiff reasonable access to an essential facility. The Court of Appeals (Ninth Circuit) rejected the claim, holding that the plaintiff was unable to show that the defendant's control of the facility carried the power to eliminate competition in the downstream market for airline transportation.[49] According to the Court, prior claims for relief under s 2 of the *Sherman Act*, notably in the *Otter Tail* case, involved firms that had this ability.[50]

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Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine' [1996] *Columbia Business Law Review* 1, 2-3.

44 A Hood and S Corones, 'Third Party Access to Australian Infrastructure', Paper presented at *Access Symposium*, Business Law Section of the Law Council of Australia, Melbourne, 28 July 2000, 24.

45 As Pleatsikas and Teece warn, there is a tendency for any costly or difficult-to-acquire input to be described by plaintiffs as a 'facility' that is 'essential', since, without it, they may not be able to compete in a particular market: Pleatsikas and Teece (above n 13) 81.

46 *Twin Labs Inc v Weider Health & Fitness* 900 F 2d 566 (1990), 568-570. The point is simply that the essential facilities doctrine must not be rendered an easy route to entry or it will deter risk-taking and new investment in vital infrastructure: Areeda (above n 29) 852-853.

47 W Tye, 'Competitive Access: A Comparative Industry Approach to the Essential Facility Doctrine' (1987) 8 *Energy Law Journal* 337, 348. The point is clear from the *Hecht* decision as well.

48 948 F 2d 536 (1991).

49 Ibid 548. The Court of Appeals (Ninth Circuit) recently reiterated this requirement in *MetroNet Services Corp v US West Communications* 329 F 3d 986 (2003), 1010.

50 948 F 2d 536 (1991), 543.

The specific reference to *Otter Tail* in the *Alaska Airlines* decision clarifies the link between the requirement in the latter case that control of the facility carry the power to eliminate competition in an upstream or downstream market and the (second) *MCI* criterion that the facility not be practically or reasonably capable of duplication.[51] It will be recalled from the facts of *Otter Tail* that the power company had baldly refused to deal with its potential downstream competitors. Given the difficulty of duplicating Otter Tail's electricity network, this refusal did more than merely impose some handicap on potential competitors, it eliminated all possibility of competition in the downstream market for retail electricity.[52]

This line of reasoning was employed in *Paladin Associates Inc v Montana Power Company*[53] as well. The case centred on Paladin's allegations that the Montana Power Company (MPC) utilised its control over its pipeline system for the transportation and distribution of natural gas across Montana to exclude Paladin from competing in the downstream market for the sale of natural gas to interstate customers. In dismissing Paladin's claim, the District Court of Montana held that a facility is 'essential' only if control of the facility carries with it the power to eliminate competition in an upstream or downstream market.[54] Here, there was no evidence that competition in the relevant downstream market was dependent upon the supply of gas from MPC's pipeline.[55] On the contrary, it was undisputed that gas customers received gas from other sources.[56]

Although there strictly was no need to do so, the judgment in *Paladin* expressly noted that the fourth criterion from *MCI* (feasibility of providing access to the facility) effectively raises the issue of whether there is a legitimate business justification for the refusal to grant the

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51 Although Behr asserts that *Alaska Airlines* has added a 'new dimension' to s 2 essential facilities claims: D Behr, 'Learning How to Share: The Essential Facilities Doctrine Revisited' (1999) http://www.columbia.edu/~dmb69/complaw (p 8).

52 948 F 2d 536 (1991), 543.

53 97 F Supp 2d 1013 (2000).

54 Ibid 1038.

55 Ibid.

56 Ibid.

plaintiff access to the facility.[57] This point may be traced to the Supreme Court's decision in *Aspen Skiing Co v Aspen Highlands Skiing Corp*,[58] which confirmed that 'valid business reasons'[59] constitute a legitimate defence against a complaint of a refusal to deal with a competitor.[60]

In *Aspen*, the defendant was the owner of three of the four ski slopes in Aspen, Colorado, and the plaintiff was the owner of the fourth slope. For many years, the parties had jointly offered an 'all Aspen' ski pass covering all four mountains. The Supreme Court could find no 'normal business purpose'[61] behind the defendant's refusal to continue this joint ticketing arrangement, observing that the defendant was even prepared to forego additional profits by so doing.[62] Hence, the Court concluded that the evidence supported an inference that the defendant 'was not motivated by efficiency concerns and that it was willing to sacrifice short run benefits and consumer goodwill in exchange for a perceived long run impact on its smaller rival.'[63] In other words, the defendant's purpose must have been to drive its smaller competitor out of business and it was therefore liable for illegal monopolistic conduct in the Aspen skiing market.[64]

Following *Aspen*, the argument has been put that a denial of access should never be unlawful per se, since legitimate business reasons will always justify not sharing a facility.[65]

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57 Ibid 1037. Cf Tye's comments criticising the *MCI* formulation of the essential facilities doctrine for ignoring the fact that the Supreme Court has cited 'valid business reasons' as a rationale for a refusal to deal with a direct competitor: Tye (above n 47) 346.

58 472 US 585 (1985).

59 Ibid 597.

60 The Supreme Court was content to rely on the general application of s 2 of the *Sherman Act* (that a business is free to deal with whomever it pleases '[i]n the absence of any purpose to create or maintain a monopoly'), without recourse to the essential facilities doctrine: 472 US 585 (1985), 602. However, valid business reasons are just as relevant to essential facilities cases as they are to any other refusal to deal case.

61 Ibid 608.

62 Ibid.

63 Ibid 610-611.

64 Ibid 611.

65 Areeda (above n 29) 852. See, also, P Ahern, 'Refusals to Deal after Aspen' (1994) 63 *Antitrust Law Journal* 155, 173-182; and J Kench, 'Part IIIA: Unleashing a Monster' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 122, 142-144.

Access to an essential facility would not be mandated, for example, where sharing will result in a reduction in the quality of the owner's product,[66] where excess capacity is not available,[67] or where the owner will be prevented from serving its own clients adequately.[68]

*City of Anaheim v Southern California Edison Co*[69] neatly illustrates the last point. Edison, a vertically integrated public utility, generated, transmitted and distributed electric power within its service area. Each city within that service area had its own electrical distribution system and was the sole provider of retail electricity within its boundaries. Edison supplied retail electricity services to all customers within its service area except within the cities' boundaries. Two cities alleged that Edison had denied them access to the Pacific Intertie (PI), high-powered transmission lines over which Edison had user rights and which brought cheaper hydroelectric power to Edison's control area than alternative sources of electric power available to the cities. Edison claimed that it needed its full capacity rights to the PI to bring power to its service area for the benefit of all its customers. The Court of Appeals (Ninth Circuit) held that the PI was not an essential facility because there were several sources of electric power available to the cities at reasonable rates to meet their needs. However, even if it had been, the Court accepted that Edison had a legitimate business reason for denying access: Edison had a 'limited right' to use the capacity of the PI and 'could not transmit all of the power it wanted if a portion of its capacity rights were being used by the cities at the same time.'[70]

In concluding this brief discussion of the development of the essential facilities doctrine in the US, attention is drawn to the way in which classic cases have managed to avoid the problem of setting the price of access. This is either because they involved boycott situations where the remedy was access on non-discriminatory terms (see *Terminal Railroad*);

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[66] *MCI Communications Corp v American Telephone & Telegraph Co* 708 F 2d 1081 (1983).

[67] *Gamco Inc v Providence Fruit & Fruit Produce Building Inc* 194 F 2d 484 (1952).

[68] In addition, the owner of the facility is not required to construct additional facilities in order to meet a demand for access: *Continental Trend Resources Inc v Oxy US Inc* [1991] 2 Trade Cases 69,510.

or because they involved an essential facility that was subject to rate regulation (as in *Otter Tail*); or because they involved the sudden withdrawal of previously provided services and the implicit remedy was to resume normal dealings (for instance, *Aspen*). Thus, the reality of court enforcement in the US is that access orders are likely to be made only in the following circumstances:[71]

- where supply to others already exists and the case involves access being ordered on non-discriminatory terms;[72]
- where the details of access can be delegated to a regulatory body charged with setting and overseeing prices;[73] or
- where there is some prior history of dealing between the parties or some comparable market price is available.[74]

## 3.3 THE EUROPEAN POSITION

### A *An 'additional refinement' of Article 82*

Access to essential infrastructure facilities in the EU[75] is governed largely by industry-specific regulation, based on EU Directives which must be adopted by Member States.[76] These

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69 955 F 2d 1373 (1992).

70 Ibid 1381.

71 Drawing on R Wright, 'Injunctive Relief in Cases of Refusal to Supply' (1991) 19 *Australian Business Law Review* 65, Pengilley has documented these thoroughly: see Pengilley (above n 14) 12-13; W Pengilley, 'The Privy Council Speaks on Essential Facilities Access in New Zealand: What are the Australasian Lessons?' (1995) 3 *Competition & Consumer Law Journal* 26, 28-29; W Pengilley, 'Access to Essential Facilities: A Unique Antitrust Experiment in Australia' (1998) 43 *Antitrust Bulletin* 519, 522; and W Pengilley, 'Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management' (2000) 8 *Trade Practices Law Journal* 56, 63.

72 Here the court is only extending already negotiated market terms of access to another market player.

73 Eg, the US Federal Energy Regulatory Commission (FERC). Indeed, Wright has concluded that, in respect of a vertically integrated monopolist with an intermediate product that has never been independently priced, dealing orders can only be effective when prices are supervised and regulated by a statutory body: Wright (above n 71) 86.

74 In such cases, the court uses the available price as the basis for the price at which the monopolist should deal.

75 The EU is comprised of fifteen Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and

directives are aimed at facilitating the development of 'internal markets'.[77] To give effect to the directives, individual Member States rely on various industry-specific regulatory agencies. The United Kingdom, for example, has established separate agencies to cover telecommunications, gas, electricity, water and rail.[78]

Despite these developments, the essential facilities doctrine remains relevant to European competition law.[79] Under Art 82 of the *Treaty Establishing the European Community* (the *EC Treaty*),[80] the European Commission can determine access issues within Member States that are brought to it by aggrieved parties. Article 82, unique among the abuse of market power provisions surveyed in this chapter for its specification of examples of abusive conduct,[81] provides:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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the United Kingdom). Ten new Members (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) will join in 2004.

76 The implementation of directives for regulated and negotiated access in the natural gas and electricity industries is discussed in C Moselle, 'Network Industries, Third Party Access and Competition Law in the European Union' (1999) 19 *Northwestern Journal of International Law and Business* 454, 454-455.

77 Eg, EU Directive 96/92/EC instituted 'common rules for the internal market in electricity'; and EU Directive 98/30/EC did likewise for the internal market in natural gas.

78 See discussion in *PC Report* (above n 8) 288.

79 However, as in the US, the scope and application of the essential facilities doctrine in Europe is 'not completely settled': P Treacy, 'Essential Facilities - Is the Tide Turning?' [1998] *European Competition Law Review* 501, 505.

80 Signed in Rome in 1957 (and commonly known as the *Treaty of Rome*), the *Treaty Establishing the European Community* was originally an initiative of Belgium, France, Germany, Italy, Luxembourg and the Netherlands, although the European Community now includes the other nine members of the EU (see n 75 above) as well. The treaty was amended by the *Treaty on European Union*, signed in Maastricht in 1992; and both treaties (EC and EU) were then amended and renumbered by the *Treaty of Amsterdam*, signed in 1997. In the result, the 'abuse of dominant position' provision moved from Art 86 to Art 82. For convenience, however, the provision is referred to exclusively as Art 82 throughout this dissertation.

81 Although in *Europemballage Corp and Continental Can Co Inc v European Commission* [1973] CMLR 199, the European Court of Justice indicated that the list in Art 82 was not exhaustive as to the kinds of abuse prohibited.

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Paragraph (c), which states that a dominant position within the common market may not be abused by 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage', has been interpreted as prohibiting the owner of a significant infrastructure facility from denying access in order to suppress competition, at least where capacity is available and a reasonable price is being offered.[82] For this reason, the essential facilities doctrine is often described as an 'additional refinement'[83] of the principles of Art 82. Nevertheless, the European Commission and courts have demonstrated their willingness to invoke the doctrine and grant access to essential infrastructure owned by a dominant undertaking, where that dominant operator was unwilling to provide access or access only at a competitive disadvantage.[84]

### B *Reception of the doctrine*

*B&I Line Plc v Sealink Harbours Ltd*,[85] the first published decision of the European Commission to use the term 'essential facility', concerned the actions of the British company, Sealink, which is both a car ferry operator, and the port authority, at Holyhead Harbour in Wales. Sealink's car ferry service faced competition from B&I, an Irish ferry operator, whose berth was in the harbour mouth.[86] The mouth was so narrow that, every time a Sealink vessel

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82 Eg, *London European Airways v Sabena* [1989] 4 CMLR 662.

83 M Furse, 'The "Essential Facilities" Doctrine in Community Law' [1995] *European Competition Law Review* 469, 472. Such comments echo the description of the US essential facilities doctrine as a 'gloss' on the *Sherman Act*.

84 Eg, *B&I Line Plc v Sealink Harbours Ltd* [1992] 5 CMLR 255.

85 [1992] 5 CMLR 255.

86 European cases, such as *B&I*, typically involve a monopolist who 'competes in a downstream or upstream market with the access seeker': B Reid and E Burrows, 'Access to Infrastructure – Potential Passages to Remorse' (1997) 16 *Australian Mining and Petroleum Law Journal* 212, 213.

went by, B&I was forced to stop loading or unloading in order to lift the ramp connecting the ship to the dock. Sealink altered its schedule of sailing times in such a way that B&I's loading was interrupted more frequently. This operated to the detriment of B&I and in favour of Sealink's own services.

The Commission held that as a dominant harbour owner, Sealink was not free to discriminate in favour of its own car ferry activities.[87] In enunciating its version of the essential facilities doctrine, the Commission ruled that a dominant undertaking which both owns or controls, and itself uses, an essential facility and which, without an objective business justification, 'refuses its competitors access to that facility, or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage',[88] infringes Art 82. In other words, the owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, imposing a competitive disadvantage on its competitor without objective justification, infringes Art 82.[89]

The reference in the *B&I* case to an objective business justification for refusing access equates to the legitimate business justification which exists in the US.[90] In the European context, objective business reasons for denying access have been held to include the following: the applicant not satisfying certain personal requirements such as being of good standing, creditworthy and financially independent; the applicant not possessing the professional and technical skills and capacity required for the operation and security of the facility; or the

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87 [1992] 5 CMLR 255, 267.

88 Ibid 265-266.

89 Ibid 266. In a second case involving Sealink, *Sea Containers v Stena Sealink* (Commission Decision 94/19/EC, OJ 1994 L15/8), the Commission concluded that, by refusing access to the port of Holyhead on reasonable and non-discriminatory terms to Sea Containers, a potential competitor in the market for ferry services between Britain and Ireland, Sealink, as port operator, had abused its dominant position in the market for port services. The Commission insisted that Sealink should provide port facilities to Sea Containers on conditions no more nor less favourable than those which its own services enjoyed.

90 As in the US, the defence is relevant to any type of refusal to deal case.

applicant not fulfilling payment obligations of a fee for use of the infrastructure.[91] Similarly, access may be refused if the proposed use is inconsistent with the safety or technical standards of the facility, or would otherwise interfere with its proper use; or would interfere with the efficient use of the facility by the existing users.[92]

In *British Midland v Aer Lingus*,[93] for instance, Aer Lingus, the dominant undertaking in the market for the London-Dublin air route, was ordered to agree to an interline facility with new entrant British Midland.[94] The Commission was willing to accept that such a facility could be withdrawn where the dominant airline could provide an objective business justification for its refusal to continue (eg, concerns about creditworthiness), but found that no pertinent reason could be advanced in the present case.[95] In language similar to that used in the US *Aspen* decision, the Commission concluded that Aer Lingus had 'not been able to point to efficiencies created by a refusal to interline nor to advance any other persuasive and legitimate business justification for its conduct. Its desire to avoid loss of market share, the circumstance that this is a route of vital importance to the company and that its operating margin is under pressure do not make this a legitimate response to new entry.'[96]

Returning to the *B&I* case, the Commission's definition therein of an essential facility as 'a facility or infrastructure without access to which competitors cannot provide services to their customers'[97] again raises the concern, discussed previously in connection with US cases,

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91 D Glasl, 'Essential Facilities Doctrine in EC Anti-trust Law: A Contribution to the Current Debate' [1994] *European Competition Law Review* 306, 314.

92 OECD (above n 17) 34.

93 Commission Decision 92/213/EEC, OJ 1992 L96/34.

94 Interline agreements are common practice between established airlines serving the same route, whereby each authorises the others to sell their services. As a result travel agents can offer passengers a single ticket providing for transportation by different carriers.

95 Commission Decision 92/213/EEC, OJ 1992 L96/34, [26].

96 Ibid [30]. Similarly, in *Air France et al v FAG* [1998] 4 CMLR 779, three European carriers (Air France, KLM and British Airways) complained that the operator of the Frankfurt Airport (Flughafen AG, or FAG) was abusing its dominant position by not giving access to other companies wishing to provide ground handling services. Since the decision to reserve the provision of those services for itself could not be justified objectively, FAG was required to submit a plan for opening up the market to independent third party handlers and self-handling airlines.

97 [1992] 5 CMLR 255, 265.

that the application of the doctrine may be wrongly focused on the protection of individual competitors rather than competition.[98] As Ridyard notes, the European approach must clearly recognise that essential facilities, and the obligations incumbent on essential facility owners, should be identified only in circumstances 'where competition does not and cannot be expected to operate, and with assets that cannot reasonably be subject to effective competition.'[99]

The decision in *London European Airways v Sabena*[100] provided some early reassurance on this point. The case concerned Sabena's refusal to grant London European access to its computerised reservation system for air transport services ('Saphir'), through which Sabena occupied a dominant position in the Belgian market for computerised air travel reservations. In finding a breach of Art 82,[101] the European Commission ruled that Sabena's conduct was a refusal, for anti-competitive reasons, to supply an essential service in a situation where there was limited competition on the Brussels-Luton route and Sabena's reservation system had spare capacity.[102]

*Sabena* underscores that the duty to provide access to a facility arises if, without access, there is, in practice, an insuperable barrier to entry for competitors of the dominant undertaking, or if, without access, competitors would be subject to a serious, permanent and inescapable competitive handicap which would make their activities uneconomic.[103]

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98 See, generally, A Overd and B Bishop, 'Essential Facilities: The Rising Tide' [1998] *European Competition Law Review* 183.

99 D Ridyard, 'Essential Facilities and the Obligation to Supply Competitors under UK and EC Competition Law' [1996] *European Competition Law Review* 438, 452.

100 [1989] 4 CMLR 662.

101 The decision is further discussed in R Subiotto, 'The Right to Deal with Whom One Pleases under EEC Competition Law: A Small Contribution to a Necessary Debate' [1992] *European Competition Law Review* 234, 236.

102 In contrast to the situation in *Alaska Airlines Inc v United Airlines Inc* 948 F 2d 536 (1991), discussed previously, it seems that access to Sabena's computer reservation system was essential for London European to compete on the Brussels-Luton route.

103 As Ridyard has explained, 'The fact that it may be inconvenient or costly for competitors to achieve market access by their own devices is not sufficient. Nor is the fact that the asset owner might be enjoying a high return from its policy of refusing to deal with competitors': Ridyard (above n 99) 452.

However, it took the more recent decision in *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG*[104] to achieve widespread recognition of this point. The *Oscar Bronner* case has been hailed as an attempt to 'rein in the possibility of extremely wide interpretations'[105] of the essential facilities doctrine, providing evidence of a 'more sceptical'[106] approach to the application of the doctrine in European competition law.

In particular, the decision signals that Art 82 must be limited to cases of refusal to supply which affect *competition* rather than competitors.[107] The case recognises very clearly that allowing competitors to demand access to the essential facilities of dominant firms, which, of itself, might seem to be pro-competitive, can ultimately be anti-competitive, if the consequence is to discourage the necessary investment in the creation of such facilities in the first place.[108]

The dispute in *Oscar Bronner* was between two publishers of daily newspapers in Austria. Bronner was the publisher of *Der Standard*, which had a market share of 3.6% of total circulation, while Mediaprint published *Neue Kronen Zeitung* and *Kurier*, which had a combined market share of 46.8% of total circulation. Mediaprint had the only nationwide home-delivery service for daily newspapers. Bronner sought access to that service on payment of reasonable remuneration and complained that Mediaprint's refusal to allow such access amounted to an infringement of Art 82.

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104 [1998] ECR I-7791 (opinion of the Advocate-General).

105 R Whish, 'Developments in European Antitrust', in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 22, 33-34.

106 Treacy (above n 79) 501.

107 Ibid 504. The same point is made in M Bergman, 'The Bronner Case – A Turning Point for the Essential Facilities Doctrine?' [2000] *European Competition Law Review* 59, 62; and C Stothers, 'Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union' [2001] *European Competition Law Review* 256, 259.

108 The 'incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits': [1998] ECR I-7791, [57]. This aspect of the case was emphasised in Bergman (ibid) 63. Writing prior to the decision, Ridyard warned that the 'over-zealous or inappropriate application of the essential facilities doctrine carries the risk of enormous damage to the system of dynamic incentives to economic efficiency on which economic and technical progress relies': Ridyard (above n 99) 438.

In the course of rendering his decision, Advocate-General Jacobs acknowledged that, under the essential facilities doctrine, a company that has a dominant position in the provision of facilities which are essential for the supply of goods or services in another market abuses its dominant position where, without an objective business justification, it refuses access to those facilities.[109] However, the Advocate-General also made it plain that incursions on the rights to choose one's trading partners and to freely dispose of one's property require careful justification.[110] In so doing, he reinforced that the primary purpose of Art 82 is to prevent the distortion of competition – and, in particular, to safeguard the interests of consumers – rather than to protect the position of particular competitors.[111]

The Advocate-General reasoned that a decision to mandate access, whether understood as an application of the essential facilities doctrine or, more traditionally, as a response to a refusal to supply goods or services, could be justified in terms of competition policy only in cases in which the dominant operator had a genuine 'stranglehold' on the related market.[112] That might be the case, for example, where duplication of the facility was impossible or extremely difficult, owing to physical, geographical or legal constraints, or was highly undesirable for reasons of public policy.[113] However, the mere fact that the dominant operator's control over a facility gave it a competitive advantage would not be sufficient.[114] The relevant test had to be an objective one: for a refusal of access to contravene Art 82, it must be extremely difficult, not merely for the undertaking demanding access, but for any other undertaking, to compete.[115] Thus, if the cost of duplicating the facility was the barrier to entry, it must be such as to deter any prudent undertaking from entering the market.[116]

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109 [1998] ECR I-7791, [34].
110 Ibid [56].
111 Ibid [58].
112 Ibid [65].
113 Ibid.
114 Ibid.
115 Ibid [66].
116 Ibid.

Applying these principles to the instant facts, the Advocate-General concluded that there could be no obligation on Mediaprint to allow Bronner access to its nationwide home-delivery network.[117] Although Bronner itself was unable to duplicate Mediaprint's network, it had numerous alternative – albeit less convenient – means of distribution open to it (such as postal delivery, shops, kiosks, newspaper stands or vending machines and so forth).[118] The case fell well short of the type of situation in which it would be appropriate to impose an obligation on a dominant undertaking to allow access to a facility that it had developed for its own use.[119]

In confirming the opinion of the Advocate-General, the European Court of Justice[120] observed that there did not appear to be any technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers.[121] The Court cited with approval *Commercial Solvents Corp v European Commission*,[122] pointing out that in this earlier case, the dominant firm's refusal to supply a vital raw material was likely to eliminate all competition in the downstream market for derivative products between its own subsidiary in that market and anyone else.[123]

The Court's endorsement of *Commercial Solvents* appears to reinforce the European view that an essential facility can be a product, such as a raw material, or a service.[124]

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117 Ibid [67].

118 Ibid.

119 Ibid [70]. Indeed, in the aftermath of the decision, Bronner was caustically described as a 'would-be free rider posing as someone deprived of access to an essential facility': F Fine, 'NDC/IMS: A Logical Application of the Essential Facilities Doctrine' [2002] *European Competition Law Review* 457, 461. (The *IMS* case referred to in the title of Fine's article is considered further in Chapter 6.)

120 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG* [1999] 4 CMLR 112.

121 Ibid 145.

122 [1974] 1 CMLR 309.

123 [1999] 4 CMLR 112, 141-142.

124 Following the decision in *Commercial Solvents*, the essential facilities doctrine was seen as an alternative means of expressing the principle that a refusal to supply an essential raw material

However, Glasl has sought to correct this misapprehension, explaining that facilities consist in 'infrastructure, or infrastructure combined with services related to them, which are of an auxiliary nature to an economic activity in a related but separate market'[125] and that tangible or intangible goods are 'unlikely to constitute such facilities'.[126]

To sum up, cases such as *B&I*, *Aer Lingus* and *Sabena* demonstrate that the crux of the essential facilities doctrine in European competition law lies in the obligation on operators of essential infrastructure to grant access to potential users of that infrastructure on a non-discriminatory basis.[127] However, as in the US, relevant decisions have concentrated on the initial question of whether access should be granted at all and have been reluctant to enter the domain of access pricing,[128] preferring to leave this as a matter for negotiation between the parties.[129]

## 3.4 NEW ZEALAND'S 'LIGHT-HANDED' APPROACH

### A *Strict reliance on the Commerce Act*

The adequacy of New Zealand's misuse of market power provision to regulate access to essential infrastructure services was investigated as part of the 1989 review of the *Commerce*

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may amount to an abuse of a dominant position. More recently, it has been said that cases involving a refusal to license intellectual property rights form part of a 'seamless line of earlier [European] essential facility cases involving physical infrastructure': Fine (above n 119) 467. Based on the attributes of true essential facilities identified in part 2.3 of Chapter 2, the author disputes the application of the essential facilities doctrine to products, services or intellectual property rights per se. Thus, European cases of refusal to supply copyright information are incorporated within Chapter 6.

125 Glasl (above n 91) 308.

126 Ibid. This author concurs – again, as in n 124 above, reliance is placed on Chapter 2, part 2.3.

127 Furse (above n 82) 473.

128 Commenting on this very point, Hay has said, 'This ought not to be acceptable. If the [US and European] courts are going to use the … doctrine to any effect, they must be prepared to address the question of what price the monopolist is allowed to charge': G Hay, 'Reflections on Clear' (1996) 3 *Competition & Consumer Law Journal* 231, 235.

129 This has been part of the reason for the development of industry-specific regimes in Europe.

*Act* 1986 (NZ).[130] In a dramatically divergent outcome to that recommended by Australia's Hilmer Committee in 1993, New Zealand's Ministry of Commerce concluded that '[r]eliance on general competition law is the Government's favoured approach for guaranteeing access to essential facilities.'[131] It was made clear, however, that industry-specific regulation would be introduced to supplement the *Commerce Act*,[132] if necessary.[133]

Access disputes in New Zealand centre, therefore, on whether the denial of access constitutes a contravention of s 36 of the *Commerce Act*. Following recent amendments,[134] that section prohibits the taking advantage of a substantial degree of power in a market for the purpose of: (a) restricting the entry of any person into that or any other market; (b) preventing or deterring any person from engaging in competitive conduct in that or in any other market; or (c) eliminating any person from that or any other market.[135]

The notion that s 36 might incorporate an essential facilities doctrine based on that developed in the US was specifically rejected by the New Zealand High Court in *Union Shipping v Port Nelson Ltd*.[136] In declining to import the doctrine into New Zealand competition law, the Court warned that a 'wrong turning at this point may prove painfully

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130 For background information on this review, see R Patterson, 'Harmonisation of Australian and New Zealand Competition Law: Never the Twain Shall Meet?' (2000) 8 *Trade Practices Law Journal* 17, 21.

131 Ministry of Commerce, 'Guarantee of Access to Essential Facilities', Discussion Paper, Wellington, 1989, 27.

132 The *Electricity Industry Reform (Amendment) Act* 2001 (NZ) and the *Telecommunications Act* 2001 (NZ) are two industry-specific access regimes now supplementing the general competition law.

133 In response to the threat of additional regulation, such as price control, many industries implemented their own voluntary industry codes. See, eg, the New Zealand *Gas Pipeline Access Code*, which defines standards of behaviour and information disclosure with respect to gas transport systems.

134 The *Commerce Amendment Act* 2001 (NZ) has brought the wording of s 36 into line with s 46 of Australia's *Trade Practices Act*. Previous references to 'use' and 'dominant position in a market' have been replaced by 'take advantage of' and 'substantial degree of power in a market', respectively. For a review of the package of amendments to the *Commerce Act*, see T Gilbertson, 'New Zealand's Commerce Act Reforms: An Australian and International Perspective' (2002) 10 *Trade Practices Law Journal* 150.

135 See s 36(2) of the *Commerce Act*.

136 [1990] 2 NZLR 662. Although in the earlier case of *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, the New Zealand High Court had been much more receptive of the doctrine.

difficult to correct'.[137] Thus, New Zealand essential facilities cases are required to be determined strictly in accordance with the terms of s 36.[138]

### B *Application of section 36*

New Zealand's so-called 'light-handed'[139] approach to access regulation has been applauded by some commentators,[140] while others are much more critical.[141] What is indisputable, however, is that access seekers in New Zealand have met with very little success in disputes with facility owners determined under s 36 of the *Commerce Act*.[142] The practical difficulty of satisfying the terms of s 36 has acted as a significant constraint on the usefulness of the provision as a means of regulating access to the country's essential facilities.[143] Such is the perceived problem that New Zealand access seekers have preferred to base recent claims, albeit with no greater degree of success, on the common law doctrine of prime necessity.[144]

This unsatisfactory situation is largely the legacy of the Privy Council's decision in the much-cited *Telecom Corp of New Zealand v Clear Communications Ltd*.[145] The outcome of

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137 [1990] 2 NZLR 662, 705.

138 With all of the 'delay and cost that this involves': Patterson (above n 130) 23.

139 Under a policy of light-handed regulation, primary reliance is placed on the general competition law. For further discussion of the New Zealand approach, see A Bollard, 'Utility Regulation in New Zealand' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 27, 31-33.

140 Eg, J Farmer, 'Transition from Protected Monopoly to Competition: The New Zealand Experiment' (1993) 1 *Competition & Consumer Law Journal* 1; and H Ergas, 'Telecommunications Across the Tasman: A Comparison of Regulatory Approaches and Economic Outcomes in Australia and New Zealand' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 117.

141 Eg, according to King and Maddock, 'The long and costly delays involved, and protracted court battles, have convinced Australian policy makers that the New Zealand approach should be avoided': S King and R Maddock, *Unlocking the Infrastructure: The Reform of Public Utilities in Australia* (Allen & Unwin, Sydney, 1996) 30. See, also, R Ahdar, 'Battles in New Zealand's Deregulated Telecommunications Industry' (1995) 23 *Australian Business Law Review* 77, 116; and A Abadee, 'The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?' (1997) 5 *Trade Practices Law Journal* 27, 46.

142 Gilbertson (above n 134) 154.

143 The use (now take advantage) element of s 36 of the *Commerce Act* has proved most problematic in New Zealand.

144 See discussion in part 3.5(C) of this chapter.

145 [1995] 1 NZLR 385 (hereafter, '*Telecom v Clear*').

that long-running dispute[146] guaranteed that new entrants in privatised monopoly sectors of New Zealand's economy would struggle to secure access to the incumbent's essential facility on fair and reasonable terms under s 36 of the *Commerce Act*.[147]

Put simply, the dispute between Clear and Telecom was this: Clear wished to enter the market for the provision of local telecommunications services in New Zealand, in competition with Telecom, but alleged it had been denied acceptable terms of interconnection to the public switched telephone network (PSTN) owned by Telecom.[148] According to Clear, the interconnection agreement drawn up by Telecom was so unfavourable as to constitute a misuse by Telecom of its dominant position as monopoly owner of the PSTN in breach of s 36 of the *Commerce Act*.[149]

Before the New Zealand High Court,[150] Telecom relied on the efficient components pricing rule (ECPR)[151] to assert that the cost of interconnection should include the direct incremental costs of producing the interconnection as well as the opportunity cost associated with Clear's use of the network.[152] Clear objected to the opportunity cost aspect of the ECPR on the basis that it represented monopoly profits foregone by Telecom in giving Clear access to

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146 For a full description of proceedings before the New Zealand High Court and Court of Appeal, and the Privy Council, see Ahdar (above n 141); and V Korah, 'Charges for Inter-Connection to a Telecommunications Network' (1995) 2 *Competition & Consumer Law Journal* 213.

147 Eg, in *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646, where the appellant challenged the access pricing practices of Transpower, the New Zealand Court of Appeal stated plainly that 'there is no control under s 36 over monopoly rents': ibid 666.

148 The size and nature of this telecommunications infrastructure made duplication uneconomic for rivals.

149 At this stage, s 36 contained the terms 'use' and 'dominant position': see n 134 above.

150 *Clear Communications Ltd* v *Telecom Corp of New Zealand Ltd* (1992) 5 TCLR 166.

151 Promulgated by the American economists, Professors W Baumol and R Willig, who gave expert evidence on behalf of Telecom, the ECPR was referred to as the Baumol-Willig rule in this case.

152 (1992) 5 TCLR 166, 203-204. To be specific, Telecom claimed that the access fee should equal the direct incremental cost to Telecom of producing the interconnection plus the revenue Telecom would have earned if it had supplied the service to Clear's customers less the costs saved by Telecom as a result of Clear using its interconnection to the PSTN to provide or receive calls.

the PSTN.[153] Essentially, Clear argued that it would not be able to compete with Telecom if the interconnection charge contained a monopoly profit element.[154]

Persuaded by Telecom that the ECPR provided a suitable pricing mechanism in this case,[155] High Court concluded that it was appropriate for Clear to be charged an access fee which included incremental and opportunity costs.[156] The Court stated:

> Where the firm supplies components or intermediate goods to another firm ... and thereby gives up some capacity that it would otherwise have used itself, then the supplier firm must be permitted to price the article in question at a level sufficient to compensate it for the profit it is forced to sacrifice because of its supply to the other firm. Economists refer to the sacrifice of profit ... as the opportunity cost of that activity.[157]

However, the New Zealand Court of Appeal[158] considered the ECPR not at all suitable for calculating the price of supply from a monopolist where the monopolist's opportunity cost included monopoly profits.[159] Instead, Gault J (with whom Richardson J concurred) suggested the Telecom could impose a charge reflecting the fixed and variable costs involved in providing interconnection services to Clear plus a 'reasonable' return on capital employed.[160] Cooke P favoured a similar approach, stating that 'Telecom is entitled to a fair commercial return for granting Clear use of the network assets, without regard to the present monopoly.'[161]

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153 Ibid 207.

154 Clear was also concerned that the ECPR would require it to 'underwrite' Telecom's level of operating efficiency (ie, Telecom may have been operating inefficiently in the downstream market and passing on its higher costs in the access price): ibid.

155 The High Court took the view that the ECPR was more likely than alternative pricing methods to improve efficiency and promote competition in the telecommunications market: ibid 217.

156 Ibid.

157 Ibid 203 (Ellis J and M Brunt).

158 *Clear Communications Ltd* v *Telecom Corp of New Zealand Ltd* (1993) 4 NZBLC 103,340.

159 See, generally, M Tollemache, 'The Untangling of the Wires? Clear v Telecom in the New Zealand Court of Appeal' [1994] *European Competition Law Review* 236.

160 (1993) 4 NZBLC 103,340, 103,364. Their Honours made it plain that monopoly profits per se were not the problem; rather it was the fact that such profits contributed to a charge so high that this would have the effect of substantially deterring competition: ibid 103,360.

161 Ibid 103,344. Overall, the judgments are consistent with the Court of Appeal's decision in *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 as to the charge a port owner might make to the operator of a ferry service. In calculating a 'reasonable' fee for use of port facilities, the appropriate starting point was held to be the assets employed and costs incurred by an efficient provider of the services in a notionally competitive market. That approach rejected both the monopoly profits which the port owner might otherwise be able to

In the result, the Court of Appeal overruled the High Court and rejected the ECPR, but without substituting its own order. Instead, the Court could only espouse the broad principle that access should be granted on fair and reasonable terms.

The matter went to the Privy Council[162] which resurrected the ECPR, reversing the Court of Appeal's decision and reinstating the High Court's reasoning in the process.[163] Their Lordships held that a person in a dominant market position does not 'use' that position for the purposes of s 36 if they act 'in a way which a person not in a dominant position but otherwise in the same circumstances would have acted'.[164] Accordingly, the position adopted by Telecom at trial based on the ECPR did not breach s 36 'since it did not involve the use by Telecom of its dominant position'.[165]

Underpinning the Privy Council's decision is the following reasoning: a hypothetical non-dominant firm in a competitive market, if asked to supply a component of a service to a competitor, would price it on the basis of its opportunity cost. Telecom, therefore, could not be faulted for doing likewise; it could not be said to be using its dominance in charging its opportunity cost, since that is what it would have charged in a fully competitive market.[166] Thus, monopoly pricing itself was not objectionable under s 36:

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earn and any monopoly profits which the ferry operator might earn as a result of having access to the port facilities.

162 Patterson thought it a 'chilling prospect' that the issues lay for determination by five Law Lords (Lord Keith of Kinkel, Lord Jauncey of Tullichettle, Lord Browne-Wilkinson, Lord Lloyd of Berwick and Lord Nolan) who had 'no first-hand experience of New Zealand economic and social conditions': R Patterson, 'Making Hilmer Clear: The Essential Facility Recommendation and the New Zealand Experience' (1994) 2 *Trade Practices Law Journal* 131, 137.

163 *Telecom v Clear* [1995] 1 NZLR 385 (advice delivered by Lord Browne-Wilkinson).

164 Ibid 403. The test of 'use of dominant position' adopted by the Privy Council closely resembles the test of 'taking advantage of market power' advanced by the Australian High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177. The Australian approach is explained in detail in Chapter 6.

165 [1995] 1 NZLR 385, 408.

166 Ibid 405-406. The ECPR is not without practical difficulties, however. The rule does not fix the terms for interconnection, but establishes a methodology for determining a price. Agreement would be required as to the extent of Telecom's opportunity cost in losing custom to Clear; and since this cost would not be static, regular reviews would be necessary, as with

> The question is whether … s 36 has some wider purpose than to enforce fair competition in a market where one firm is in a dominant position. The Court of Appeal took the view that s 36 had the wider purpose, beyond producing fair competition, of eliminating monopoly profits currently obtained by the person in the dominant market position. Their Lordships do not agree.[167]

In any event, their Lordships surmised that the charging of monopoly profits foregone by Telecom would only continue until they were competed away by Clear's competition in the contested local telephone market.[168]

Ahdar has criticised the Privy Council's approach as being 'extremely artificial and prone to mislead'.[169] He argues that there is an 'air of unreality'[170] in asking how a non-dominant firm in a competitive market would have priced its essential facility, when firms do not control essential facilities in competitive markets 'nor is their provision a *sine qua non* to effective competition flourishing at all'.[171] Certainly, opportunity cost would not reflect monopoly profit in a competitive market, and Telecom would not have been able to include in its price a margin designed to yield an overall rate of return at monopoly levels. In the author's view, that is the crux of the matter. In *Telecom v Clear*, the Privy Council plainly adopted the test of 'taking advantage of market power' under s 46 of the *Trade Practices Act*, formulated by the Australian High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*,[172] as the test of 'use of dominant position' under s 36 of the *Commerce Act*.[173] However, with respect, the Privy Council erred in applying that test by treating monopoly rents

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any long-term supply contract. See M Ross, 'New Zealand's Experiment in Pricing Access to Essential Facilities' (1995) 2 *Agenda* 366, 369-370.

167 [1995] 1 NZLR 385, 407.

168 Ibid 407-408. The Privy Council reasoned that if Clear was the more efficient provider of the service, it would be able to charge less for local calls. That would force Telecom to cut its prices, thereby lowering its opportunity cost and ultimately reducing the access fee charged to Clear. This process of forcing down the price would continue until any element of monopoly price was competed out of Telecom's charges: ibid. For further explanation, see Ross (above n 166) 368.

169 Ahdar (above n 141) 103.

170 Ibid.

171 Ibid.

172 (1989) 167 CLR 177.

173 See n 164 above.

as incidental to Telecom's opportunity cost, rather than as a manifestation of the firm's monopoly power.[174]

A final point to make about the Privy Council's decision in *Clear* relates to their Lordships' view that it was not helpful to ask whether a monopolist had acted 'reasonably' or 'with justification'.[175] If this were so, their Lordships reasoned, a monopolist would have little idea what, in the future, a court might find to be reasonable or justifiable.[176] Thus, s 36 must be construed in such a way as to enable a monopolist, before it enters into a line of conduct, to know with some certainty whether or not it is acting lawfully.[177] However, such concerns seem out-of-step with the recognition in US and European jurisprudence of legitimate business justifications and objective business justifications, respectively, for denying access.[178]

### C *Doctrine of prime necessity*

In order to avoid the spectre of failure surrounding s 36 of the *Commerce Act*, third party access seekers in New Zealand have attempted to address essential facilities issues under the common law doctrine of prime necessity.[179] This doctrine dates back to the 17th century musings of Lord Hale[180] who, in his 'Treatise de Portibus Maris', wrote of a wharf owner not being permitted to charge 'arbitrary and excessive duties' for wharfage and cranage because 'the wharf and crane and other conveniences are affected with a public interest and they cease to be *juris privati* only.'[181] Thus, the 'venerable'[182] doctrine imposes upon monopoly suppliers

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174 This point is pursued in Chapter 6 in connection with the take advantage element of s 46 of the *Trade Practices Act*.

175 [1995] 1 NZLR 385, 403.

176 Ibid.

177 Ibid.

178 See text accompanying n 57ff and n 90ff, respectively. As discussed in Chapter 6, legitimate business reasons may also justify a refusal to deal under s 46 of the *Trade Practices Act*.

179 For discussion of the doctrine in the New Zealand context, see Patterson (above n 162) 141-145 and (above n 130) 23; Ahdar (above n 141) 112; and A Bollard and M Pickford, 'New Zealand's "Light-Handed" Approach to Utility Regulation' (1995) 2 *Agenda* 411, 420.

180 Lord Chief Justice of the King's Bench in the 1670s.

181 These extracts are set out in *Allnutt v Inglis* (1810) East 527, 538-539. See, also, B McAllister, 'Lord Hale and Business Affected with a Public Interest' (1929-30) 43 *Harvard Law Review* 759.

of essential services (or prime necessities) a common law duty to supply at a reasonable price.[183]

Lord Hale's treatise was cited at length in the English case of *Allnutt v Inglis*,[184] and its principles adopted by the Privy Council in *Minister of Justice for the Dominion of Canada v City of Levis*,[185] in respect of the 'prime necessity'[186] (water) at issue in that case.[187] Known thereafter by that moniker, the doctrine of prime necessity has been applied in New Zealand in relation to, for example, the supply of water,[188] electricity,[189] and drainage[190] and sewerage services.[191]

However, in *Mercury Energy Ltd v Transpower New Zealand Ltd*,[192] the New Zealand High Court struck out a cause of action which alleged that Transpower, the operator of the national electricity grid, was under a common law obligation to charge reasonable prices to users. The subsequent appeal by Vector Ltd (previously Mercury Energy Ltd) was unanimously dismissed by the Court of Appeal in *Vector Ltd v Transpower New Zealand Ltd*.[193] The Court accepted that the doctrine of prime necessity formed part of the common law of New Zealand,[194] but held that there was 'no room for the operation of the doctrine'[195] in the

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182 *Auckland Electric Power Board v Electricity Corp of NZ Ltd* [1994] 1 NZLR 551, 557.

183 Ibid.

184 (1810) 12 East 527, 538-539.

185 [1919] AC 505, 512-513.

186 Ibid 513. The term 'prime necessity' was used for the first time in this case.

187 In the US, language suggestive of the doctrine is also found in *Associated Press v United States* 326 US 1 (1945). There, by-laws which permitted members of Associated Press to block the admission of competitors and prohibited members from selling news to non-members were held to be a restraint of trade in violation of s 1 of the *Sherman Act* (US). Frankfurter J compared Associated Press to a public utility, a 'business infused with the public interest that was required to serve all', and stated that there was a 'need for the maximum flow of information and opinion' to preserve democracy and the US Constitution: ibid 29.

188 Eg, *State Advances Superintendent v Auckland City Corp and the One Tree Hill Borough* [1932] NZLR 1709.

189 Eg, *Wairoa Electric-Power Board v Wairoa Borough* [1937] NZLR 211; and *South Taranaki Electric-Power Board v Patea Borough* [1955] NZLR 954.

190 Eg, *Hutt Golf Course Estate Co Ltd v Hutt City Corp* [1945] NZLR 56.

191 Eg, *Huntly Borough v South Auckland Education Board* [1963] NZLR 282.

192 (1999) 8 TCLR 554.

193 [1999] 3 NZLR 646.

194 Ibid 663.

195 Ibid 665 (Richardson P, Gault, Blanchard and Tipping JJ). Thomas J concurred in a separate judgment.

instant case. In the Court's judgment, the doctrine would involve 'heavy-handed regulatory intervention on Transpower's pricing'[196] and this was precluded by the *Commerce Act*, reinforced by the *State-Owned Enterprises Act* 1986 (NZ), which had established a 'light-handed'[197] and 'exclusive'[198] statutory scheme for achieving price control in New Zealand.[199] It was the Court's view that the methods of price control introduced under the *Commerce Act* were intended by the New Zealand Parliament to be the only methods of price control available under New Zealand law.[200]

The *Vector* decision was recently endorsed by the New Zealand Court of Appeal in *Pacifica Shipping Ltd v Centreport Ltd*.[201] There, by parity of reasoning with *Vector*, the doctrine of prime necessity was held to have no application in circumstances where Pacifica, a long-term user of wharf facilities at the Port of Wellington, claimed that rent sought by Centreport, the port owner and operator, under the terms of a new lease was 'unreasonable'.[202] The appellant had sought to distinguish *Vector*, arguing that what was at issue in the present case was not price control, but a refusal to supply. This argument was rejected by the Court of Appeal on the basis that the invocation of the doctrine of prime necessity 'necessarily involves at least an attempt at price control',[203] since it is 'designed to control the prices which qualifying monopolists may impose on their customers'.[204] Thus, Pacifica could not, on the one hand, seek to invoke the doctrine of prime necessity to control the rent which Centreport wished to charge, and yet, on the other hand, assert that *Vector* could be distinguished.[205]

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196 Ibid.
197 Ibid.
198 Ibid 666.
199 Ibid.
200 Ibid.
201 [2003] 1 NZLR 433.
202 Ibid 439-440, affirming Ronald Young J's decision in *Pacifica Shipping Ltd v Centreport Ltd* (unreported, New Zealand High Court, 19 September 2001) at first instance.
203 [2003] 1 NZLR 433, 439 (Gault P, Tipping and McGrath JJ).
204 Ibid.
205 Ibid.

By effectively closing off the avenue of prime necessity,[206] the decisions in *Vector* and *Pacifica* leave little doubt that access disputes in New Zealand will continue to be litigated principally under s 36 of the *Commerce Act*.[207] This creates an imperative to ensure the efficacy of s 36 as a means of regulating access to essential facilities. Positive steps have been taken recently. The intention of the New Zealand Parliament in amending s 36 of the *Commerce Act* to accord so closely with the terms of s 46 of the *Trade Practices Act* was to encourage an Australian approach to the interpretation and application of s 36.[208] Chapter 6 of this dissertation, through analysis of seminal decisions under s 46 of the *Trade Practices Act*, provides a template for the implementation of New Zealand's 'new' misuse of market power provision in essential facilities cases.

An Australian approach to s 36 of the *Commerce Act* may not preclude the need for further industry-specific access regimes in New Zealand. However, as Chapter 6 demonstrates, it will provide an appropriate basis for evaluating the necessity for such regimes by allowing s 36 to provide a means of access regulation in industries where, previously, the legacy of *Telecom v Clear* prevented it from so doing.

### 3.5 LESSONS LEARNED

There is no question that US and European antitrust law has informed consideration of the essential facilities problem in Australia.[209] Significantly, however, in interpreting s 46 of the

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206 This accords with the Australian position. In *Bennett & Fisher Ltd v Electricity Trust of South Australia* (1962) 106 CLR 492, the High Court held that the doctrine of prime necessity had no application in Australia, and there has been no attempt to resuscitate it.

207 At least in cases where industry-specific access regimes do not apply.

208 According to the report of the New Zealand Commerce Select Committee, 'Government members wish to make very clear that the intention of Parliament in adopting the words "take advantage of" would be to reverse … [the effect of the Privy Council's decision in *Telecom v Clear*] and to provide the New Zealand courts with the opportunity to apply the test with an appropriate level of flexibility': Commerce Select Committee, 'Commentary on the Commerce Amendment Bill', Wellington, February 2001, 8.

209 Analysis of the essential facilities doctrine appears in each of the following articles, 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 *Trade Practices Law Journal* 188; Pengilley (above n 14) and (above n 16); Robertson (above n 43); Abadee (above

*Trade Practices Act*, Australian courts have refused to embrace the essential facilities doctrine as it applies in those jurisdictions. Emulation of New Zealand's approach, whereby access disputes would fall for consideration under the strict terms of s 46, was rejected by the Hilmer Committee as a basis for dealing with the essential facilities problem.[210] In the result, Australia has specifically chosen not to rely on further judicial development of refusal to deal principles under the misuse of market power provisions of general competition law to deal with access issues.[211]

### A *Rejection of the essential facilities doctrine*

In countering suggestions that an essential facilities doctrine similar to that existing in the US could be imported into Australia through judicial interpretation of s 46,[212] the Hilmer Committee observed that, in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*,[213] the High Court had not accepted such a doctrine and the Full Federal Court had specifically rejected it.[214]

To briefly revisit the facts of the *Queensland Wire* case: BHP, responsible for approximately 97 per cent of Australia's steel output, produced Y-bar steel[215] which it sold exclusively to its wholly owned subsidiary Australian Wire Industries (AWI). AWI produced fence posts from the Y-bar and sold these as a producer. Queensland Wire Industries (QWI)

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n 141); Reid and Burrows (above n 86); and Kench (above n 65). The doctrine is also considered in the *Hilmer Report* (above n 1) and the *PC Report* (above n 8).

210 *Hilmer Report* (above n 1) 243-244.

211 This reflects the Hilmer Committee's 'indifference to a judicially-evolved doctrine': Abadee (above n 141) 37.

212 Such an analysis was undertaken by Kewalram, who concluded that 'incorporating the essential facilities doctrine into s 46 does require considerable flexibility and imagination': Kewalram (above n 209) 202.

213 [1987] ATPR 40-810 (Federal Court); [1988] ATPR 40-841 (Full Federal Court); (1989) 167 CLR 177 (High Court).

214 *Hilmer Report* (above n 1) 243. This outcome clearly suited the Hilmer Committee, which chose to highlight complaints about the lack of 'clarity, coherence or consistency' in the doctrine: ibid 244, citing K Vautier, 'The "Essential Facilities" Doctrine', Occasional Paper No 4, New Zealand Commerce Commission, 1990, 65.

sought supply of the Y-bar produced by BHP in order to produce fence posts and compete against AWI in the rural fencing market. BHP offered to supply at prices which were so high that its conduct amounted to a constructive refusal to supply. Unsuccessful in the lower courts, QWI was able to convince the High Court that BHP's conduct amounted to a misuse of market power.

However, only the Full Federal Court was willing to involve itself in discussion of the essential facilities doctrine. In response to QWI's submission that a monopolist could generally refuse to deal except in cases where it controlled an essential facility,[216] the Full Federal Court said:

> We do *not* accept this submission. First, it is not readily accommodated to the terms of s 46 itself, and it is those terms that govern this case. Secondly … the 'essential facility' doctrine evolved as a gloss upon the succinct terms of the *Sherman Act*. Thirdly, we have some difficulty, at least in cases where a monopoly of electric power, transport, communications or some other 'essential service' is not involved, in seeing the limits of the concept of 'essential facility' … Fourthly, even if there be such a doctrine, there is a particular difficulty where the aid of the courts is sought to oblige the respondent to accept the applicant as a customer … Fifthly, in applying the 'essential facility' doctrine, there would appear to be a need to consider the impact upon it of another 'doctrine', that of upholding conduct engaged in for a 'legitimate business purpose' … Finally, there also is force in BHP's submission that the 'essential facility' cases involved discriminatory refusals to deal rather than, as in the present case, a 'vertically integrated' monopolist who had refused to deal at all in an intermediate product and committed it solely to its own manufacturing operations.[217]

Of course, the Full Federal Court only had to say that the supply of Y-bar did not involve a question of access to an essential *facility* at all.[218] None of the six detailed reasons

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215 The significance of Y-bar steel is that it is used to produce star picket posts by cutting the steel into fence post lengths and drilling holes through which wire will pass. Star picket fencing is the most popular form of rural fencing used in Australia.

216 In effect, QWI was arguing that BHP's control of the steel and steel products market should be regarded as control of an essential facility, so that, following the US essential facilities doctrine, BHP was required to supply Y-bar to QWI to allow it to compete in the rural fencing market.

217 [1988] ATPR 40-841, 49,076-49,077 (Bowen CJ, Morling and Gummow JJ) (emphasis added).

218 W Pengilley, 'The Privy Council Speaks on Essential Facilities Access in New Zealand: What are the Australasian Lessons?' (1995) 3 *Competition & Consumer Law Journal* 26, 31.

given by the Court for its rejection of the essential facilities doctrine is convincing to this author,[219] as explained below.[220]

First, it is difficult to accept that the essential facilities doctrine 'is not readily accommodated to the terms of s 46', when the doctrine has been accommodated under the misuse of market power provisions of the *Sherman Act* and the *EC Treaty* – especially as the three sets of provisions share a common aim of preventing exclusion from markets.[221] The Full Federal Court appears to have misconceived that, because the doctrine is not spelt out in the provision, it has no relevance to s 46. The essential facilities doctrine fits neatly within the concept of preventing the entry of a person to a market or preventing a person from engaging in competitive activity. The very basis of the doctrine is that access to such a facility should be allowed because, without such access, a party can neither obtain market entry nor compete.[222] In fact, when s 46 is compared with the *MCI* criteria, a vague matching of elements is apparent: a monopolist in control of a true 'essential facility' easily equates to a corporation with a 'substantial degree of power in a market'; the 'denial of access' would be the 'taking advantage' of that power; and legitimate business purposes are relevant both to assessing the 'feasibility of providing the facility' and to mitigating an alleged 'proscribed purpose' under s 46.[223]

Second, to describe the essential facilities doctrine as a 'gloss', or indeed an 'additional refinement', of the terms of a statutory provision prohibiting the misuse of market power does not justify its rejection. To do so would be akin to rejecting all principles of law that have evolved from judicial interpretation of statute. Certainly, in Australia, it cannot be said that the

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219 Cf Robertson's claim that the Full Federal Court was 'right to reject any generalised and independent doctrine of essential facilities' based on US or European authorities: Robertson (above n 43) 104.

220 The Full Federal Court's reasons have also been criticised in Pengilley (above n 16) 59-61 and (above n 14) 16-18; and Kewalram (above n 209) 198-200.

221 Pengilley (above n 14) 16.

222 Pengilley (above n 16) 59.

223 Kewalram (above n 209) 200.

*Trade Practices Act* is not subject to continual interpretation by the courts – that is the very nature of the common law.[224]

Third, the express reference to 'electric power, transport, communications or some other "essential service"' suggests that the doctrine *is* relevant to those fields.[225] Instead of rejecting the doctrine, a more fitting response to concerns about defining the limits of the concept of essential facility would be to set the standard of 'essential' at an appropriate (ie, high) level.[226]

Fourth, it must be noted that the 'particular difficulty' of obliging the respondent to accept the applicant as a customer did not prevent the High Court, on appeal in *Queensland Wire*, from overturning the Full Federal Court and imposing a duty to deal on BHP. Admittedly, concerns arise from the possible need for judicial supervision once access rights have been granted,[227] but the issue of remedies is separate from the issue of liability.[228] Such concerns do not justify the immediate rejection of the essential facilities doctrine.

Fifth, the need to consider 'conduct engaged in for a "legitimate business purpose"' does not seem to be an objection to the essential facilities doctrine itself, but, rather, a complaint about having to conduct such further analysis. However, most grounds of liability have defences and 'legitimate business purposes' are no more than that.[229] Indeed, as Chapter 6 will bear out, an inquiry as to the presence of legitimate business reasons is routinely undertaken in refusal to supply cases under s 46. Accordingly, this is not a reason for rejecting the application of the essential facilities doctrine.

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224 Ibid 198.

225 Pengilley (above n 16) 60.

226 Kewalram (above n 209) 199. Refer to the discussion of this issue in Chapter 2, part 2.3.

227 These concerns are pursued in part 3.5(B) of this chapter.

228 Kewalram (above n 209) 199.

229 Ibid.

Finally, the claim that essential facilities cases involve 'discriminatory refusals to deal' rather than refusals to supply on the part of a 'vertically integrated' monopolist is simply inaccurate (as the decision in *Otter Tail* demonstrates).[230] Being a vertically integrated producer does not prevent the application of the doctrine.[231]

On appeal, it was hoped that the High Court would 'take the opportunity to state clearly whether s 46, as presently drafted, is broad enough to include an essential facility doctrine similar to the US doctrine.'[232] Surprisingly, however, the High Court remained totally silent on the status of the essential facilities doctrine. While this is disappointing, it is arguable whether the incorporation of the essential facilities doctrine under s 46 is indeed necessary for the provision to address access issues satisfactorily. This issue is discussed in Chapter 6.

### B *Inadequacy of section 46*

The Hilmer Committee viewed s 46 (absent the essential facilities doctrine) as a poor vehicle for regulating access to essential facilities, citing the evidentiary problems of proving in court that refusal to supply on reasonable terms is for a proscribed purpose; the cost, time and risk involved in obtaining a court resolution of a commercial dispute; and doubts about the ability of the courts to determine the terms and conditions, particularly the price, at which access should occur.[233] In short, the Committee considered courts the wrong forum in which access disputes should be decided,[234] and was 'crystal clear in its determination'[235] to keep this particular area of disputation away from the judiciary.

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230 Ibid.

231 Pengilley argues that, in any event, 'many would categorise BHP's conduct as being a discriminatory refusal to deal': Pengilley (above n 14) 18.

232 S Corones, 'Are Corporations with a Substantial Degree of Market Power Free to Choose their Distributors and Customers?' (1988) 4 *Queensland University of Technology Law Journal* 21, 27.

233 *Hilmer Report* (above n 1) 243-245. The Committee recognised that s 46 could be amended 'in some way', but did not explore this option: ibid 243.

234 In support of this view, Baxt has argued that courts are too slow, that parties with deep pockets could use lawyers to 'manipulate' the legal system to delay any decisions on access, and that access should be made available through a more 'predictable' process: R Baxt, 'Third Line Forcing and Other Major Reforms Following the Adoption of the Hilmer Report' (1995) 109

The 'poor track record'[236] of the courts in determining optimal pricing and terms of access to essential facilities[237] has been widely accepted as justifying the Hilmer Committee's conclusion as to the inadequacy of s 46 to deal with access issues.[238] Related to this was the perceived inability of the courts to oversee access that may require a continual supervisory role.[239] As the essential facilities decisions discussed in this chapter have shown, the major problem in such cases has been the making of an access order.[240] To take the US experience, for example, the courts have declined to mandate access except where non-discriminatory access could be ordered, or the whole matter could be delegated to a regulatory agency whose specific charter is to set prices and terms of dealing, or the parties could be ordered to continue dealing on the basis of prior dealing arrangements.[241]

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*Australian Banker* 128, 129. Cf Pengilley's contention that 'court precedent gives rise to business certainty': Pengilley (above n 14) 36.

235 S Corones, 'The Hilmer Report and its Potential Implementation' (1993) 21 *Australian Business Law Review* 451, 454.

236 W Pengilley, 'Access to Essential Facilities: A Unique Antitrust Experiment in Australia' (1998) 43 *Antitrust Bulletin* 519, 524-525. See, also, R Smith, 'Competition Law and Policy – Theoretical Underpinnings' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 16, 23.

237 Indeed, the Hilmer Committee's view that the courts face difficulties in determining the appropriate terms and conditions on which supply should be made available is shared by judges overseas. See, eg, *Mercury Energy Ltd v Transpower New Zealand Ltd* (1999) 8 TCLR 554, 583, where the New Zealand High Court cautioned that 'the setting of pricing principles would be a protracted matter of considerable complexity, ill-suited to the adversarial process'; and *Byars v Bluff City News Co* 609 F 2d 843 (1979), 864, where the Court of Appeals (Sixth Circuit) thought that 'in the ordinary case ... the difficulty of setting a price at which a monopolist might deal might well justify withholding relief altogether.'

238 As in W Pengilley, 'The Ten Most Disastrous Decisions made Relating to the Trade Practices Act' (2002) 30 *Australian Business Law Review* 331, 340, reference is often made to the discrepancy between the orders of the Federal Court in *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd* [1990] ATPR 41-007 and the Full Federal Court in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* [1991] ATPR 41-109. Both courts found that ASX Operations (ASXO), a monopoly supplier of electronic stock exchange information, had misused its market power by charging Pont Data too high a price for this information and thereby deterring Pont Data from engaging in competitive conduct in the downstream retail market. At first instance, Wilcox J ordered ASXO to supply the stock exchange information to Pont Data at marginal cost, which amounted to an annual fee of $100. On appeal, the Full Federal Court reverted to the fee charged during two years of prior dealings between the parties. This required Pont Data to pay ASXO $1.45 million per annum.

239 Pengilley (above n 236) 525. Areeda has stated bluntly that '[n]o court should impose a duty to deal that it cannot … adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency': Areeda (above n 29) 853.

240 Pengilley (above n 218) 28-29, relying on Wright (above n 73).

241 Refer to Pengilley's articles cited previously: see n 71 above. In Australia, two interlocutory cases in which the Federal Court has been prepared to order supply, and to fix prices on the basis of previous dealings, are *MacLean v Shell Chemicals (Australia) Pty Ltd* [1984] ATPR

Moreover, the *Clear* litigation in New Zealand demonstrates the 'total unsuitability'[242] of the courts and general competition law provisions in determining the terms of access where there is no prior dealing or agreement between the parties. The case serves as a warning against 'the danger of placing too heavy a reliance on courts, operating under general antitrust law, as industry regulators.'[243] Litigation is likely to be expensive and protracted; and, in the end, the court may be incapable of solving the basic problem which the parties have put to it, namely, what are appropriate terms and conditions of access?[244]

Unquestionably, courts are not 'price control agencies'.[245] They have neither the resources nor, as a general rule, personnel with the skills and experience to gather appropriate cost and other information in order to make pricing decisions.[246] Inevitably, there will be complaints by the access seeker or provider, respectively, that judicially mandated prices are so high as to amount to a continuation of the refusal to supply, or so low as to eliminate any profit on the supply.[247] Moreover, any requirement to supervise regularly the price and other terms

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40-462 and *O'Keeffe Nominees Pty Ltd v BP Australia Ltd* [1990] ATPR 41-057. Cf *Berlaz Pty Ltd v Fine Leather Care Products Ltd* [1991] ATPR 41-118, 52,768, where one of the reasons given by Pincus J for refusing an injunction was that 'the hearing produced no satisfactory explanation of how the Court should perform the task of setting the prices and other terms of trade, if an injunction were granted.'

242 Abadee (above n 141) 46. Where there is no previous dealing, Abadee regards the courts' task in determining access terms and conditions as 'insurmountable': ibid 36. See, also, W Pengilley, 'Comment on "Part IIIA: Unleashing a Monster"' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 161, 163.

243 Ahdar (above n 141) 116.

244 In *Telecom v Clear* [1995] 1 NZLR 385, 408-409, the Privy Council was moved to 'echo the sentiments of the courts below as to the sterility of these proceedings which, having been pursued right through the appeal procedure, still do not determine the terms on which Clear's local service is to be connected to Telecom's network.'

245 Pengilly (above n 218) 29.

246 Of course, the courts could be permitted to contract out access price setting to a specialist body: Pengilley (above n 242) 163. Alternatively, expert lay members could assist judges in their pricing decisions, as can happen in the New Zealand High Court; or the matter could simply be transferred to the Australian Competition Tribunal, a 'mixed' adjudicative body: Pengilley (above n 218) 56. However, none of these measures relieves the courts/tribunal of any necessary supervisory burden once access prices have been determined. More fundamentally, n 257 below highlights that reliance on the Australian Competition Tribunal (or, indeed, courts with a structure similar to the tribunal) is not without limitations either.

247 Pengilley (above n 218) 29.

on which parties deal is not a task the judiciary necessarily has the desire or expertise to undertake.[248]

In contrast, some commentators assert that while the task of determining the supply price may be difficult, this is no reason for the court to refrain from assessing a reasonable price.[249] Kench, for instance, contends that the courts are just as capable as the Australian Competition and Consumer Commission (ACCC) of working out terms and conditions of access on presentation of submissions and expert argument from each side.[250] Further, he maintains that the courts are capable of supervising access arrangements, in the same way as the Federal Court is presently empowered to enforce the ACCC's arbitration determinations under Part IIIA[251] and to prohibit 'obstructors' from hindering access to declared services,[252] including by way of interim injunctions and the making of restraining and mandatory orders.[253]

On balance, this author agrees that the determination of appropriate prices and terms and conditions are, for the most part, matters 'for negotiation or for administrative inquiry'.[254]

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248 Kewalram (above n 209) 202. Eg, in *United States v Paramount Pictures Inc* 334 US 131 (1948), 163, the US Supreme Court expressed the view that court orders should not be made if constant supervision is required because '[t]he judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective.' And in Australia, Justice French, writing extra-curially, has stated that the difficulties of any court-based formulation of implementation provisions in relation to refusals to supply illustrates that the courts are 'not equipped to consider issues of micro-management or implementation of judgments or determinations which they may make': R French, 'The Role of the Courts in the Development of Australian Trade Practices Law' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 98, 108. If, in addition to setting access prices, regulatory bodies must be asked to supervise those prices, this would seem to confirm the unsuitability of the courts for the task.

249 Eg, M Williams, 'Section 46 of the Trade Practices Act: Misuse of Market Power – A Modern Day Catch 22?' (1992) 22 *Queensland Law Society Journal* 377, 385; S Welsman, 'In Queensland Wire, the High Court has Provided an Elegant Backstop to "Use" of Market Power' (1995) 2 *Competition & Consumer Law Journal* 280, 293; and Kench (above n 65) 345.

250 Kench (above n 65) 345. Under Part IIIA of the *Trade Practices Act*, this task is assigned to the ACCC.

251 Section 44ZZD of the *Trade Practices Act*.

252 Sections 44ZZ and 44ZZE of the *Trade Practices Act*.

253 Kench (above n 65) 345.

254 French (above n 248) 108.

Where possible, it is preferable to excuse the courts from the question of assessing access charges, giving this task to a regulatory body (presently, the ACCC) instead.[255]

Delegation of terms of access to a regulatory body has certain advantages over the court system, not least of which is 'hands on' involvement with the access regime.[256] More particularly, the regulator will have business and technical expertise which is unavailable in the judiciary, or can employ such expertise when necessary, and will be capable of making decisions as to prices, rate of return and the like – the very matters with which the courts have struggled.[257]

## 3.6 CONCLUSION

The favoured method for establishing and administering access to essential facilities in the US, the EU and New Zealand involves reliance on general competition legislation (under each jurisdiction's monopolisation, abuse of dominant position or misuse of market power provision, respectively), supplemented by industry-specific access regimes. Insofar as the former is concerned, at least in the US and the EU, where denials of access are addressed under the rubric of the essential facilities doctrine, there is some sense of the courts attempting to engage directly with the particular complexities inherent in access disputes. In contrast, New Zealand's rejection of the essential facilities doctrine has left access issues to be determined

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255 P Prince, 'Queensland Wire and Efficiency – What Can Australia Learn From US and New Zealand Refusal to Deal Cases?' (1998) 5 *Competition & Consumer Law Journal* 237, 270.

256 Pengilley (above n 218) 58; and Abadee (above n 141) 46.

257 Ibid. However, the Australian Competition Tribunal is the ultimate arbiter of access disputes and may face the same difficulties as the courts: Pengilley (above n 36) 255; and Abadee (ibid). It has been pointed out, for instance, that '[a]lthough composed of a Federal Court Judge, an economist and a business person, and perhaps therefore more business competent than the courts of the land, the tribunal none the less has no staff, no investigatory powers and no capacity to involve itself in detailed regulation of industry on an ongoing basis. The tribunal hearings in all relevant respects are akin to court hearings and the tribunal is informed only of such matters as are put to it by parties appearing before it': Pengilley (ibid).

strictly, and thus far most unsatisfactorily, in accordance with the terms of s 36 of the *Commerce Act*.[258]

In Australia, where the essential facilities doctrine has not been embraced, doubts relating to the efficacy of s 46 of the *Trade Practices Act* as a stand-alone mechanism for providing access to essential facilities were crystallised in the Hilmer Report.[259] The reluctance and/or inability of the courts to engage in access pricing was the principal misgiving expressed by the Hilmer Committee about using the provision as the primary means of resolving access disputes,[260] although the problem of proving that a monopolist's conduct was engaged in for a purpose proscribed by s 46 was cited as a concern as well.[261] These perceived limitations were such that the 'Committee felt that an administrative solution was preferable to reliance upon s 46'.[262] Nevertheless, despite the introduction of Part IIIA of the *Trade Practices Act*, s 46 retains a residual role in facilitating access to essential infrastructure in Australia. The continuing relevance of s 46 is explained in Chapter 6, while the access regime itself is the topic of Chapters 4 and 5.

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258 As mentioned previously, this has led to New Zealand buttressing its general competitive conduct rules with industry-specific access regimes.

259 The Productivity Commission has observed that some of the 'mooted modifications' to s 46 to increase its effectiveness in an access context would make the provision less distinguishable from access regimes and price controls: *PC Report* (above n 8) 112. Pengilley's suggestion that the courts should delegate responsibility for setting access prices to specialist agencies is a case in point: Pengilley (above n 242) 163.

260 *Hilmer Report* (above n 1) 243-244.

261 Ibid.

262 Explanatory Memorandum, *National Competition Policy Draft Legislative Package* (AGPS, Canberra, 1994) [1.11]. Certainly, a 'specific and powerfully interventionist system of [access] rules' would seem to offer a superior alternative to a general prohibition on misuse of market power: Clough (above n 7) 333.

# CHAPTER 4

## PATHS TO ACCESS UNDER PART IIIA OF THE TRADE PRACTICES ACT

### 4.1 INTRODUCTION

The national access regime that was introduced on 6 November 1995[1] by no means reproduced the recommendations of the Hilmer Committee[2] in their entirety.[3] However, the Commonwealth Government embraced the vision of the Committee to a sufficient extent to enact, in Part IIIA of the *Trade Practices Act* 1974 (Cth),[4] a generic regime governing third party access to eligible infrastructure services.[5]

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1 Pursuant to the *Competition Policy Reform Act* 1995 (Cth).

2 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*') 266-268.

3 Cf A Abadee, 'The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?' (1997) 5 *Trade Practices Law Journal* 27, 40. Indeed, in *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,755, the Australian Competition Tribunal (ACT) went so far as to say: 'Any submission as to the proper construction of the provisions in Part IIIA of the Act, or as to the policy underlying 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.' However, having stated this, the ACT itself refers to the underlying 'policy' of Part IIIA on several occasions in that case (eg, ibid 40,782, 40,792, 40,793 and 40,797), but 'does not appear to indicate, other than by reference to the statutory language and, on one occasion, the Competition Principles Agreement and the second reading speech, where it has located that underlying policy': I Tonking, 'Access to Facilities – Reviewing Part IIIA' (2000) 492 *Australian Trade Practices News* 1, 4. The author acknowledges that Part IIIA does not constitute a wholesale implementation of the recommendations in the Hilmer Report, but endorses the point of Tonking's criticism – and the National Competition Council's recent comments to the same effect (see text accompanying n 27 below) – that the Hilmer Report obviously articulates the underlying *policy* of Part IIIA.

4 All section references in this chapter are to the *Trade Practices Act*, unless otherwise specified.

5 For a general overview of the national access regime, see Australian Competition and Consumer Commission, *Access Regime – A Guide to Part IIIA of the Trade Practices Act* (AGPS, Canberra, 1995); B Marshall and R Mulheron, 'Access to "Essential Facilities" under Part IIIA of the Trade Practices Act: Implementing the Legislative Regime' (1998) 10 *Bond Law Review* 99; and P Clarke and S Corones, *Competition Law and Policy: Cases and Materials* (Oxford University Press Australia, Melbourne, 1999) Chapter 16.

Under Part IIIA, there are three avenues by which a third party may gain access to the services of essential facilities in Australia:

- Requesting that the National Competition Council (NCC) recommend that the designated Minister[6] *declare* access to those services. 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).

- Seeking access through a State or Territory access regime, which, on recommendation by the NCC to the Commonwealth Minister, has been *certified as effective*. Once a State or Territory access regime is certified as effective, access to the 'covered' services is exclusively governed by that regime, and the declaration provisions of Part IIIA become inapplicable.[7]

- Seeking access under terms and conditions specified in a legally binding *undertaking* from the facility operator, which has been accepted by the ACCC. However, an access undertaking cannot be accepted in respect of a service that has been declared,[8] and, conversely, a service cannot be declared once it is the subject of an access undertaking,[9]

Unequal use of these mechanisms has been evident to date. In the period of Part IIIA's operation, the NCC has dealt with fewer than a dozen declaration applications, and the only undertaking accepted by the ACCC has been for the National Electricity Code. Instead, the

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6 The designated Minister for infrastructure owned by a State or Territory is the Premier or Chief Minister; and for all other infrastructure, the relevant Commonwealth Minister (usually the Commonwealth Treasurer): ss 44B and 44D.

7 Sections 44G(2)(e) and 44H(4)(e).

8 Section 44ZZB.

9 Sections 44G(1) and 44H(3).

facilitation of access has been achieved mainly by the certification of State and Territory industry-specific regimes.[10]

However, following its recent inquiry into the national access regime, the Productivity Commission concluded that the declaration provisions of Part IIIA have had the most 'significant impact' on access reform, notwithstanding the limited amount of declaration activity to date.[11] 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.[12] There, the declaration process has acted as a 'discipline'[13] or 'driver'[14] – clearly indicating the 'default regime'[15] that will apply if one of the other paths to access is not 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.[16] And even where applications for declaration have failed, participation in the declaration process has facilitated private negotiations by the parties involved, with access agreements 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.[17]

Against that background, this chapter begins by systematically reviewing the process of declaration under Part IIIA.[18] Combined with a general overview of the relevant procedures, part 4.2 of the chapter provides a 'snapshot' of the case law arising under the declaration

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10 Industry-specific regimes have also proliferated outside the ambit of Part IIIA, such as those relating to airport services and telecommunications. Refer to Table 2.3 in Chapter 2.

11 Productivity Commission, *Review of the National Access Regime* (AusInfo, Canberra, report dated 28 September 2001, released 17 September 2002) (hereafter, '*PC Report*') 14.

12 Ibid.

13 Ibid, citing a submission to the inquiry by the NCC (sub 43, January 2001).

14 Productivity Commission, *The National Access Regime* (Issues Paper, October 2000) (hereafter, '*PC Issues Paper*') 9.

15 *PC Report* (above n 11) 14, citing a submission to the inquiry by the Queensland Mining Council (sub 27, December 2000).

16 *PC Report* (ibid) 159. See, further, L Evans, 'Access Under the Trade Practices Act' (2000) 8 *Competition & Consumer Law Journal* 45.

17 *PC Report* (ibid) 28.

18 This review draws on aspects of B Marshall and R Mulheron, 'Declarations of Essential Services under Part IIIA of the Trade Practices Act: A "Discipline" on Access Reform' (2003)

provisions, so as to provide context for subsequent analysis of those decisions. This is followed, in parts 4.3-4.5, by a detailed consideration of the procedures for achieving declaration of an infrastructure service, including the threshold matters relevant to determining whether the declaration process may be invoked, the substantive criteria that must be satisfied in order for a service to be declared, and the roles assigned to the NCC and the designated Minister. Part 4.6 examines the negotiate-arbitrate framework established by Part IIIA for setting terms and conditions of access to a declared service.

Given the importance attributed by the Productivity Commission to the role of declarations within the access regime, there is a deliberate emphasis in this chapter on the declaration route, as opposed to the other paths, to access. Nevertheless, for completeness, the certification process is addressed in part 4.7, and access undertakings are covered in part 4.8. Overall conclusions are then presented in part 4.9.

The analysis in this chapter is informed by existing case law, pertinent academic commentary and the guiding precepts of the NCC,[19] all of which have given 'flesh' to the complex regime in Part IIIA. Particular regard is also had to the recent pronouncements of the Productivity Commission. The chapter assesses the major changes to Part IIIA that were foreshadowed by the Commission,[20] the relatively light-handed recommendations that ensued in its final report,[21] and the Commonwealth Government's reaction to the latter.[22]

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31 *University of Western Australia Law Review* 226.

[19] National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act* (NCC, Melbourne, Parts A and B released December 2002, Part C released February 2003). Part A of the Guide examines the rationale for access regulation and provides an overview of the different paths to access; while Parts B and C provide more detailed information on those routes, namely declaration and certification, that involve the NCC directly. The current Guide supersedes the NCC's *Draft Guide to Part IIIA*, released in 1996.

[20] See Productivity Commission, *Review of the National Access Regime* (Position Paper, 29 March 2001) (hereafter, '*PC Position Paper*') 257-258 for a summary of the proposals countenanced by the Productivity Commission. These are also listed in Table 7.1 in Chapter 7.

[21] See *PC Report* (above n 11) 426-427 for a summary of the final recommendations made by the Productivity Commission. Refer, also, to Table 7.1 in Chapter 7.

[22] Commonwealth Treasury, 'Government Response to Productivity Commission Report on the Review of the National Access Regime', Canberra, 20 February 2004 (hereafter, '*Final Response*').

## 4.2 A 'SNAPSHOT' OF THE DECLARATION PROCESS

Obtaining access to services under Part IIIA's declaration route involves a two-stage process.[23] The first stage requires that a decision be made to declare, or not to declare, the service to which access is being sought.[24] If the service is declared, this triggers the second stage of the process, which requires that terms and conditions of access be set. The procedures to be followed in having a service declared and then determining the terms and conditions of access to that service are summarised in the form of a flowchart in Figure 4.1.

### A *Stage one*

It is apparent from Figure 4.1 that stage one of the declaration process may involve up to five phases, with the possible participation of four regulatory or judicial bodies. The five phases of stage one are explained briefly below and the declaration decisions to date, referenced according to each of these phases, are set out in Table 4.1.[25]

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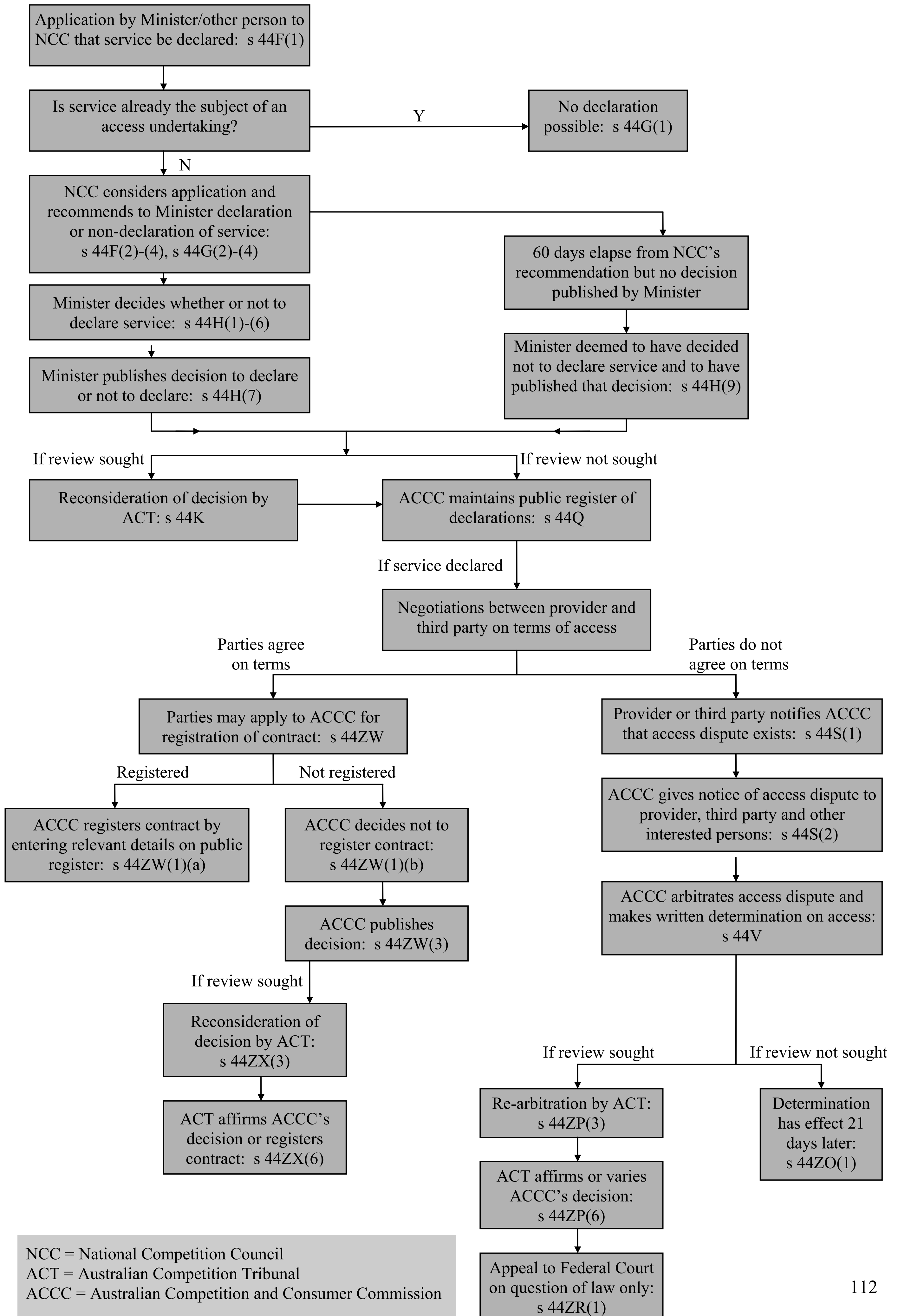
23 Confirmed in *Re Australian Union of Students* [1997] ATPR (ACT) 41-573, 43,961; and *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,755.

24 See Part IIIA, Division 2, Subdivisions A and B (ss 44F-44L) for the provisions governing the declaration of a service.

25 Table 4.1 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); applications currently before the NCC; or draft recommendations. Details of applications for declaration are available on the NCC's website at www.ncc.gov.au.

**FIGURE 4.1: From declaration to terms of access**



First, an applicant (whether the designated Minister or another person) must ask the NCC to recommend under s 44G that a particular service be declared.[26] The threshold requirement that a non-Ministerial applicant must act 'in good faith' is discussed in part 4.3 of this chapter.

Second, the NCC must determine the application by reference to the six criteria contained in s 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 Australian Competition Tribunal (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 in the Hilmer Report;[27] and economic approaches to issues that have been raised in previous applications considered by the NCC.[28] Although there is no legislative requirement that the NCC take into account submissions from interested persons, the experience has been that it is extremely willing to do this as well.[29] The NCC must report its recommendation as to whether or not the service should be declared to the designated Minister.

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26 Section 44F(1).

27 Cf the ACT's view of the relevance of the Hilmer Report, discussed in n 3 above.

28 National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act – Part B Declaration* (NCC, Melbourne, December 2002) (hereafter, '*NCC Declaration Guide*') [1.13]. This document sets out 'the Council's current thinking on the declaration criteria': ibid [1.14].

29 This accords with the Hilmer Committee'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': *Hilmer Report* (above n 2) 252.

Third, once the designated Minister has received a declaration recommendation, he/she must declare the service or decide not to declare it.[30] Declaration of a service depends on the Minister being satisfied of all the criteria specified in s 44H(4), which mirror the six matters considered by the NCC under s 44G(2). The Minister has 60 days to publish his/her declaration or decision not to declare the service,[31] after which the Minister is deemed to have decided not to declare the service.[32]

Inconsistent conclusions of the NCC and the designated Minister have been a minor feature of the declaration process to date. 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 a NCC recommendation to do so.[33] 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.[34] The whole issue of Ministerial involvement in the access regime is considered later in part 4.5 of this chapter.

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30 Section 44H(1).

31 Sections 44H(7) and 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.

32 Section 44H(9).

33 Similar observations were made in Tonking (above n 3) 3.

34 While 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 Pty Ltd* [1997] ATPR (NCC) 70-003.

Fourth, 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.[35] The review by the ACT is a reconsideration of the matter, and for the purposes of the review, the ACT has the same powers as the Minister.[36] If the Minister declared the service, the ACT may affirm, vary or set aside the declaration;[37] 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.[38]

Fifth, the Federal Court may become involved in the declaration process under Part IIIA, and has done so on two occasions thus far,[39] 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.[40]

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35 Sections 44K(1) and 44K(2). The application must be lodged within 21 days after publication of the Minister's decision: s 44K(3).

36 Sections 44K(4) and 44K(5).

37 Section 44K(7).

38 Section 44K(8). There are no grounds for disputing the Productivity Commission's view that the current rights of appeal attaching to Part IIIA declaration decisions 'should be retained': *PC Report* (above n 11) Finding 15.1.

39 *Rail Access Corp v New South Wales Minerals Council Ltd* (1998) 87 FCR 517; and *Hamersley Iron Pty Ltd v NCC* [1999] ATPR 41-705. A third case, initiated by Western Power Corporation, settled out of court.

40 As discussed in part 3.5 of Chapter 3, the participation of courts in access matters was viewed by the Hilmer Committee as highly problematical – leading to the design of Part IIIA as an administrative and regulatory regime. The extremely limited role played by the courts is one of the regime's most notable features.

**TABLE 4.1: 'Snapshot' of Part IIIA declaration decisions to date**

| *Case* | *Phase 1: Applicant* | *Phase 2: Did NCC recommend declaration?* | *Phase 3: What did designated Minister decide?* | *Phase 4: Was ACT asked to review?* | *Phase 5: Was any application to Federal Court filed?* |
|---|---|---|---|---|---|
| Austudy payroll deduction application | Australian Union of Students | No[41] | Followed recommendation; decided not to declare (Cth Treasurer) | Yes[42] – affirmed Minister's decision not to declare | No |
| Sydney International Airport (SIA) freight handling application | Australian Cargo Terminal Operations Pty Ltd (two applications – one for Sydney, one for Melbourne) | Yes[43] | Followed recommendation; decided to declare (Cth Treasurer) | Yes[44] – affirmed Minister's decision to declare (Melbourne declared on interim basis) | No |
| Brisbane-Cairns freight services application | Carpentaria Transport Pty Ltd | No[45] | Followed recommendation; decided not to declare (Qld Premier) | Yes, but withdrawn | No |
| Sydney-Broken Hill rail application | Specialized Container Transport | Yes[46] | Did nothing; therefore deemed not to declare (NSW Premier) | Yes, but withdrawn when access to track was negotiated | No |
| Kalgoorlie-Perth rail and freight services applications | Specialized Container Transport | Yes (but rail line only, not freight support services)[47] | Did not follow recommendation; decided not to declare any service (WA Premier) | Yes, but withdrawn when access to track was negotiated | No |
| Hunter Valley rail application | NSW Minerals Council Ltd | Yes[48] | 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,[49] for declaratory relief |

41 *Australian Union of Students* (unreported, NCC, June 1996).
42 *Re Australian Union of Students* [1997] ATPR (ACT) 41-573.
43 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000.
44 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754.
45 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003.
46 *Specialized Container Transport* [1997] ATPR (NCC) 70-004.
47 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006.
48 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005.
49 *Rail Access Corp v New South Wales Minerals Council Ltd* (1998) 87 FCR 517.

**TABLE 4.1 (cont)**

| *Case* | *Phase 1: Applicant* | *Phase 2: Did NCC recommend declaration?* | *Phase 3: What did designated Minister decide?* | *Phase 4: Was ACT asked to review?* | *Phase 5: Was any application to Federal Court filed?* |
|---|---|---|---|---|---|
| Hamersley rail application | Robe River Iron Associates | Ceased assessment after Federal Court decision | – | – | Yes,[50] for declaratory relief |
| Victorian rail application | Freight Australia | No[51] | Followed recommendation; decided not to declare (Cth Treasurer) | Yes[52] | No |
| Wirrida-Tarcoola rail application | AuIron Energy Ltd | Yes[53] | Followed recommendation; decided to declare (Cth Treasurer) | Yes,[54] but parties declined to place any material before ACT, which then ordered that Minister's declaration be set aside | No |
| Sydney Airport airside services application | Virgin Blue Airlines Pty Ltd | No[55] | Followed recommendation; decided not to declare (Cth Treasurer) | – | – |

### B *Stage two*

As mentioned previously, declaration of a service does not provide the access seeker with the right to access, but merely the right to negotiate an access arrangement. Thus begins the second stage of the process, which is also represented in Figure 4.1. If negotiation cannot

50 *Hamersley Iron Pty Ltd v NCC* [1999] ATPR 41-705.

51 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001).

52 A series of directions for the hearing of the matter were provided in *Freight Victoria Ltd* [2002] ATPR (ACT) 41-884, but, to date, no decision has been released.

53 *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002).

54 *Asia Pacific Transport Pty Ltd* [2003] ATPR (ACT) 41-920.

55 *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003). This recommendation was released on 29 January 2004, the date that the designated Minister's decision to accept it was announced.

result in agreement between the access seeker and the service provider, then the ACCC must resolve the dispute by arbitration. Consideration of Part IIIA's negotiate-arbitrate framework for setting terms and conditions of access, and the ACCC's role therein, is reserved until part 4.6 of this chapter.

## 4.3 THRESHOLD REQUIREMENTS FOR AN ACCESS DECLARATION

### A *Service*

Although the Hilmer Committee contemplated a regime for promoting access to essential facilities,[56] Part IIIA is more specifically concerned with ensuring access to the *services* provided by such facilities.[57]

This refinement in the legislation[58] 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.[59] 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.[60]

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56 *Hilmer Report* (above n 2) 239.

57 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': *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 10; and reiterated in *NCC Declaration Guide* (above n 28) [1.7].

58 The cause, according to Aliprandi, of 'awkward' drafting in Part IIIA: S Aliprandi, 'Hamersley Iron Pty Ltd v National Competition Council' (2000) 8 *Trade Practices Law Journal* 40, 45.

59 Hence, the Productivity Commission's view that the current emphasis in Part IIIA on the *services* provided by essential infrastructure facilities is 'appropriate': *PC Report* (above n 11) Finding 6.4.

60 Explanatory Memorandum, *National Competition Policy Draft Legislative Package* (AGPS, Canberra, 1994) [1.16]. See, also, the explanation in *NCC Declaration Guide* (above n 28) [3.11]-[3.14].

As a threshold matter, therefore, the NCC must consider whether the service in respect of which the declaration recommendation is sought meets the statutory definition of 'service' in s 44B.[61] According to this definition:

> 'service' means a service provided by means of a facility and includes:
> (a) the use of an infrastructure facility such as a road or railway line;
> (b) handling or transporting things such as goods or people;
> (c) a communications service or similar service;
> but does not include:
> (d) the supply of goods; or
> (e) the use of intellectual property; or
> (f) the use of a production process;
> except to the extent that it is an integral but subsidiary part of the service.

This definition specifically excludes three matters – the supply of goods,[62] the use of intellectual property,[63] and the use of a production process[64] – so as to ensure that manufacturing plants are not caught up in the access regime, that patent protection is not undermined, and that access does not artificially and inefficiently break up an integrated production chain.[65] The definition also provides an exception to the exclusion in the case where any of the three excluded matters is 'an integral but subsidiary part of the service'.[66]

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61 Section 44B is the definitions section of Part IIIA.

62 In any event, as discussed in Chapter 6, s 46 represents a potential source of redress in cases involving a refusal to supply goods.

63 Various arguments as to why Part IIIA should not apply to intellectual property are summarised in A Hood and S Corones, 'Third Party Access to Australian Infrastructure', Paper presented at *Access Symposium*, Business Law Section of the Law Council of Australia, Melbourne, 28 July 2000, 35-37. Again, however, 'rightsholders clearly need to be wary of the implications [under s 46] of any refusal to license their intellectual property, particularly in situations involving third party competitors': P Brudenall, 'The Collective Administration of Copyright and Competition Policy: Tension in the Digital Age' (1997) 8 *Australian Intellectual Property Journal* 121, 131. See the discussion of the *Magill* case in Chapter 6.

64 The production process exception appears to have followed the Hilmer Report, which identified the need to exempt 'production processes', so as not to 'deprive investors of the fruit of risk-taking investment': *Hilmer Report* (above n 2) 251, including fn 42.

65 *PC Position Paper* (above n 20) 115.

66 The use of the word 'subsidiary' in this exception has been queried: Hood and Corones (above n 63) 61-62. However, the author considers that the purpose of the term is to preserve the potential application of s 46 as the primary means of redress in disputes involving the matters excluded from Part IIIA's definition of 'service' (where they are neither integral nor subsidiary to the particular service).

As expected, applications for declaration have been challenged by service providers on the basis that the service the subject of the application is not a 'service' within the meaning of s 44B.[67] Such a challenge succeeded in *Hamersley Iron Pty Ltd v NCC*.[68] There, Robe River Iron Associates, an unincorporated joint venture, applied to the NCC to have the bulk iron ore rail track transportation service provided by Hamersley's privately owned, purpose-built railway line (linking together five of its mines in the Pilbara region of Western Australia and a port at Dampier) recommended for declaration under Part IIIA. Robe planned to develop a new mine in the vicinity of one of Hamersley's mines and hoped to gain access to the pre-existing railway line, instead of building a new railway line. The application excluded Hamersley's locomotives, rolling stock and operational personnel, as Robe's intention was to provide these itself. Hamersley opposed the declaration on the basis, inter alia, that the rail track service was excluded from the operation of Part IIIA because it involved the use of a production process, and so fell within the exclusion in paragraph (f) of the s 44B definition of 'service'. It sought a declaration from the Federal Court as to whether this was correct.

In agreeing with Hamersley, Kenny J defined 'production process' as 'a series of operations by which a marketable commodity is created or manufactured'.[69] Hamersley had described its operations as highly integrated, explaining that it used a 'recipe' (in effect, a blend of different grades of ore in varying quantities) to mix ore from five of its six mines to prepare its export product, and that the railway line was an integral part of this process, as deliveries of ore from different mines were scheduled at different times to fit in with the requirements of the

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67 Such a challenge was unsuccessful in *Rail Access Corp v NSW Minerals Council Ltd* (1998) 87 FCR 517, discussed in detail in R Baxt, 'The Access Regime in the Courts – Ensuring the Access Regime Works as Widely as Potentially Possible!' (1998) 26 *Australian Business Law Review* 472. Another challenge, mounted by Western Power Corporation in respect of an application for declaration lodged by three parties on 9 January 2001 (see n 25 and n 39 above), was settled by the parties.

68 [1999] ATPR 41-705. For case note discussion, see A Hood, 'When is a Railway Part of a Production Process? Hamersley Iron Pty Ltd v National Competition Council' (1999) 27 *Australian Business Law Review* 421; and M Legg, 'Hamersley Iron Pty Ltd v National Competition Council' (1999) 15 *Australian & New Zealand Trade Practices Law Bulletin* 50.

69 [1999] ATPR 41-705, 43,033.

'recipe'.[70] Thus it was open to Kenny J to find that the railway line was not used simply to collect the ore from the mines and deliver it to the port for export in its original state, but rather that 'Hamersley's use of the railway line is an operation upon which other operations necessarily depend for the creation of its export product.'[71] Her Honour therefore concluded that 'the use of the railway is integral and essential to the highly integrated series of operations that constitute Hamersley's production process.'[72] Appeals from the decision of Kenny J were later forever stayed.[73]

The decision in *Hamersley Iron* has been criticised on several grounds, including that:

- Kenny J ought to have characterised the service to which access was being sought in terms of the use to which an *access seeker* would put the infrastructure, rather than the use to which the *service provider* currently put the infrastructure;[74]
- the decision may encourage firms to integrate vertically in an inefficient way to avoid having their services declared under Part IIIA, by artificially arranging their operations to incorporate the use of the facility into the production process;[75] and
- the decision was correct, but on a different basis – that is, Robe had stated that if access to Hamersley's railway line was not forthcoming, Robe would have to commence construction of its own, which suggests that Hamersley's rail infrastructure was not

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70 Ibid 43,031-43,032.
71 Ibid 43,036.
72 Ibid 43,038.
73 *Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd* [2000] ATPR 41-733. The NCC and Hope Downs Management Services Pty Ltd, an interested party in the proceedings, lodged appeals from Kenny J's finding that Robe was not seeking access to a 'service'. These appeals were due to be heard by the Full Federal Court, but the NCC was notified by Robe on the morning of the hearing of the appeals that it was discontinuing its declaration application, which rendered the appeal moot.
74 Aliprandi (above n 57) 44.
75 A Cull, 'Hamersley Iron Pty Ltd v National Competition Council' (1999) 18 *Australian Mining and Petroleum Law Journal* 169, 173; and S King and R Maddock, 'Issues in Access' in *1999 Industry Economics Conference: Regulation, Competition and Industry Structure* (Productivity Commission and Monash University, Melbourne, 12-13 July 1999) 19, 21-22.

truly an essential facility, in the sense that access to it was not essential for competition.[76]

The author's view is that the decision will remain confined to its own particular facts,[77] since it is difficult to envisage how publicly owned or privatised railways which are used by many different firms to transport goods could be part of a production process.[78]

By ensuring that the access regime is not too broad in its application, the current exclusions from the definition of 'service' seek to protect the legitimate interests of owners of essential infrastructure facilities and preserve incentives for investment in such facilities. Thus, the Productivity Commission has recommended, and the Commonwealth Government agrees, that these exclusions should be retained.[79] However, in light of the decision in *Hamersley Iron*, judicial interpretation of the production process exclusion is expected to be monitored by the NCC.[80]

### B *Facility*

Another key requirement of the definition of 'service' reproduced previously is that the service must be provided by means of a 'facility'.

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[76] N Calleja, 'Access to Essential Services – Have the Hilmer Reforms Been Successfully Implemented?' (2000) 8 *Trade Practices Law Journal* 206, 216.

[77] Cf the application to declare the rail freight services in *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,270, in which the NCC considered that it was 'highly doubtful that the facility could be considered as a production facility … as the facilities generate a service, not a product.'

[78] This view is also espoused in Hood and Corones (above n 63) 59; and *NCC Declaration Guide* (above n 28) [3.30] ('the Council considers that only in a very few instances would the facts support a conclusion that a service provided by means of an infrastructure facility (such as a railway) is a part of a facility owner's production process').

[79] *PC Report* (above n 11) Recommendation 6.4; *Final Response* (above n 22) 6.

[80] Ibid.

Should the NCC require assistance with the interpretation of this term, which is not defined in Part IIIA,[81] the ACT has suggested that 'the dictionary definitions may be of some help'.[82] 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".'[83] Fortunately, further clarification has emerged, notwithstanding the ACT's unhelpful inclination to disregard this threshold matter when it has appeared that any of the substantive declaration criteria (discussed in part 4.4 below) would not be satisfied.[84]

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).[85]

Second, the definition of the relevant facility is extremely important in cases where access is sought to a service which relies on the use of *several* assets or components. In these circumstances, the definition 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. The ACT has noted that a key factor in defining a facility is the 'minimum bundle of assets required to provide the relevant services subject to declaration'.[86] The access seeker will usually (but not always)[87] seek a

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81 This is perhaps surprising, given that the s 44B definition of 'service' refers to roads and railway lines by way of examples of infrastructure facilities. The absence of a definition of 'facility' is also noted in *NCC Declaration Guide* (above n 28) [3.33].

82 *Re Australian Union of Students* [1997] ATPR (ACT) 41-573, 43,957.

83 Ibid.

84 Ibid 43,959 ('the Tribunal does not find it necessary to decide these questions' of whether the Austudy payroll deduction service is a 'service', or whether the DEETYA computer database is a 'facility'). Failure to clarify these points was the subject of criticism in K O'Connell and S Aliprandi, 'Re: Application for Review of the Decision by the Commonwealth Treasurer Published on 14 August 1996 not to Declare "Austudy Payroll Deduction Service" under Part IIIA of the Trade Practices Act' (1997) 5 *Trade Practices Law Journal* 252.

85 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,427.

86 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,791.

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.[88] On the other hand, as the NCC pointed out in the *Carpentaria* application, by seeking declaration of a service which relies on the use of many facilities, the applicant makes it more difficult for the cluster of facilities to meet the declaration criteria in Part IIIA.[89] This is because s 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. As the NCC has explained, the 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.[90]

This issue arose squarely for consideration in the *Sydney International Airport* (*SIA*) review.[91] The case related to services provided at Sydney International Airport (SIA) for use by third parties in the loading and unloading of international aircraft. The access seeker (seeking declaration of those freight handling services at SIA) successfully convinced the ACT that the relevant facility should be defined as widely as possible.[92] The alternative definitions contemplated for 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; or the airport as a whole. The ACT held that the relevant facility was 'the minimum set of physical assets necessary for international aircraft to land at SIA, unload and load passengers and freight and depart in a safe and commercially sustainable

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87 Eg, 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: *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 10.

88 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,791.

89 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,272.

90 Ibid.

91 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754.

manner, that is, all the basic air-side infrastructure, such as the runways, taxiways and terminals and the related landside facilities integral to the effective functioning of airside services. This is, in practical terms, the whole of the airport.'[93]

Analogous reasoning was argued, and applied, in the recent *Virgin Blue* application.[94] In seeking declaration of certain airside services at Sydney Airport (ie, the domestic airport)[95] – specifically, the use of runways, taxiways, parking aprons and other associated facilities necessary to allow aircraft carrying domestic passengers to (i) take off and land using the runways at Sydney Airport, and (ii) move between the runways and the passenger terminals at Sydney Airport[96] – the access seeker, Virgin Blue, relied on the *SIA* review as authority for the proposition that the relevant facility for the provision of these services was the whole of Sydney Airport.[97] In dealing with this issue, the NCC was careful to point out that since the earlier decision related to international air freight services, whereas the current application concerned domestic passenger operations, it did not necessarily follow that the 'minimum bundle of assets' required in each case would be the same.[98] Nevertheless, consistent with the ACT's approach in the *SIA* review, the NCC concluded that 'a multitude of highly interconnected assets'[99] were required to provide the airside services in the instant case, and that, 'as such, the relevant facility is the whole of Sydney Airport'.[100]

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92 Ibid 40,773.

93 Ibid. For further comment, see A Hood, 'Access to Bottleneck Facilities: The Australian Competition Tribunal's Sydney International Airport Decision' (2000) 8 *Trade Practices Law Journal* 113.

94 *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003).

95 Cf the adjacent Sydney International Airport (SIA).

96 *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 3.

97 Ibid 23.

98 Ibid.

99 Ibid 25.

Third, Part IIIA applies whether the facility is owned privately, or by the Commonwealth or State/Territory governments or their instrumentalities.[101] However, it is irrelevant whether the facility is controlled by a single entity or a group of firms. As the OECD has noted, the Part IIIA regime applies the same standards to single versus jointly owned facilities.[102]

Fourth, there is no requirement under Part IIIA that the facility be vertically integrated.[103] The significance of vertical integration was explicitly addressed in the *SIA* review. There, the facility owner, Sydney Airports Corporation Limited (SACL), was not vertically integrated. While it controlled SIA, it did not itself provide freight handling services for international aircraft. Such services were provided by other organisations which were given access to the airport to carry out these activities. SACL argued that, since it was not a vertically integrated monopolist, it could not leverage its power into the market for freight handling services, and it was not appropriate that Part IIIA apply to its facility.[104] 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 vertically integrated organisations.[105]

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100 Ibid.

101 Section 44E provides that Part IIIA binds the Crown in right of the Commonwealth, States and Territories. This accommodates the Hilmer Committee's observation that '[m]any of the facilities potentially subject to an access regime are currently owned by Commonwealth, State and Territory Governments': *Hilmer Report* (above n 2) 260. So-called 'special' concerns of the States and Territories about the application of a third party access regime to their assets were considered, but roundly dismissed, by the Committee: ibid 262-264.

102 Organisation for Economic Co-operation and Development, 'The Essential Facilities Concept', OCDE/GD(96)113, Roundtables on Competition Policy, Paris, 1996, 41.

103 Nor should there be, given the discussion of this issue in Chapter 2, part 2.2(B).

104 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,755.

### C Good faith

In accordance with s 44F(1), a written application to the NCC seeking a recommendation that a service be declared may be made by the designated Minister or any other person.[106] To date, as Table 4.1 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 s 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,[107] before expending its resources on the relevant inquiries. In only two applications thus far have the bona fides of the access seeker been challenged, both without success.

In *Australian Union of Students*,[108] the facility owner complained that the applicant, the Australian Union of Students, had misrepresented that it was a trade union and that it was incorporated. However, the NCC was satisfied that the applicant's representative had made the application in a genuine attempt to gain access to the service defined as the Austudy payroll deduction service.[109] This victory was shortlived – as discussed elsewhere in this chapter, the application for a declaration of access to the DEETYA computer database failed on numerous bases.

In the *Virgin Blue* application, the NCC received several submissions from interested parties claiming that Virgin Blue's use of the declaration process was intended merely to gain

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105 Ibid 40,756.

106 The Hilmer Committee envisaged that proceedings would be initiated only by 'government – Commonwealth, State or Territory': *Hilmer Report* (above n 2) 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 *University of New South Wales Law Journal* 1, 38.

107 *Specialized Container Transport* [1997] ATPR (NCC) 70-004, 70,340.

108 Unreported, NCC, June 1996.

the airline a commercial advantage in its negotiations with SACL (provider of the relevant airside services).[110] However, the NCC was not persuaded that this meant that Virgin Blue's application was not made in good faith.[111] As the NCC explained, most, if not all, applicants for declaration will be seeking a commercial advantage from making such applications.[112]

### 4.4 CRITERIA FOR DECLARATION

Assuming that the relevant 'service' is provided by means of a 'facility', and that the application is made in good faith, then ss 44G(2) and 44H(4) come into play. Respectively, these provisions stipulate that the NCC cannot recommend declaration of a service, and the Minister cannot declare a service, unless each of the following criteria is satisfied:[113]

> (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.[114]

What follows in this part of the chapter is a detailed analysis of the six declaration criteria set out above, starting with the fundamental requirements of 'natural monopoly' and

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109 Ibid 1; confirmed on review in *Re Australian Union of Students* [1997] ATPR (ACT) 41-573.

110 *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 127.

111 Ibid 128.

112 Ibid.

113 As King and Maddock have observed, 'The conditions for declaration established under s 44G and s 44H resemble those used by US courts when invoking the essential facilities doctrine': S King and R Maddock, *Unlocking the Infrastructure: The Reform of Public Utilities in Australia* (Allen & Unwin, Sydney, 1996) 71.

114 As s 44H(4) requires the Minister to be satisfied of exactly the same matters when deciding whether to declare a service, all references to a particular criterion in s 44G(2) are hereafter

'essentiality', set out in criteria (b) and (a), respectively. Drawing on Chapter 2's exposition of these core concepts, it makes logical sense under s 44G(2) to begin by establishing whether the provision of the service is a natural monopoly, and, following this, whether access to the service is essential. Hence, it is preferable to consider criterion (b) before criterion (a).[115]

Clearly, there is a need for pragmatism and common sense in evaluating the threshold of intervention set by s 44G(2). Drafting workable declaration criteria is a difficult task. As with other areas of competition law, the challenge is to convey complex economic notions in a legally operational way.

Of course, as O'Bryan has observed in connection with the access regime, '[T]he economic answer can … be welded to the legal framework'.[116] Thus, the interpretation of the declaration criteria is critical – and, in the discussion below, much attention focuses on the NCC's declaration recommendations, and the ACT's recent decisions in the *SIA* review and *Duke Eastern Gas Pipelines Pty Ltd*.[117] Although the latter case concerned the National Third Party Access Code for Natural Gas Pipeline Systems (the National Gas Code, or NGC), the four coverage criteria operative under the NGC effectively replicate declaration criteria (a), (b), (d) and (f) in Part IIIA.[118]

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taken to include references to the same criterion in s 44H(4).

115 *NCC Declaration Guide* (above n 28) [1.15].

116 M O'Bryan, 'Access Pricing: Law Before Economics?' (1996) 4 *Competition & Consumer Law Journal* 85, 88. In so doing, the views of experts in 'that field of economics which is concerned with competition policy, or more particularly with the regulation of essential infrastructure' will be both relevant and useful: *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] ATPR 41-886, 45,162 (Parker J).

117 [2001] ATPR (ACT) 41-821.

118 The background to the *Duke* case is as follows. In January 2000, AGL Energy Sales & Marketing Ltd applied to the NCC requesting that the Eastern Gas Pipeline (EGP), which transports natural gas from Longford, Victoria, to Horsley Park, near Sydney, be covered under the National Gas Code (the NGC). The NGC provides that an application for coverage must be assessed against the coverage criteria set out in s 1.9(a)-(d) of the Code. These criteria are: (a) that access (or increased access) to services provided by means of the pipeline would promote competition in at least one market (whether or not in Australia), other than the market for the services provided by means of the pipeline; (b) that it would be uneconomic for anyone to develop another pipeline to provide the services provided by means of the pipeline; (c) that access (or increased access) to the services provided by means of the pipeline can be provided without undue risk to human health or safety; and (d) that access (or increased access) to the

## A Uneconomical to develop another facility

Section 44G(2)(b) specifies that, in order for declaration of a service to occur, it must be uneconomical for anyone to develop another facility to provide the service. This criterion recalls the Hilmer Committee's endorsement[119] of *MCI Communications Corp v American Telephone & Telegraph Co*,[120] where 'a competitor's inability practically or reasonably to duplicate the essential facility'[121] was identified as a crucial element of the essential facilities doctrine.[122]

### (1) *A test of natural monopoly*

#### (a) *'uneconomical'*

In the *SIA* review, the ACT drew attention to the specific language of criterion (b), as follows:

> It is important to understand, in the terms of [criterion (b)], what it is that must be uneconomical for anyone to develop. It is not simply another 'facility' but rather 'another facility to provide the service'.[123]

As explained in Chapter 2, it will be uneconomical to develop 'another facility to provide the service', such that criterion (b) is satisfied, where the provision of the service is a natural

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services provided by means of the pipeline would not be contrary to the public interest. The NCC considered that the s 1.9 criteria were satisfied and recommended that the EGP be covered. The Minister followed the NCC's recommendation and decided to cover the EGP. (See *Eastern Gas Pipeline* [2001] ATPR (NCC) 70-007 for the NCC's recommendation and the Minister's decision.) In October 2000, Duke, the owner of the EGP, applied to the ACT for a review of the Minister's decision. The ACT held that the Minister's decision should be set aside as it was not satisfied that criterion (a) of s 1.9 of the NGC had been met.

119 *Hilmer Report* (above n 2) 244.

120 708 F 2d 1081 (1983).

121 Ibid 1132.

122 Refer to the discussion of the US doctrine in Chapter 3, part 3.2.

123 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,791.

monopoly.[124] In these circumstances, the facility that provides the service can reasonably be described as a natural monopoly facility.[125]

Commentators do not dispute that criterion (b) is intended to limit declaration to services provided by a facility exhibiting natural monopoly characteristics.[126] Instead, their concern is that the criterion targets natural monopolies imprecisely. Clough, for instance, points out that s 44G(2)(b) 'alters the definition of essential facilities from "facilities which would be uneconomic to duplicate" to "whether it would be uneconomical for anyone to develop another facility to provide the service"'[127] – an alteration which King and Maddock characterise as a shift from the intention to provide access to natural monopolies towards providing access to any or all facilities.[128]

Past statements by the regulatory bodies that oversee the access regime have added to the sense of concern. For example: the NCC once expressed the view that the 'uneconomical to duplicate' criterion in s 44G(2)(b) is expected to 'limit the scope of access declarations to infrastructure with entrenched monopoly power, and *usually* infrastructure exhibiting natural monopoly characteristics';[129] the ACT has stated that Part IIIA is intended to 'apply *largely*, or perhaps only, to facilities with "monopoly" characteristics such as infrastructure networks of which examples are gas transmission pipelines, electricity transmission grids, railways and telecommunications networks';[130] and the ACCC has said that it may be 'necessary to *go*

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124 *NCC Declaration Guide* (above n 28) [2.7].

125 Ibid.

126 Eg, D Clough, 'Economic Duplication and Access to Essential Facilities in Australia' (2000) 28 *Australian Business Law Review* 325. Moreover, in *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821, 43,058, the ACT pointed to statements by the Hilmer Committee equating the terms 'uneconomical' and 'natural monopoly', such as the following: 'Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically' (in *Hilmer Report* (above n 2) 240).

127 Clough (ibid) 335.

128 King and Maddock (above n 113) 45. See, also, Calleja (above n 76) 212.

129 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,400 (emphasis added).

130 *Re Australian Union of Students* [1997] ATPR (ACT) 41-573, 43,956 (emphasis added).

*beyond* the concept of natural monopoly in assessing the uneconomical to duplicate criterion' in some instances.[131]

The danger of extending the access regime to non-natural monopoly facilities was summed up by the Industry Commission, as follows:

> … a willingness to consider wider parameters than natural monopoly for declaration could increase uncertainty about future returns from investment and lead to unforeseen negative impacts on competition.[132]

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.[133] The Commission considered that re-specification of criterion (b) in terms 'that it would be uneconomic for anyone to develop *a second* facility to provide the service' would limit the scope of Part IIIA to natural monopoly service provision.[134] However, given the possible interpretational problems, and related uncertainties, associated with this change of wording, the Productivity Commission resolved not to pursue the proposal further.[135]

In any event, the author submits that such an amendment was not required. The ACT's decision in the *SIA* review has confirmed that criterion (b) operates as a test of natural monopoly – because the ACT adopts a broad social construction (rather than a commercial view) of the term 'uneconomical'.[136]

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131 *Delta Car Rentals* [1999] ATPR (ACCC) 75-000, 75,130 (emphasis added).

132 Industry Commission, *Industry Commission Submission to the NCC on 'The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act'* (AGPS, Canberra, 1997) 12-13. Similar concerns are expressed in Chapter 2, part 2.3.

133 *PC Report* (above n 11) 170.

134 Ibid 171 (emphasis added).

135 The Commission was particularly concerned that 'reference to a "second facility" could (wrongly) be interpreted as referring to a service based on the same technology': ibid 191.

136 E Willett, 'The Role of Declaration in Infrastructure Regulation', Paper presented at *Competition Law and Regulation Symposium*, University of New South Wales, Sydney, 24-25 August 2000, 16.

In that decision, the ACT stated that 'uneconomical' should be construed 'in terms of the associated costs and benefits of development for society as a whole'.[137] This view lay to rest a strong difference of expert opinion in the 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, as expressed in the second reading speech of the *Competition Policy Reform Bill*,[138] which is directed to securing access to 'essential facilities of national significance'.[139] According to the ACT, this language does not suggest that the intention of Part IIIA is only to consider 'a narrow accounting view of "uneconomic" or simply issues of profitability'.[140] Thus, the practical effect of adopting a private test interpretation would be 'to frustrate the underlying intent of the Act'.[141] On the facts of the case, the ACT concluded that, because of the substantial economies of scale and scope associated with operating SIA, it would be uneconomical for anyone to develop another facility to provide the relevant freight handling services.[142]

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137 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,793.

138 See Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 June 1995, 2799.

139 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 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 [private] benefit-cost 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': J Kench, 'Part IIIA: Unleashing a Monster' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 122, 154, citing expert evidence by Professor P Williams in the *SIA* review.

140 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,793.

141 Ibid. Private considerations can sometimes make it commercially viable for an infrastructure owner to build another facility even though this would be inefficient if all social costs were considered: *NCC Declaration Guide* (above n 28) [4.34]. However, this is a matter relevant to the assessment of criterion (a), not criterion (b): *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821, 43,059.

142 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,793.

An inquiry into whether it is uneconomical in a social cost-benefit sense for two or more facilities to provide a particular service is an inquiry into the existence of a natural monopoly.[143] In other words, criterion (b) tests whether the relevant facility exhibits natural monopoly characteristics.[144]

In the *Duke* case, the ACT articulated the natural monopoly test under criterion (b) as follows:

> … the test is whether for a likely range of reasonably foreseeable demand for the services provided by means of the [facility], it would be more *efficient*, in terms of costs and benefits to the community as a whole, for one [facility] to provide those services rather than more than one.[145]

The ACT also made it clear that, in applying this test, it is necessary to consider, and usually offset, the three strands of economic efficiency (namely, productive, allocative and, especially, dynamic efficiency).[146]

Expressing the social test under criterion (b) in terms of the subadditivity requirement for natural monopoly identified in Chapter 2[147] merely involves saying that the facility must serve the range of reasonably foreseeable demand for the service(s) provided by that facility at

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143 *NCC Declaration Guide* (above n 28) [4.15]. It is 'an explicit natural monopoly test': King and Maddock (above n 75) 24.

144 *NCC Declaration Guide* (ibid) [4.4].

145 *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821, 43,071 (emphasis added). Earlier in its decision, the ACT expressed the natural monopoly test by reference to *market* demand: ibid 43,059. However, in applying criterion (b), the ACT relied on the natural monopoly *facility* approach: ibid 43,071-43,072. The latter approach was employed by the NCC in the recent *Virgin Blue* application to conclude that Sydney Airport, as a natural monopoly facility, satisfied criterion (b): *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 28 and 36.

146 [2001] ATPR (ACT) 41-821, 43,059 and 43,072.

147 As explained in part 2.5(B)(1) of Chapter 2, a facility will satisfy the subadditivity requirement if: for a single-service facility, the facility exhibits economies of scale over the range of reasonably foreseeable demand for the service; or for a multi-service facility, the facility exhibits economies of scale in the provision of each and every service provided by the facility, particularly over the range of reasonably foreseeable demand for the service subject to declaration, *and* economies of scope. See, also, *NCC Declaration Guide* (above n 28) [2.10].

lower cost (after taking into account productive, allocative and dynamic effects) than two or more facilities.[148]

### (b) *'for anyone'*

The inclusion of the term 'anyone' in criterion (b) represents a point of departure from the US essential facilities doctrine, a crucial element of which involves assessing whether the party wanting access can economically duplicate the facility.[149] That difference of approach, which has been confirmed by the NCC,[150] serves to underscore the relevance of the social test interpretation of 'uneconomical'.

Further elucidation of the term 'anyone' is contained in the *SIA* review. There, the ACT held that, in determining whether it would be uneconomical for anyone to develop another facility to provide the service, 'anyone' excluded SACL, the facility owner.[151] The justification for the ACT'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.[152]

Thus, the decision clarifies 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.

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148 A facility which meets the subadditivity requirement is likely to be a *sustainable* natural monopoly facility, since low variable costs and large economies of scale will combine to deter or limit new entry: *NCC Declaration Guide* (ibid) [4.39]. The use of specialised assets with limited alternative economic value is likely to reduce the threat of 'cream-skimming' entry: ibid. But see n 141 above.

149 King and Maddock (above n 113) 78-79.

150 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,279. See, also, *NCC Declaration Guide* (above n 28) [4.97]-[4.98].

151 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,792.

152 Ibid.

### (c) ***'to develop another facility to provide the service'***

As Kench has emphasised, criterion (b) specifies that it must be uneconomical for anyone 'to develop another facility to provide the service' – it is not a test of duplication of the existing facility (which, if it is a natural monopoly, will defy duplication by definition).[153] Pursuing this point, Willett has stated that 'develop' should be interpreted liberally to recognise that another *existing* facility may be developed, rather than to impose any requirement of duplication of the original facility.[154] The OECD has similarly explained that, when considering whether it is uneconomical to develop another facility to provide the service, the cost of *duplicating* the facility may not necessarily be relevant.[155] For instance: it may not be necessary to exactly 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.[156] Thus, it may be economical to *develop* a new or existing facility to provide the service.

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,[157] 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.'[158] Similarly, in *Re Specialized Container Transport – Westrail*,[159] the NCC adopted the view that 'the key question is whether it is likely

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153 Kench (above n 139) 153.
154 Willett (above n 136) 16.
155 OECD (above n 102) 42-43.
156 Ibid.
157 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000.
158 Ibid 70,124.
159 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006.

that an actual or potential market participant would find it commercially worthwhile to duplicate the facility in question.'[160]

Considerable clarification of this matter was provided by the ACT in the *Duke* case. The ACT stated that a literal construction of criterion (b) might require the decision-maker, in the application of the criterion, to ignore the existence of facilities which have already been developed, because the words of the criterion ask whether it is economic to develop *another* facility.[161] The ACT considered that to proceed in that fashion would be 'blinkered',[162] and that there was no logic in excluding existing facilities from consideration when determining whether criterion (b) is satisfied.[163]

Since the *Duke* decision, the NCC has shifted ground on the meaning to be attributed to criterion (b). It said in the *AuIron* application[164] that 'the term "develop" is sufficiently broad to encompass minor modifications or enhancements to an existing rail track … [which] means that criterion (b) is not met if another existing rail track can be economically expanded to provide the services under application.'[165] Also, in the *Freight Australia* application,[166] 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.'[167] 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 … subject to declaration, but could economically be modified or expanded to do so, then criterion (b) is not met.[168]

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160 Ibid 70,439.
161 *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821, 43,057-43,058.
162 Ibid 43,058.
163 Ibid.
164 *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002).
165 Ibid 13. In the result, no existing track could be expanded, nor was it economically feasible to develop other existing rail tracks.
166 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001).
167 Ibid 14.
168 *NCC Declaration Guide* (above n 28) [4.85]; reiterated in *Application by Virgin Blue for*

This has represented a distinct modification of the NCC's previous approach. Now, in assessing criterion (b), the NCC considers whether it would be uneconomic to develop either new or existing facilities to provide the services subject to declaration.[169]

**(2) *Developing another facility to provide part of the service***

A closely related provision to s 44G(2)(b) is s 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'.[170] The NCC has tended to treat these two provisions together,[171] although it has recently acknowledged that they are distinct.[172] The NCC's view is that it has a residual discretion to recommend against declaration, even where all the s 44G(2) criteria are met, if the terms of s 44F(4) are satisfied.[173]

*Carpentaria Transport Pty Ltd*[174] neatly illustrates the effect of s 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 identified as all rail infrastructure necessary to handle and transport freight from terminal to terminal. These facilities were grouped as track, above-

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*Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 29.

169 *NCC Declaration Guide* (ibid) [4.86].

170 Emphasis added.

171 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,123.

172 *NCC Declaration Guide* (above n 28) [4.94].

173 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 11; and *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 128. See, also, *NCC Declaration Guide* (above n 28) [10.2].

174 [1997] ATPR (NCC) 70-003.

track (including locomotives and rolling stock), and terminals (including loading and lifting equipment).[175]

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 to provide *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.[176] The decision has been lauded for recognising that there can be no natural monopoly in readily reproducible and transferable railway assets (as opposed to railway infrastructure);[177] and for representing the positive application of s 44F(4) where natural monopoly services and contestable services are inappropriately bundled together.[178]

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[179] against declaration of the Austudy payroll deduction service.[180]

### B *Promoting competition in other markets*

Pursuant to s 44G(2)(a), a service cannot be declared unless access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other

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175 Ibid 70,269.
176 Ibid 70,308 (NCC) and 70,325 (Minister).
177 S Joy, 'Regulating Access to Railway Infrastructure' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 130.
178 Willett (above n 136) 17.
179 *Australian Union of Students* (unreported, NCC, June 1996).
180 Ibid 2-3.

than the market for the service. In the ensuing discussion of criterion (a), the former market is described as 'market #2', and the latter as 'market #1'.

As a preliminary point, the ACT has confirmed that the reference to 'increased access' in criterion (a) means that 'existing access to a service is no bar to a consideration of whether a declaration should be made in respect of that service.'[181] Thus, declaration is available where existing or new users are permitted access to the service, and seek the right to additional access beyond that presently permitted and/or access on more efficient terms and conditions than those offered by the service provider.[182]

The ACT has also recognised that declaration should be limited to services provided by bottleneck facilities (ie, facilities that provide services to which access is essential for competition in upstream or downstream markets).[183] This is the object of criterion (a). As is plainly stated in the NCC's Declaration Guide, 'Criterion (a) addresses whether a facility that exhibits natural monopoly characteristics, and thus satisfies criterion (b), is also a bottleneck facility.'[184]

However, there is no requirement under s 44G(2)(a) that access be essential to promote competition in a dependent market. On the contrary, the broad terms of criterion (a) simply require that access to the service must promote competition in any other market. Indeed, the NCC noted in the *Carpentaria* application that 'to recommend that an application meets this

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181 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,797; and reiterated in *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821, 43,060-43,061.

182 *NCC Declaration Guide* (above n 28) [5.53]; reiterated in *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 14-15.

183 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,771.

184 *NCC Declaration Guide* (above n 28) [5.2].

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.'[185]

Yet, in the *Freight Australia* application,[186] the NCC observed that 'the purpose of criterion (a) is to determine whether declaration would enhance the environment for competition in an upstream or downstream market.'[187] This echoes the ACT's statement in the *SIA* review that:

> The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that [criterion (a)] is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market.[188]

This emphasis on promoting competition in an upstream or downstream market,[189] rather than in any other market, accords more closely with the terminology in the Hilmer Report[190] and in cl 6 of the Competition Principles Agreement (CPA).[191]

Several commentators have queried the requirement in criterion (a) that competition be promoted in another *market*,[192] favouring, instead, the language of the Hilmer Report that access should permit effective competition in another *activity*.[193] However, King (who together

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185 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,273.

186 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001).

187 Ibid 17.

188 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,775.

189 More recently, the NCC has preferred the term 'dependent market': see *NCC Declaration Guide* (above n 28) [5.3]; and *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 37.

190 Where it was stated that access regulation should apply only where '[a]ccess to the facility in question is essential to permit effective competition in a *downstream or upstream activity*': *Hilmer Report* (above n 2) 251 (emphasis added).

191 Clause 6(1)(b) of the CPA requires access to infrastructure services if this is 'necessary to permit effective competition in an *upstream or downstream market*' (emphasis added).

192 Eg, R Smith and J Walker, 'Part IIIA, Efficiency and Functional Markets' (1998) 5 *Competition & Consumer Law Journal* 183, 208 (the requirement is 'unnecessary'); Calleja (above n 76) 212 (it is an 'unnecessary complication'); and Hood and Corones (above n 63) 76 (there is 'no reason in policy or history' for the requirement).

193 *Hilmer Report* (above n 2) 251.

with Maddock developed the two-part test of essentiality discussed in Chapter 2), takes no issue with the 'other *market*' requirement in s 44G(2)(a), saying that the stipulation that access must promote competition in a market other than the market for the service 'can be seen as a *weak essentiality test*, requiring that the service is used as an input rather than for final consumption.'[194]

Certainly, 'market' is a familiar term under the *Trade Practices Act* – and, as explained in part (1) below, the legal and economic principles for market definition are an established part of Australian trade practices jurisprudence. For this reason, the author supports continued reliance on the market concept in s 44G(2)(a).[195] The real concern with criterion (a) is the weak nature of the essentiality test contained therein. Proposals for strengthening this test are considered in part (2).

### (1) *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.'[196] In considering market definition, the NCC has indicated[197] that it will be guided by High Court pronouncements,[198] and those of the ACT,[199] on the meaning of 'market'. Thus, the NCC has

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194 S King, 'National Competition Policy' (1997) 73 *Economic Record* 270, 275 (emphasis added). King (and Maddock) would prefer that access should promote competition (in the sense that it leads to prices that better reflect social costs) in a *market for final goods and services*: King and Maddock (above n 75) 22.

195 Cf Smith and Walker (above n 192) 208; and Calleja (above n 76) 212.

196 *NCC Declaration Guide* (above n 28) [5.4].

197 *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 17.

198 Notably, *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, in which Mason CJ and Wilson J (188), Dawson J (199-200) and Toohey J (210) approved the Trade Practices Tribunal's explanation in *Re Queensland Co-operative Milling Association Ltd* [1976] ATPR (TPT) 40-012, 17,247 that 'a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.'

199 Eg, *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000]

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 the market covers); the functional dimension (the relevant stage in the production and distribution chain); and the temporal dimension (the period over which substitution possibilities need to be considered).[200] The NCC has also set out, in its Declaration Guide, an explanation of the process of market definition that is commendable both for its concision and clarity:

> The process of market definition begins with the narrowest feasible product, functional and geographic market boundaries and extends these boundaries in product, geographic and functional space to include all those sources and potential sources of close *substitutes*, so as to identify the smallest areas over which it would be profit maximising for a hypothetical monopolist to impose a small but significant and non-transitory increase in price. If consumers would respond to an increase in price by switching to alternative products or services, then the market must be expanded and the process continues. The collective effect of *substitution* determines what is in and out of the relevant market.[201]

To date, most attention under criterion (a) has focused on functional markets[202] – no doubt because the situations where access to a service would promote competition in another product market 'will be relatively unusual'.[203]

In the *SIA* application, the NCC identified the following tests for determining whether the different functional layers of a market constitute distinct markets:[204]

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ATPR (ACT) 41-754, 40,772-40,773.

200 *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 18-19. For further discussion of the four market dimensions, see *NCC Declaration Guide* (above n 28) [5.20]-[5.41].

201 *NCC Declaration Guide* (ibid) [5.16]-[5.17] (emphasis added). The temporal parameters of a market are generally determined by long-run, rather than short-run, substitution possibilities.

202 Smith and Walker (above n 192) 190; Kench (above n 139) 151; and *NCC Declaration Guide* (ibid) [5.6] and [5.42].

203 Smith and Walker (ibid).

204 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,112 (citing a submission by Professor H Ergas in respect of the unrelated *Carpentaria* declaration application). For additional explanation of the tests, see D Shiff, H Ergas and M Landrigan, 'Telecommunications Issues in Market Definition' (1998) 6 *Competition & Consumer Law Journal* 32, 42; Smith and Walker (above n 192) 195-197; King and Maddock (above n 75) 22-23; and *NCC Declaration Guide* (above n 28) [5.23].

- *Economic separability test*

  The question here is whether the transaction costs involved in the separate provision of the good or service at the two layers would not be so great to prevent such separate provision from being feasible. In other words, is it feasible for the relevant vertical layers to be separated or would the costs of such separation make this infeasible?

- *Asset specificity test*

  Separability is a necessary but not sufficient condition for different functional layers to form distinct markets. Each layer must also use assets sufficiently specific to that layer such that the assets cannot readily produce the output of the other layer. Thus, the question to ask is this: Are the assets involved with each layer sufficiently specialised to prevent 'supply-side substitution' between the layers?[205]

The *SIA* application resulted in the NCC recommending declaration of, and the Commonwealth Treasurer declaring, the following freight handling services at SIA: the service provided through the use of the freight aprons and hard stands to load/unload international aircraft at the airport; and the service provided by the use of an area at the airport to store equipment used to load/unload international aircraft, and to transfer freight from the loading/unloading equipment to/from trucks at the airport.[206]

Before the ACT, South Pacific Airmotive Pty Ltd (SPAM) made the main argument in favour of upholding the Treasurer's declaration, as it wished to obtain access to the declared

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[205] Smith and Walker have criticised both tests, arguing, in respect of the economic separability test, that the determination of transaction costs (ie, the economies of joint production and consumption foregone) 'will not generally be practical', and, in respect of the asset specificity test, that it is 'difficult to think of examples where assets can be substantially redeployed between functional levels': Smith and Walker (above n 192) 204 and 197. They favour, with minor refinements, the alternative tests proposed in R Smith and N Norman, 'Functional Market Definition' (1996) 4 *Competition & Consumer Law Journal* 1, 11: Smith and Walker (ibid) 208.

[206] *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,156; Treasurer's decision reproduced ibid 70,159.

services in order to provide ramp handling services[207] at SIA. SPAM submitted that the market for ramp handling services (market #2) was separate and distinct from the market for the declared services (market #1).[208] In contrast, SACL argued that the declared services fell within a market for the provision of services for the operation of international aircraft, which included ramp handling services, so that SPAM's proposed activities would fall into that market and not into a separate market as required by criterion (a).[209] Relying on the test of economic separability, the ACT accepted SPAM's submission that market #2 and market #1 were functionally distinct.[210] The ACT then found that access to the declared services would promote competition in the separate ramp handling market.[211]

A functional distinction was similarly drawn by the NCC in the *Virgin Blue* application between the market for domestic passenger air transport services (market #2) and the market for the airside services the subject of the declaration application (market #1).[212] However, criterion (a) was not met in this case, as the NCC was not convinced that access to the relevant airside services would promote competition in the dependent domestic passenger market.[213]

In the *Carpentaria* application, the NCC agreed with the applicant 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 linehaul modes of transport (including rail).[214]

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207 Involving the actual loading/unloading of aircraft through use of the 'freight handling' services.

208 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,772. Professor Ergas was SPAM's expert witness.

209 Ibid 40,772-40,773.

210 Ibid. The ACT did not explicitly consider the asset specificity test.

211 Ibid 40,791.

212 *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 56.

213 Ibid 101. See text accompanying n 220 below for further explanation.

214 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,274. Similarly, in the *Hunter Rail* application, the NCC determined 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

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.[215] However, the Minister disagreed, briefly dismissing, in connection with criterion (a), the NCC's delineation of the two markets described above.[216]

### (2) *Promotion of competition*

The arguments put forward by service providers, endeavouring to disprove that access would promote competition in another market, have been many and varied. In this context, arguments that have resulted in criterion (a) not being met have included 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;[217]
- the 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;[218]
- there was already strong competition in market #2, which was unlikely to be enhanced by a declaration of access;[219] and
- there were sufficient existing constraints (eg, the threat of regulation and the need to maintain passenger numbers) on the service provider's incentive to exercise its market power to adversely affect competition in market #2.[220]

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assets required for the production of services in each market were not common: *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,395.

[215] *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,293. 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.

[216] See Minister's decision, reproduced ibid 70,323, relevant part of decision at 70,325.

[217] Eg, successful in *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006.

[218] Eg, successful in *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821; and cited as relevant in *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002).

[219] Eg, successful in *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002). See, further, *NCC Declaration Guide* (above n 28) [5.64].

[220] Eg, successful in *Application by Virgin Blue for Declaration of Airside Services at Sydney*

In contrast, arguments that have not caused criterion (a) to fail have included 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;[221]
- 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;[222]
- the access seeker already had access to the service, so declaration would merely preserve the status quo rather than promote competition;[223]
- the access seeker's access to the service would preclude anyone else from having access (eg, due to limited availability of terminals), which would not promote competition in market #2, even if a declaration of access were to occur;[224]
- access may not lead to any lower prices in market #2 because of access charges that the access seeker may have to pay;[225]
- 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;[226]
- granting access to the access seeker would give that party substantial market power which it would seek to abuse;[227] and

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*Airport* (unreported, NCC, November 2003) 90.

221 Eg, unsuccessful in *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003.

222 Eg, unsuccessful in *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003; and in *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754.

223 Eg, unsuccessful in *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003.

224 Eg, unsuccessful in *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003; and in *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754.

225 Ibid.

226 Ibid.

227 Ibid.

- 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.[228]

In reflecting on the arguments above, it must be remembered that, contrary to the Hilmer Committee's recommendation, criterion (a) simply requires that competition in another market be 'promoted', rather than result in *effective* competition in another market.[229] 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.[230]

These fears have been exacerbated by the ACT's reasoning in the *SIA* review. Although the ACT made it clear that criterion (a) is concerned with furthering competition rather than furthering a particular type or number of competitors,[231] it went on to say:

> The Tribunal does not consider that the notion of 'promoting' competition in [criterion (a)] requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition … involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.[232]

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[228] Eg, unsuccessful in *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002). As the NCC explained, '[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': ibid 23. The NCC's approach was endorsed in R Smith and D Round, 'When is a Market a Market?' (2003) 31 *Australian Business Law Review* 412, 419-421.

[229] *Hilmer Report* (above n 2) 266.

[230] King and Maddock (above n 113) 76.

[231] *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,775. Earlier in its decision, the ACT also stated, 'The Minister and the Tribunal do not look at the promotion of "competitors" but rather the promotion of "competition". Such an analysis is not made by reference to any particular applicant seeking to have a service declared': ibid 40,759.

[232] Ibid 40,775. The approach was approved in *Duke Eastern Gas Pipeline Pty Ltd* [2001] ATPR (ACT) 41-821, 43,061.

The ACT applied this 'future with and without' test in the instant case to conclude that competition in at least one market, the market for ramp handling services, would be promoted by the declaration.[233]

In effect, the ACT held in the *SIA* review that the promotion of competition cannot be gauged in terms of actual outcomes (ie, an actual increase in competition).[234] Instead, in reaching a view as to whether increased access 'would promote competition', the ACT must look to the future, in much the same way as it does with authorisation,[235] and compare the future conditions and environment for competition with and without declaration.[236]

At the other extreme, King and Maddock have pointed out that the word 'promote' in s 44G(2)(a) could be interpreted to mean 'to raise to a higher rank, status, degree, etc'.[237] This interpretation would strengthen criterion (a) as a test of essentiality, since 'promotion of competition' then implies a 'measurable effect'.[238]

Certainly, the NCC's view, as reflected in its decisions, has been that the promotion of competition in market #2 should not be trivial.[239] It has specifically stated that there should be 'tangible benefits'[240] which may be forecast from the declaration. These have been identified

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233 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,791.

234 *NCC Declaration Guide* (above n 28) [5.56].

235 The ACT's 'future with and without' approach to authorisation under Part VII of the *Trade Practices Act* requires the Tribunal to examine the structure of the relevant market as it exists, comparing the probable structure that would exist in the future if the proposed conduct were not entered into, with the probable structure that would exist in the future if the proposed conduct were entered into. See, eg, *Re Queensland Independent Wholesalers Ltd* [1995] ATPR (ACT) 41-438.

236 *NCC Declaration Guide* (above n 28) [5.56].

237 King and Maddock (above n 113) 77.

238 Ibid. Cf Evans' comment that '"promotion" carries a notion of an activating or triggering effect, rather than … measuring gradations': L Evans, 'Regulation of Access to Utilities: The Search for a Common Thread', Paper presented at *Trade Practices Workshop*, Business Law Section of the Law Council of Australia, Surfers Paradise, 13-15 August 1999, 16.

239 Eg, *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,292; and *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,392.

240 Eg, *Specialized Container Transport* [1997] ATPR (NCC) 70-004, 70,341; and *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,392.

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.[241]

Despite the careful statements of the NCC about the need for non-trivial and tangible benefits under criterion (a), critics of the ACT's reasoning in the *SIA* review have argued that that the 'future with and without' test of promoting competition will hardly ever not be met.[242] Responding to these concerns, the Productivity Commission has 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.[243] The author agrees that this amendment is necessary to provide a sufficient hurdle against inappropriate declarations – but notes that the ACT's approach in the *SIA* review was applied without apparent difficulty or controversy in three recent determinations of the NCC.[244]

The NCC has opposed the change, on the basis that even adding this one word would fundamentally alter the criterion in an undesirable manner.[245] However, as the Productivity Commission has pointed out, if the NCC can decide that a declaration of access would create

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241 See nn 239-240 above.

242 See, eg, the submissions cited in *PC Report* (above n 11) 179, in which the recurring criticism of criterion (a) was that it is too easily satisfied. As one respondent to the inquiry commented, '[I]t is difficult to envisage how the conclusion could ever be other than that competition … would be promoted by declaring a facility open for access': ibid 163, citing a submission by I Tonking (sub 5, December 2000). 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 *Australian Business Law Review* 140, 140.

243 *PC Report* (ibid) Recommendation 7.1. Interestingly, after extensive review and deliberation, this change to criterion (a) was the only amendment to the declaration criteria recommended by the Productivity Commission in its final report.

244 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 18-19; *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 19-20; and *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 60.

245 *PC Report* (above n 11) 190.

the conditions for increased competition, it should also be able to make an assessment about the likely magnitude of such effects on competition.[246]

'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*[247] – a fact which explains the Productivity Commission's preference for it. In contrast, the Commonwealth Government, while willing to amend criterion (a), has indicated that the word 'material' should be substituted for 'substantial'.[248] However, this will only raise questions as to the meaning of 'material'. Unless some explanation of that concept is included in the legislation or an explanatory memorandum, such a change may simply add to present concerns surrounding the interpretation of criterion (a).[249]

### C *National significance*

Pursuant to s 44G(2)(c), which has been described by the NCC as a 'test of materiality',[250] the NCC cannot recommend declaration of a service unless it judges the facility (which provides the service) to be of national significance, having regard to: its size; its importance to constitutional trade and commerce; or its importance to the national economy. While the facility needs to satisfy only one of the three benchmarks,[251] it has been noted by the NCC that there is considerable overlap between the second and third of those conditions.[252]

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[246] Ibid 191. This is not to deny that quantitative assessments, which demand specificity, are more difficult than relative ones.

[247] That is, in the context of ss 45, 46, 47 and 50.

[248] *Final Response* (above n 22) 7.

[249] L Thomson and S Writer, 'A Workable System of Access Regulation: The Productivity Commission's Review of the National Access Regime' (2003) 11 *Trade Practices Law Journal* 92, 95.

[250] *NCC Declaration Guide* (above n 28) [6.1]. The test is intended to place less important facilities outside the scope of Part IIIA: *PC Issues Paper* (above n 14) 26.

[251] *NCC Declaration Guide* (ibid) [6.2].

[252] *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,130; and *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported,

### (1) *Application of criterion (c)*

#### (a) *Identifying the facility*

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),[253] 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.

Facing such dichotomy of argument in the *Carpentaria* application,[254] the NCC reasoned that whether particular facilities should be considered separately depends on whether those facilities can be duplicated economically.[255] If they cannot, then they ought to be considered in unison, but if certain of the facilities are economically feasible to duplicate (as, in this 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.[256] Thus, the NCC concluded that the national significance of the 'below rail' and 'above rail' elements of the service should be assessed separately,[257] and that the track, but not the rolling stock or terminals, was of national significance.[258] However, although the designated Minister (the Premier of Queensland) followed the NCC's recommendation and declined to declare the freight services the subject of Carpentaria's application, the Minister treated this criterion quite differently, stating: '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

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NCC, November 2003) 102.

253 As in *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003.

254 Ibid 70,309-70,310.

255 Ibid 70,310.

256 Ibid.

257 Ibid 70,310-70,311.

my deliberations the above and below track facilities as a whole.'[259] Notwithstanding this difference in reasoning, the NCC's approach of separating above and below rail facilities was repeated subsequently in respect of the *Kalgoorlie-Perth* rail application.[260]

The issue of how expansively 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?'[261] 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 and which was dependent upon the freight handling facilities.[262] This was accepted by the ACT on review.[263] Mindful of this reasoning, no arguments were even put to the NCC in the *Virgin Blue* application that Sydney Airport was not of national significance.[264]

### (b) *Satisfying the test of materiality*

To appreciate why some facilities satisfy the test of national significance and others fail, it is useful to consider the factors that have contributed to infrastructure being 'nationally significant'. On the basis of the existing cases, three relevant factors have emerged, which closely track the benchmarks listed in the legislation itself.

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258 Ibid 70,313-70,314.

259 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.

260 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,446-70,449.

261 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,129.

262 Ibid 70,134.

263 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,793.

264 *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported,

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.[265] Thus, a rail track of some 1700 kilometres in length, servicing directly 11 ports along the route, and one of the longest rail corridors in Australia, was nationally significant, whereas rail terminals in regional Queensland, not large when compared in size to rail terminals in capital cities, were not;[266] and 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, failed the criterion.[267]

Second, 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.[268] This was highly relevant in the *Hunter Rail* application.[269] 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.[270] In an entirely different context, the ACT concluded in the *Austudy* review[271] 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

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NCC, November 2003) 104. As a 'major economic driver' for the Sydney metropolitan area, there was no doubt that Sydney Airport was of national significance: ibid 105.

265 *NCC Declaration Guide* (above n 28) [6.3].

266 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,311.

267 *Re Australian Union of Students* [1997] ATPR (ACT) 41-573, 43,960. The computer network was the 'facility' in this case, and it contained approximately 485,000 student names.

268 Eg, *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,312. See, also, *NCC Declaration Guide* (above n 28) [6.5].

269 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005.

270 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: *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 37.

271 *Re Australian Union of Students* [1997] ATPR (ACT) 41-573.

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.[272] That service was not declared.

Third, the criterion can be established by the importance of the facility to trade or commerce in related markets.[273] 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 coal for local and export markets, and that, since coal was Australia's largest single commodity export, the railway line was nationally significant.[274] It was similarly effective in the *SIA* application, in which it was argued that the performance of freight handling facilities at SIA significantly influenced the performance of industries reliant upon international air freight, such as those involving time-sensitive or perishable goods, or those which rely on 'just-in-time' inventory management.[275]

### (2) *Focus of criterion (c)*

#### (a) *National or local significance?*

Some respondents to the Productivity Commission's inquiry argued that criterion (c) should be more narrowly confined to facilities of 'major national significance'.[276] 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 US where sports

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272 Ibid 43,959.

273 Eg, *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,311. See, also, *NCC Declaration Guide* (above n 28) [6.6].

274 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,404.

275 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,130-70,131; confirmed by the ACT in *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,793.

276 *PC Report* (above n 11) 168.

stadiums[277] and ski fields[278] have been held to be essential facilities.[279] 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,[280] 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.[281] 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 national, level being ignored.[282]

Such submissions appear to disregard the costs associated with access regulation. Concern about the level of these regulatory costs underlies the requirement that the access regime be applied only to facilities of national significance.[283] The criterion is intended to ensure that access regulation is imposed only when the net benefits are likely to be more than

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277 *Hecht v Pro-Football Inc* 570 F 2d 982 (1977).

278 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985).

279 For further discussion, see N Rochow, 'Recent Reforms in Competition Law' (1998) 20 *Law Society of South Australia Bulletin* 28, 30.

280 L Griggs, 'Access to Essential Facilities' (1997) 71 *Law Institute Journal* 40, 42.

281 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 *Trade Practices Law Journal* 188, 205; W Pengilley, 'The National Competition Policy Draft Legislative Package: The Proposed Access Regime' (1995) 2 *Competition & Consumer Law Journal* 244, 251-253; and Abadee (above n 3) 44. Cf King and Maddock (above n 113) 71 ('the test of "national significance" is clearly intended to better define the scope of the Australian access regime').

282 *PC Report* (above n 11) 168.

283 King and Maddock (above n 113) 95.

trivial.[284] Hence, the Productivity Commission's refusal to recommend that the requirement of 'national' significance in criterion (c) be removed.[285]

### (b) *Facilities or services?*

But what exactly should be nationally significant under criterion (c) – the facility or the service? Contrary to the intention of the Hilmer Committee,[286] the criterion focuses on the importance of the facility, rather than the service to which the applicant is seeking access.[287] Thus, in the *SIA* review, while 'the predominant and pervasive role that SIA plays in Australia's commercial links with the rest of the world'[288] meant that it was clearly a facility of national significance, it was not necessary to establish that the freight handling services the subject of the declaration were nationally significant.

The Productivity Commission acknowledged that the declaration criteria in Part IIIA would be improved by incorporating a screening test 'to ensure that the service (rather than the facility) is of significance to the national economy',[289] but did not recommend any change to the drafting of criterion (c).[290] The Commission's hesitation is surprising. Part IIIA permits the declaration of services, not facilities – logically, it is these *services* which should be of significance to the national economy. Criterion (c) should be amended to reflect the same

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284 G Samuel, 'Competition Reform and Infrastructure' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 1, 3.

285 In any event, action under s 46 may possibly be taken in respect of access disputes involving non-nationally significant infrastructure.

286 *Hilmer Report* (above n 2) 251-252.

287 Eg, *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,308*; NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,403; and *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,445. See, also, Calleja (above n 76) 212; and Hood and Corones (above n 63) 70-72.

288 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,793.

289 *PC Report* (above n 11) 192.

290 However, the Commission indicated that it would revisit this issue in the future: ibid.

preoccupation of the other criteria in s 44G(2) with whether a particular service should be declared.[291]

### D *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 or safety. Infrastructure operators who seek to deny access on this ground bear the onus of proving to the NCC (in the first instance) that access to the service would compromise health or safety.[292]

Criterion (d) has attracted little debate since the enactment of Part IIIA,[293] and has not proved a deciding factor in any decision to date. The Productivity Commission made no recommendation to alter or remove the criterion,[294] and it appears destined to continue as a little-used, but appropriately cautionary, element of s 44G(2).

#### (1) *Terms of criterion (d)*

As a matter of drafting, it is notable that s 44(G)(2)(d) does not phrase the relevant test as whether 'access (or 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, if any, attaches to this difference in terminology? It was argued in the *SIA* review that, since access to the freight handling services had been provided for some considerable time to various organisations such as Qantas and Ansett, access was already being provided without undue risk to human health and safety,

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291 Criterion (b) is the only other criterion in which the word 'facility' appears. However, as explained previously, the real focus of criterion (b) is whether the provision of the relevant *service* is a natural monopoly. See text accompanying nn 124-125 above.

292 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,404.

293 *PC Report* (above n 11) 162.

294 Other than the possibility of incorporating this criterion within the public interest test in

which, in and of itself, satisfied criterion (d).[295] The ACT disagreed, and proceeded to treat s 44G(2)(d) as if the criterion contained the words, 'increased access'.[296] The NCC's view that the introduction of further ramp handlers would not bring about an undue risk to human health or safety at SIA was confirmed.[297]

**(2) *Application of criterion (d)***

The existence of legislative or regulatory instruments, or licences, governing the operation of the service (dealing with 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) relatively easily.[298] 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.[299]

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.'[300] In the end, however, neither the NCC nor the Minister was prepared to accept that the access seeker's proposed methods of operation, nor the presence of another ramp

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criterion (f): ibid 193.

295 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,794.

296 Ibid 40,794-40,795; and reiterated by the NCC in *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 38.

297 [2000] ATPR (ACT) 41-754, 40,795.

298 Eg, *Specialized Container Transport* [1997] ATPR (NCC) 70-004, 70,358; *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,404-70,405; *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,450; *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,794; *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 38; and *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 107-108.

299 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,450. Ultimately, the WA Premier decided not to declare Westrail's rail line service, contrary to the NCC's recommendation, for reasons unrelated to health and safety.

handler, posed any safety concerns additional to those that were inherent in ramp handling operations.[301] 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.[302] However, the ACT considered that there was no evidence to support such a contention, and rejected the argument.[303]

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 s 44G(2)(d) by imposing safety requirements as part of the terms and conditions of access contracts with third parties.[304] This point was confirmed on review by the ACT.[305] Since that decision, the NCC has also noted that, while some facilities require a degree of spare capacity to provide appropriate safety margins,[306] safety requirements should not be used as a barrier to entry.[307]

### E *Effective existing access regime*

Pursuant to s 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.[308]

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300 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,134.

301 Ibid 70,141 (NCC) and 70,160 (Minister).

302 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,794.

303 Ibid.

304 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,141. See, also, *NCC Declaration Guide* (above n 28) [7.7].

305 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,794.

306 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 29.

307 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,406.

The rationale for the inclusion of criterion (e) may be traced to the Hilmer Committee's view that State/Territory-based regimes were 'incapable of dealing effectively with access issues affecting interstate or national facilities'.[309] The legislature accounted for this by providing that, in circumstances where a State/Territory regime was already in place, the NCC should determine whether to recommend declaration under the national regime which would then prevail over the existing access regime.

If the Commonwealth Minister has previously certified a State/Territory regime as an effective access regime,[310] the NCC must follow that decision unless it believes that a substantial modification of the regime has occurred during the intervening period.[311] If the State/Territory regime has not already been certified, the NCC must determine the effectiveness of the regime for itself.[312] The certification procedure, to which criterion (e) alludes, and the Productivity Commission's recommendations in respect of certification, are examined in part 4.6 of this chapter.

To date, several regimes have been certified and accepted by the Commonwealth Minister as effective.[313] 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,[314] the Australasian rail access regime,[315] and the Victorian rail access regime.[316]

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308 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,795.

309 *Hilmer Report* (above n 2) 249.

310 Section 44N dictates the procedure to be followed by the Commonwealth Minister in deciding whether a State/Territory regime is an effective access regime.

311 Section 44G(4).

312 In so doing, the NCC must have regard to the principles set out in the CPA: s 44G(3). The NCC's approach to certification is detailed in National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act – Part C Certification* (NCC, Melbourne, February 2003) (hereafter, '*NCC Certification Guide*').

313 See Table 4.3 in part 4.7(C) of this chapter.

314 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,451.

315 *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 40-41.

316 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 30.

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.[317]

### F *Not against the public interest*

Section 44G(2)(f) requires that access (or increased access) to the service would not be contrary to the public interest.

Contrary to the Productivity Commission's view,[318] the author strongly contends that the public interest criterion should be abolished from the matrix of declaration criteria. This contention rests on the following bases, each of which is fully advanced below.[319] First, the criterion has had no decisive effect in any application to date, and, indeed, taken in context with the other declaration criteria, is incapable of such effect. Second, the various arguments that service providers have raised in seeking to prove that access would be contrary to the public interest have almost uniformly met with rejection. Third, because of the manner in which the criterion has been worded – it is expressed in the negative – its construction has been difficult. Fourth, and most fundamentally, the broad nature of the criterion conflicts with the objective of economic efficiency underpinning Part IIIA.

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317 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006. The Minister's decision is reproduced ibid 70,456.

318 *PC Report* (above n 11) 193.

319 These bases draw on B Marshall and R Mulheron, 'Declarations under Part IIIA of the Trade Practices Act: The Case for Abolishing the Public Interest Criterion' (2003) 15 *Bond Law Review* 284.

### (1) *Concerns about criterion (f)*

#### (a) *No decisive effect*

A notable aspect of criterion (f) is that it has not proved decisive in any application for declaration under Part IIIA to date. In a useful summary of the matters under discussion in this part of the chapter, Table 4.2 outlines the NCC's conclusion on each of the declaration criteria in s 44G(2), in respect of the nine recommendations for/against declaration the NCC has made.

As Table 4.2 demonstrates, in none of these cases were criteria (a)-(e) satisfied, only for declaration of the service not to be recommended because it would be contrary to the public interest. Conversely, where any or all of criteria (a)-(e) failed, in only one case did the outcome of the public interest inquiry favour a recommendation that access be declared; in the remainder, criterion (f) reflected the adverse outcomes of the earlier criteria.[320] In this regard, Hole et al'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'[321] is as true now as it was then.

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[320] Indeed, the NCC applied this exact reasoning in the recent *Virgin Blue* application, concluding that because criterion (a) had not been met, it followed that criterion (f) also was not satisfied: *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 115.

[321] J Hole, A Bradley and P Corrie, 'Public Interest Tests and Access to Essential Facilities', Staff Working Paper, Industry Commission, March 1998, xii.

**TABLE 4.2: NCC's application of declaration criteria**

| *Case* | *Was NCC satisfied of criterion?* | | | | | | *Did NCC recommend declaration?* |
|---|---|---|---|---|---|---|---|
| | *(a)* | *(b)* | *(c)* | *(d)* | *(e)* | *(f)* | |
| Austudy payroll deduction application[322] | Y | N | N | Y | Y | N | No |
| SIA freight handling application[323] | Y | Y | Y | Y | Y | Y | Yes |
| Carpentaria freight services application[324] | Y | Partly | N | Y | Y | Y | No |
| Sydney-Broken Hill rail application[325] | Y | Y | Y | Y | Y | Y | Yes |
| Kalgoorlie-Perth (i) rail and (ii) freight services application[326] | (i) Y (ii) N | (i) Y (ii) N | (i) Y (ii) N | (i) Y (ii) Y | (i) Y (ii) Not addressed | (i) Y (ii) 'no need to … examine' | (i) Yes (ii) No |
| Hunter rail application[327] | Y | Y | Y | Y | Y | Y | Yes |
| Freight Australia rail application[328] | N | Y | Y | Y | Y | 'not necessary … to consider' | No |
| Wirrida-Tarcoola rail application[329] | Y | Y | Y | Y | Y | Y | Yes |
| Sydney Airport airside services application[330] | N | Y | Y | Y | Y | N | No |

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322 *Australian Union of Students* (unreported, NCC, June 1996). The Commonwealth Treasurer followed the NCC's recommendation and decided not to declare the Austudy payroll deduction service. The Treasurer's decision was affirmed on review: *Re Australian Union of Students* [1997] ATPR (ACT) 41-573.

323 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000. The Commonwealth Treasurer followed the NCC's recommendation and decided to declare the relevant services. The Treasurer's decision was affirmed on review: *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754.

324 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003. The Queensland Premier followed the NCC's recommendation and decided not to declare the freight handling services.

325 *Specialized Container Transport* [1997] ATPR (NCC) 70-004. The NSW Premier did not act on the NCC's recommendation to declare, and thus was deemed not to have declared the rail service. An application to the ACT for review was later withdrawn.

326 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006. The WA Premier decided not to declare either Westrail's rail service or its freight support services, acting contrary to the NCC's recommendation in respect of the rail service and consistently with the NCC's recommendation in respect of the freight support services. An application to the ACT for review was later withdrawn.

327 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005. The NSW Premier did not act on the NCC's recommendation to declare, and thus was deemed not to have declared the rail service. An application to the ACT for review was later withdrawn.

328 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001). The Commonwealth Treasurer followed the NCC's recommendation and decided not to declare the relevant services. An application for review by the ACT has been lodged and is awaiting determination.

329 *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002). The Commonwealth Treasurer followed the NCC's recommendation and decided to declare the rail track services. However, the ACT ordered that the Minister's decision be set aside when the parties to an application for review of the declaration declined to place any material before the Tribunal: *Asia Pacific Transport Pty Ltd* [2003] ATPR (ACT) 41-920.

330 *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported,

Further, 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 preceding declaration criteria already address a number of positive elements in the public interest.[331] Thus, the public interest criterion is not meant to call into question the findings in the previous criteria, but inquires whether there are *any other matters* relevant to a declaration being contrary to the public interest.[332]

This point was made in *Duke Eastern Gas Pipelines Pty Ltd*,[333] where the ACT had to consider s 1.9(d) of the National Gas Code, which is the equivalent provision to the public interest criterion in s 44G(2)(f). Commenting on s 1.9(d), the ACT said:

> … criterion (d) does not constitute an additional positive requirement which can be used to call into question the result obtained by the application of pars (a), (b) and (c) of the criteria. Criterion (d) accepts the results derived from the application of pars (a), (b) and (c), but inquires whether there are any other matters which lead to the conclusion that coverage would be contrary to the public interest.[334]

The ACT's statement has since been cited and applied by the NCC under Part IIIA,[335] and confirms the expectation that, in construing the s 44G(2) criteria, a logical, but legislatively-unspoken, presumption is invoked: where criteria (a)-(e) are met, then the presumption arises that a declaration of access would be in the public interest.[336] Accordingly,

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NCC, November 2003). The Commonwealth Treasurer followed the NCC's recommendation and decided not to declare the relevant services.

331 Eg, *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,316; *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,409; and *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,451.

332 *NCC Declaration Guide* (above n 28) [9.3]. The Productivity Commission also views 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': *PC Issues Paper* (above n 14) 27.

333 [2001] ATPR (ACT) 41-821.

334 *Duke Eastern Gas Pipelines Pty Ltd* [2001] ATPR (ACT) 41-821, 43,072.

335 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 33; *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 43; and *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport* (unreported, NCC, November 2003) 115.

336 Hole, Bradley and Corrie (above n 321) xii. See, also, *NCC Declaration Guide* (above n 28)

in applying criterion (f), the NCC is concerned to determine whether any argument would displace that presumption.[337]

However, the idea that the presumption could be displaced where all of criteria (a)-(e) are satisfied defies economic sense. The author struggles to envisage circumstances where this would be justified – noting, in particular, that criterion (d), with its emphasis on human health and safety, arguably allows for sufficient public interest input anyway – and submits the outcomes in Table 4.2 in support of this view.

Early comments by the NCC on the declaration process under Part IIIA reflect this same line of reasoning:

> … declaration should be confined to circumstances in which the normal dynamics of innovation and investment, or the other regulatory means available, will not be sufficient to counteract the monopolistic position held by an infrastructure operator. This is principally because, where effective competition is likely, granting access will do little to promote competition and thus have little effect on prices and quality. But it will impose potentially large regulatory costs on governments and the infrastructure operator. Hence it would be difficult to establish that granting access in such cases would not be contrary to the public interest.[338]

Tonking has interpreted the above passage to mean that the NCC believed the public interest test would filter out many declaration applications on the basis that these would not be judged as contributing to effective competition.[339] However, contrary to that view, the author considers that it is impossible for criterion (f) to act as a filter when the fulfilment of criteria (a)-(e) leads inexorably to the conclusion that declaration would not be contrary to the public interest. In such cases (representing the opposite of the effective competition scenario

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[9.4].

337 This approach was made plain by the NCC in *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,409. More recently, the NCC has said that, under criterion (f), it must be satisfied that the costs of declaration do not outweigh the benefits: *NCC Declaration Guide* (ibid) [9.8].

338 National Competition Council, *The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act* (NCC, Melbourne, 1996) (hereafter, '*NCC Draft Guide*') 23.

339 Tonking (above n 3) 3.

described by the NCC in the preceding paragraph),[340] it would be a straightforward matter to establish criterion (f).

The outcomes shown in Table 4.2 demonstrate the inconclusiveness of the public interest test, given the other criteria upon which declaration depends. Curiously, however, the Productivity Commission supported the retention of criterion (f).[341] As discussed further in section (d) below, this would seem to ignore the potential for a wide-ranging public interest test to conflict with the objective of economic efficiency underpinning Part IIIA, and may ultimately compromise the efficiency gains to be derived from access reform.

**(b) *Public interest contentions mostly unsuccessful***

An examination of the matters which have been raised under criterion (f) reveals the wide variety of arguments that the NCC has considered in connection with declaration applications to date. However, by far the majority of arguments have failed to establish that it would be contrary to the public interest to declare the relevant service.

In *NSW Minerals Council Ltd*,[342] the service provider argued that the imminent implementation of an effective State rail access regime would render the rail network (the service the applicant was seeking to have declared) the subject of both Part IIIA and the State regime, with consequential differing processes for the arbitration of terms and conditions of access.[343] In refuting this argument, the NCC reasoned that, since it has the ability under s 44J to recommend the revocation of an access declaration after an effective regime is introduced,[344]

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340 But based on consistent reasoning. See text accompanying n 338 above.

341 *PC Report* (above n 11) 193.

342 [1997] ATPR (NCC) 70-005.

343 Ibid 70,409-70,411. The NSW Government had submitted the existing State rail access regime to the NCC for certification as effective under Part IIIA, and was prepared to modify the State regime to meet any concerns raised by the NCC in that process: ibid 70,410.

344 Section 44J permits the NCC to recommend the revocation of a declaration if it is satisfied that, at the time of the recommendation, one of the declaration criteria would prevent the designated

declaring the rail service under Part IIIA would not compromise any government's ability to implement uniform and effective access arrangements for the rail network and so would not be contrary to the public interest.[345] In reaching this conclusion, the NCC pointed out that it has no power to unnecessarily defer or delay consideration of a valid application under Part IIIA pending the implementation of an effective State access regime at some point in the future.[346]

In the *Carpentaria* application, the service provider sought to raise, as a public interest issue, the possibility of conflict between its existing industrial relations policies and the policies of a new entrant, in terms of award and union coverage, award conditions, occupational health and safety compliance, and uniformity of enterprise bargaining.[347] The NCC dismissed the argument, citing no evidence of 'different policies'.[348] In circumstances where substantive reform of the service provider's workforce was already underway, the NCC also found insufficient evidence to support the submission that declaration would result in the service provider incurring job losses, particularly in regional areas, giving rise to 'significant social considerations'.[349]

In the *AuIron* application, the service provider claimed that it would be contrary to the public interest for the services of a facility (in this case, the Wirrida-Tarcoola rail track) to be declared when the access seeker had publicly stated that it did not require access until a few years hence.[350] However, the NCC held that, before trains could commence operating on the track, the access seeker would need to engage in commercial arrangements (eg, feasibility

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Minister from declaring the relevant service.

345 [1997] ATPR (NCC) 70-005, 70,411. Similar arguments failed in *Specialized Container Transport* [1997] ATPR (NCC) 70-004, 70,373; and in *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 43.

346 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,411. See, also, *Specialized Container Transport* [1997] ATPR (NCC) 70-004, 70,373; and *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 45.

347 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,320-70,321.

348 Ibid 70,321.

349 Ibid.

350 *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 44.

studies, calling for tenders) to facilitate the transportation of its product by the required starting date, and that the service provider's argument thus had no basis.[351]

Three separate matters were raised by the facility owner, SACL, in the *SIA* review in an attempt to demonstrate that declaration of the relevant freight handling services would be contrary to the public interest. First, it was submitted that SACL itself was the organisation best equipped, and authorised by statute, to carry out the difficult task of managing SIA, in terms of balancing the competing demands for scarce space there, and that the ACCC should not be allowed to perform this role.[352] The ACT disposed of this submission by saying that it was 'not allowing the Commission to do anything'.[353] As the ACT explained:

> Part IIIA of the Act sets out the statutory scheme which provides a role for the Council, the Minister, the Tribunal, the Commission and the Federal Court of Australia. It is part of this statutory scheme, where in certain circumstances an applicant cannot gain access to a service, that a process can be commenced which may result in the Commission arbitrating an access dispute. At that stage, the provider of the service has full opportunity to make such submissions it wishes to the Commission as it is a party to the arbitration of the access dispute: s 44U.[354]

In this way, the argument by the service provider that the ACCC was usurping another body's functions, contrary to the public interest, was summarily dismissed.

The second public interest argument was that declaration of the services would cause congestion at the airport and increase the risk of accidents; and the third that the congestion resulting from declaration would adversely affect the efficiency of airport passenger and freight operations, including departure times and arrival/delivery times.[355] The ACT rejected the second contention, for reasons which it had previously covered under criterion (d). That is, declaration would not bring about further congestion at SIA and therefore access could be

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351 Ibid 45.
352 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,795.
353 Ibid.
354 Ibid 40,795-40,796.
355 Ibid 40,795.

provided without undue risk to human health or safety.[356] Rejection of the third contention followed logically from this conclusion.[357]

Earlier submissions to the NCC also sought to invoke criterion (f) in this case. It was contended that if the freight handling services were declared, this would deprive any new owner or lessee of the airport of the opportunity to lodge an undertaking with the ACCC, as s 44ZZB provides that the ACCC cannot accept an undertaking if the service is a declared service.[358] The lodgment of undertakings was argued to be preferable to declaration, because, inter alia, it avoids the possibility of time-consuming and expensive disputes with third parties about the terms and conditions of access.[359] Again, this argument failed to convince that declaration would be contrary to the public interest. The NCC considered that the argument should not prevent declaration of the service, but should impact upon the duration of any declaration.[360] The NCC also dismissed, as unsubstantiated, the argument that declaration would be contrary to the public interest because it would undermine the incentives of existing competitors (and the service provider) to invest in new airport infrastructure.[361] A related contention that the access seeker would compromise the use of limited space and capacity within the airport was rejected by the NCC as well, on the grounds that 'declaration under Part IIIA inevitably constrains to some degree the power of a service provider to deal with a declared facility.'[362]

### (c) *Tendency to be misconstrued*

A further problem with the public interest test is its propensity to be misconstrued. As explained in section (a) above, the test does not require the access seeker to demonstrate a

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356 Ibid.
357 Ibid.
358 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,146.
359 Ibid.
360 Ibid.
361 Ibid 70,148.

public interest benefit; rather, the test is expressed in the negative, namely that access to the service would not be contrary to the public interest. Nevertheless, in going against the NCC's recommendation and deciding not to declare freight services provided by Queensland Rail in the *Carpentaria* application, the Premier of Queensland, as designated Minister, gave (inter alia) the following reason: 'I consider that the Carpentaria application does not demonstrate a public interest benefit … I believe that granting access to QR's above track services would discourage capital investment both by QR and other users in capital equipment in the above track services.'[363] With respect, that statement is incorrect because Carpentaria did not need to demonstrate that an access declaration would give rise to any public interest benefit.

This problem is compounded by the fact that, in certain decisions to date, the NCC has specifically identified the public interest benefits which would accrue should a declaration of access be made. Such findings have included the following:

- that declaration of the relevant rail service would remove the government prerogative of collecting coal royalties through excess rail freights, and that moving away from collecting royalties in this manner, which was both non-transparent and discriminatory, would be in the public interest;[364]
- that the environmental and safety benefits arising from the replacement of some road freight services by rail transport would be in the public interest;[365] and
- that access would enhance the economic activity and social viability of regional population centres in the public interest.[366]

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362 Ibid 70,150.

363 See Premier's Media Release, reproduced in *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,325.

364 *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,413.

365 *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,452.

366 *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 43.

While these factors may well have encouraged a declaration of access, such findings are strictly not within criterion (f). The criterion does not require, and should not be satisfied by any proof, that the provision of access to the service is in the public interest.

Indeed, these conclusions seek to reverse the onus of proof that is operative under criterion (f). It follows from the negative nature of the test that the onus is on the service provider to show that declaration would be contrary to the public interest.[367] However, in only one case to date has a service provider discharged this onus, and successfully refuted criterion (f). In the *Austudy* review, the ACT determined that the applicant access seeker, 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.[368] For this reason, the ACT found that access to the Austudy payroll deduction service would be contrary to the public interest.[369]

**(d) *Ill-defined scope and objectives***

There is no attempt to define the term 'public interest' in criterion (f), because, as the NCC has explained, public interest considerations are likely to 'vary from one application to another'.[370] It appears that Parliament's intention was for the criterion to be assessed on a case-by-case basis.

Questions are now being raised, however, as to whether the legislation should spell out the matters to be considered under criterion (f).[371] Indeed, a Senate Select Committee

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367 This is at odds with the usual presumption that the party seeking change should demonstrate a benefit from that change: *PC Issues Paper* (above n 14) 28.

368 *Re Australian Union of Students* [1997] ATPR (ACT) 41-573, 43,960.

369 Ibid 43,961, confirming the earlier decision of the NCC.

370 *NCC Declaration Guide* (above n 28) [9.1].

371 *PC Issues Paper* (above n 14) 28.

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.'[372]

In this regard, prior experience with the public benefit test for authorisation and notification of anti-competitive conduct under Part VII of the *Trade Practices Act*[373] helps to inform the interpretation of the public interest criterion. In the early *QCMA* decision,[374] the Trade Practices Tribunal (TPT), predecessor of today's ACT, embraced a wide conception of 'public benefit' as being 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.'[375] In refining this description in *Re 7-Eleven Stores*,[376] the TPT explained that, in modern economics, 'progress' had been subsumed into the notion of efficiency, a multi-dimensional concept encompassing productive efficiency, allocative efficiency and dynamic efficiency.[377]

Despite this broad view, in practice, the public benefits that have been recognised under Part VII of the Act (including promotion of cost savings in industry, expansion of the range of goods and services available, increased employment, and provision of better information to consumers)[378] have not strayed far from matters of economic policy.[379]

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372 Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, *Riding the Waves of Change* (AGPS, Canberra, 2000) 43.

373 See ss 90 and 93, respectively.

374 *Re Queensland Co-operative Milling Association* Ltd [1976] ATPR (TPT) 40-012.

375 Ibid 17,242.

376 [1994] ATPR (TPT) 41-357.

377 Ibid 42,677. Refer to part 2.5(B) of Chapter 2 for further explanation of these aspects of efficiency.

378 These examples are drawn from a list of recognised 'public benefits' contained in Australian Competition and Consumer Commission, *Access Undertakings – A Guide to Part IIIA of the Trade Practices Act* (ACCC Publishing Unit, Canberra, 1999) (hereafter, '*ACCC Undertakings Guide*') 80-81.

379 C Johnston, 'Consumer Welfare and Competition Policy' (1996) 3 *Competition & Consumer Law Journal* 245, 246.

Consistent with that approach, the NCC has stated that a key public interest consideration under criterion (f) is the effect that declaration would have on economic efficiency.[380] More specifically, in light of the tripartite nature of economic efficiency described above, the NCC has confirmed that its primary concern is the impact of declaration on *dynamic* efficiency.[381] This is consistent with the author's arguments in Chapter 2 – recall, in particular, the contention that priority must be given to dynamic efficiency (over productive and allocative efficiency) and that this selection must be made explicit in the objects clause proposed for Part IIIA.

However, the NCC does not view the terms 'public interest' and 'economic efficiency' as synonymous,[382] thereby implicitly endorsing the diverse arguments about the merits or problems of an access declaration that have been mounted under criterion (f).[383] Indeed, the NCC has specifically cited the so-called 'public interest' matters listed in cl 1(3) of the CPA as potentially relevant.[384] This non-exhaustive list comprises the following: ecologically sustainable development; social welfare and equity considerations, including community service obligations; government legislation and policies relating to matters such as occupational health and safety, and industrial relations; economic and regional development, including employment and investment growth; the interests of consumers generally, or of a class of consumers; the competitiveness of Australian businesses; and the efficient allocation of

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380 *NCC Declaration Guide* (above n 28) [9.9]. This point was previously made in the NCC's submission to the Productivity Commission: (sub 43, January 2001) 79.

381 *NCC Declaration Guide* (ibid) [9.10]. See, also, the NCC's submission to the Productivity Commission: (ibid) 84-85. However, Hood and Corones warn that this is not within the province of the NCC, because once a service is declared, the price at which it will be made available is subject to negotiation by the parties and, if agreement is not reached, is determined by the ACCC: Hood and Corones (above n 63) 82-83. The warning is repeated in the Law Council of Australia's submission to the Productivity Commission: (sub 37, January 2001) 15. Regulator approval of negotiated access contracts and single regulator administration of the declaration process are measures that would eliminate this concern. These measures are discussed in part 4.6 of this chapter.

382 *NCC Declaration Guide* (ibid) [9.20].

383 See previous discussion in part 4.4(F)(1)(c) above.

384 *NCC Declaration Guide* (above n 28) [9.20]. Other relevant matters are identified as including 'impending access regimes or arrangements, national developments, the desirability for consistency across access regimes, relevant historical matters and privacy': ibid [9.21].

resources.[385] A veritable smorgasbord, yet some commentators assert that cl 1(3) is weighted too heavily in favour of competition and efficiency![386]

In its final report, the Productivity Commission did not take up the suggestion of explicit guidance in respect of criterion (f) – it could have sought, for example (as a second-best solution), to confine the criterion to efficiency considerations. Instead, it merely noted that 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.'[387]

It is submitted, however, that the appropriate policy response to addressing non-efficiency concerns (such as equity and environmental issues) associated with the implementation of Part IIIA is through direct budgetary means.[388] Such assistance need not be solely 'compensatory' in nature, but should include 'active social policies' which seek to encourage creative change in the behaviour of assistance recipients.[389] This approach supports economic reform, while safeguarding wider community values.

Currently, it is the very fact that criterion (f) permits decision-makers involved in the declaration process to consider non-efficiency matters which should be cause for much unease. As Duns has explained, the concern with any public benefit/interest test is that it 'allows a range of ill-defined values to muddy the scope and objectives of competition law.'[390] Transposing Duns' analysis to the declaration criteria in Part IIIA, the author similarly finds

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[385] However, cl 1(3) does not define the term 'public interest' for the purposes of ss 44G(2)(f) and 44H(4)(f).

[386] F Argy, 'National Competition Policy: Some Issues' (2002) 9 *Agenda* 33, 41-42.

[387] *PC Report* (above n 11) 193 (emphasis added). The Commission deferred any assessment of whether the declaration criteria should be recast to focus explicitly on efficiency considerations until the next scheduled review of Part IIIA: ibid Recommendation 7.2. The Commonwealth Government has endorsed the latter recommendation: *Final Response* (above n 22) 7.

[388] To do otherwise confuses the realisation of potential gains with the distribution of those gains. Refer to the discussion of this issue in Chapter 2, part 2.5(A).

[389] Argy (above n 386) 43. Active policies would include adjustment assistance, equal opportunity measures, and active labour market programs (such as wage subsidies and training).

[390] J Duns, 'Competition Law and Public Benefits' (1994) 16 *Adelaide Law Review* 245, 267.

that the public interest criterion has 'no identifiable objectives'[391] and is 'the feature most at odds … with a view of competition law which sees the promotion of efficiency as its only proper goal.'[392]

**(2) *A call to abolish criterion (f)***

Writing in 1975, Gentle's criticism of public interest criteria in trade practices law remains apposite and convincing:

> The use of the term 'the public interest' in laws for the control of monopolistic conditions has a long, colourful, but not always distinguished history. It is a vague term that amounts to little more than a mellifluous buck-passing device … [R]esort in legislation to loose terms like 'the public interest' invites conflict between economics and the law, by indicating government unwillingness to specify clear economic objectives for anti-monopoly policy.[393]

Fortunately, the reality of the access regime to date is that criterion (f) appears to be playing a very retiring role in the matrix of declaration criteria. Indeed, it has on occasion been completely disregarded if the preceding criteria have not been satisfied.[394] Such an approach is supported by the *Duke* decision,[395] and in that light, there seems little risk of criterion (f) acting as a 'catch-all' provision. Nevertheless, the case for its abolition is compelling.

While calls to abolish the public interest criterion may seem radical and contentious, especially in light of the Productivity Commission's support for its retention, the experience so far confirms that the criterion serves no useful purpose in the matrix of declaration criteria

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Admittedly, Duns' focus was the public benefit test in Part VII of the *Trade Practices Act*, but the parallels with the public interest criterion in Part IIIA are undeniable.

391 Ibid 259.

392 Ibid 266. See S Begg and S Jennings, 'Assessment of the Commerce Act in Terms of Economic Principles' in A Bollard (ed), *The Economics of the Commerce Act* (New Zealand Institute of Economic Research, Wellington, 1989) 3, for a similar condemnation of the public benefit test in the *Commerce Act* 1986 (NZ).

393 G Gentle, 'Economic Welfare, the Public Interest and the Trade Practices Tribunal' (1975) 51 *Economic Record* 174, 174.

394 Refer to Table 4.2 in this chapter.

395 See text accompanying n 334 above.

under Part IIIA. Certainly, no declaration decisions to date have turned on the public interest criterion. In fact, the decisions demonstrate that, given appropriate interpretation and application of criteria (a)-(e), there is little work for criterion (f) to do – especially after allowing for the fact that the onus of proof under criterion (f) has not always been interpreted correctly.[396] Most damaging, of course, is the capacity of a wide-ranging public interest test to undermine the pro-efficiency objective of Part IIIA (to be captured in the regime's new objects clause).[397]

Whether there is sufficient political will to abolish criterion (f) is another question. While one might wish for microeconomic reform to be pursued with zeal,[398] entrenchment of a public interest test within the matrix of declaration criteria is undoubtedly politically expedient.[399]

### G *Residual discretion not to declare*

A disappointing aspect of the *SIA* review derives from the ACT's positive, albeit somewhat qualified, response to SACL's submission that, even if the ACT were satisfied of all the matters specified in s 44H(4),[400] it nevertheless had a 'residual discretion' to decline to make a declaration.[401] Such a discretion is not apparent on the face of s 44H(4), but the ACT still said:

> 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 s 44H(4) of the Act, that discretion is extremely limited. The matters therein specified

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396 As presently worded, it is not for the access seeker to prove that a declaration of access would be in the public interest; rather, it is for the service provider to show that declaration would be contrary to the public interest.

397 Modified, in accordance with the author's submission in part 2.5(C) of Chapter 2, to reflect an explicit emphasis on dynamic efficiency.

398 See, generally, D Parham, 'A More Productive Australian Economy' (2000) 7 *Agenda* 3.

399 Especially as community concern about the socio-economic effects of National Competition Policy is ongoing. See, eg, L Rowe, 'Economic Reformers are Losing their Nerve', *The Australian*, 26 October 2001, 13.

400 As mentioned previously, s 44H(4) sets out the same six declaration criteria found in s 44G(2).

401 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,796.

> cover such a range of considerations that the Tribunal considers there is little room left for an exercise of discretion if it be satisfied of all the matters set out in s 44H(4).[402]

The only consolation is that SACL's attempts to convince the ACT to exercise its residual discretion against declaration by resubmitting its public interest concerns, together with various other concerns,[403] under the rubric of 'matters for discretion' failed to meet with any success either.[404]

Other references to a residual discretion have been scant. In the *Freight Australia* application, the NCC stated that s 44F(4) comprised part of its residual discretion.[405] 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.[406] As explained previously, this matter has usually been incorporated within the determination of criterion (b).

While there was no mention of any residual discretion not to declare on the part of the ACT, or the NCC for that matter, in the Productivity Commission's final report, the interplay between criterion (f) and such a discretion remains a live issue after the *SIA* review. However, what purpose can an 'extremely limited'[407] residual discretion possibly serve? Certainly, there is no advantage in permitting public interest-type arguments to be advanced as matters for discretion as well as under criterion (f). As explained previously in part 4.4(D) of this chapter, these arguments risk undermining the pro-efficiency objective of the access regime. With

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402 Ibid.

403 Eg, it was argued that, as a matter of discretion, the ACT should not impose a requirement on SACL to deal with persons with whom SACL considered it should not have to deal, for reasons including safety and operational concerns. However, the ACT dismissed this argument on the basis that SACL appeared to be submitting that any service provider should have the right to determine, without interference, who should have access to that service, in direct contravention of the policy of Part IIIA: ibid 40,797.

404 Ibid 40,796-40,798.

405 *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 11. See, also, *NCC Declaration Guide* (above n 28) [10.2].

406 Ibid.

407 See text accompanying n 402 above.

respect, the author submits that the ACT's claim to possession of a residual discretion to refuse declaration should be retracted or overruled at the earliest opportunity.

## 4.5 OTHER DECLARATION (STAGE ONE) ISSUES

### A *Role of the minister*

An important issue impinging upon the effectiveness and timeliness of Part IIIA processes is the role played by the Minister in the declaration of services. The Hilmer Committee took the view that, because a decision to grant a right of access inevitably involves trade-offs between the interests of different groups (eg, 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.[408] Subsequently, Professor Hilmer explained that the mechanisms his Committee recommended 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.[409]

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 that:

- the politicisation of the decision whether or not to grant access has no objectivity, no forum for hearing, and no certainty;[410]
- the involvement of both the NCC and the Minister, with examination of the same criteria, involves double-handling and consequential inefficiencies;[411]

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408 *Hilmer Report* (above n 2) 250. For further discussion, see A Abadee, 'Hilmer's National Focus: Interpreting Part IIIA of the Trade Practices Act' (1998) 6 *Trade Practices Law Journal* 103.

409 F Hilmer, 'The Bases of Competition Policy' (1994) 17 *University of New South Wales Law Journal* viii, xiii. (The content of that article was largely reiterated in F Hilmer, 'The Bases and Impact of Competition Policy (1995) 25 *Economic Analysis & Policy* 19.)

410 Pengilley (above n 106) 4.

- 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;[412]
- Ministerial involvement has added to the uncertainty, unpredictability and time-consuming nature of the Part IIIA declaration process;[413]
- 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 systems but none have been declared;[414] and
- Ministerial involvement in declarations (and certifications) but not in undertakings, introduces an element of inconsistency into the access regime.[415]

However, following its consideration of the arguments for and against Ministerial participation, the Productivity Commission concluded in a fashion that closely reflected the sentiments of the Hilmer Committee many 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 than by regulators.[416]

That conclusion is extremely disappointing.[417] Ministerial involvement is a time-wasting aspect of the declaration process that adds no value whatsoever. No purpose is served by multiple assessments of declaration applications – especially when the ACT's review of the Minister's decision renders the Minister's role redundant. The author submits, therefore, that the NCC should be permitted to decide declaration applications under Part IIIA, rather than simply make recommendations to the Minister in respect of such applications – and it is the

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[411] Pengilley (above n 281) 249.

[412] *PC Report* (above n 11) 371, citing a submission by the Law Council of Australia (sub 37, January 2001).

[413] Ibid, citing a submission by AAPT Limited (sub 42, January 2001).

[414] Ibid, citing a submission by Rio Tinto (sub 15, December 2000).

[415] This was the Productivity Commission's own view: *PC Report* (above n 11) 372.

[416] Ibid Finding 14.1.

[417] Especially as it runs counter to the Productivity Commission's earlier view in *PC Position*

NCC's decision that should be subject to merit review. Although this would represent a major change in approach, it would provide significant benefits in terms of more timely processes.[418] Anticipated resistance from the States and Territories may be countered by pointing out that the NCC is neither a creature of the Commonwealth nor any State/Territory; rather it is a creation of the Council of Australian Governments.[419] Accordingly, comity issues are not affected by giving the NCC power to make declaration decisions itself.[420]

### B *Timeliness and transparency of stage one procedures*

As discussed in Chapter 3, the Hilmer Committee evinced a strong intention to keep access disputes away from the courts.[421] 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 s 46 of the *Trade Practices Act*.[422]

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.[423] As argued above, abolishing the Minister's role under Part IIIA would have the advantage of eliminating one (unnecessary) layer of decision-making.

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*Paper* (above n 20) 226-227.

418 Ibid 226.

419 Hood and Corones (above n 63) 43.

420 Ibid.

421 *Hilmer Report* (above n 2) 243-244.

422 Ibid.

423 See, eg, Abadee (above n 3) 40 ('there is reason to doubt the boast that the regime will deal with access disputes … expeditiously'); and I Tonking, '2000 – The Year in Review' (2001) 499 *Australian Trade Practices News* 1, 5-6 ('facility owners and seekers … generally agree that the procedures seem unduly protracted and cumbersome').

At present, the only time limit on declaration determinations is that which applies to Ministerial decisions from declaration recommendations made by the NCC: 60 days.[424] 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.[425] 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 absence of time limits has (with limited exception)[426] drawn criticism, both from academic commentators[427] and participants in the Part IIIA declaration process.[428] Consider, for example, the sequence of events leading to the *SIA* review. The initial application for declaration of the freight handling services at SIA was made in November 1996. On 30 June 1997, the designated Minister declared those services. Some 25 months later, in December 1998, SACL's application for review of the Minister's decision was heard by the ACT. There was then a further delay of 15 months before the ACT handed down its decision. And, 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.[429]

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424 Section 44H(9). The Productivity Commission supported the retention of this 60 day limit: *PC Report* (above n 11) Finding 15.2.

425 *NCC Draft Guide* (above n 338) 15.

426 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 11) 400.

427 Eg, Calleja (above n 76) 221; Hood and Corones (above n 63) 49; and Tonking (above n 423) 5-6.

428 See *PC Report* (above n 11) 397-399.

429 Hood (above n 93) 118.

Against this background, the Productivity Commission concluded that the imposition of *target* time limits in the declaration process would be desirable.[430] Its recommendation, which the Commonwealth Government supports, is that the target time limit for assessment of declaration applications by the NCC should be four months, and that reviews of declaration decisions by the ACT should similarly be heard and decided within four months.[431] No doubt the implementation of these recommendations will be welcomed by those frustrated with the processes to date.[432]

The Productivity Commission has also recommended that if the 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.[433] The rationale for this is that a deemed decision reflecting the NCC's detailed assessment of the issues is obviously preferable to an automatic presumption against declaration without regard to the facts of the matter.[434] Yet the Commonwealth Government opposes this recommendation, claiming inexplicably that it risks compromising the decision-making process.[435] The author has argued for the abolition of the Minister's decision-making role under Part IIIA; however, if Ministerial involvement is retained, deemed acceptance by the Minister of the NCC's recommendation after 60 days is an extremely sensible proposal.

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430 The Commission considered the possibility of introducing mandatory time limits for each step in the Part IIIA process, but was concerned that binding time limits might compromise good decision-making in complex cases: *PC Position Paper* (above n 20) 236.

431 *PC Report* (above n 11) Recommendation 15.3; *Final Response* (above n 22) 19. However, for this timeframe to be at all realistic, the question of increased funding and resources for the NCC and the ACT must also be addressed.

432 Given that the aim of the Hilmer Committee was to 'ensure that efficient competitive activity can occur with minimal uncertainty and delay arising from concerns over access issues', no doubt the Committee also would have welcomed the introduction of these target time limits. See *Hilmer Report* (above n 2) 248.

433 *PC Report* (above n 11) Recommendation 15.5.

434 Ibid 408. In the author's view, such a change may be expected to increase the incentive for Ministers to make their decisions within the 60 day period.

435 *Final Response* (above n 22) 20.

The NCC has chosen to operate publicly when assessing applications for declaration and certification (although there is no legislative requirement for it to do so).[436] Typically, it has invited submissions on applications and released draft recommendations seeking further comment.[437] The ACCC follows similar practices in respect of proposed access undertakings, but there the obligation is imposed statutorily.[438]

Recognising that open and transparent processes have an important role to play in enhancing regulatory accountability, reducing uncertainty for participants and generally promoting confidence in a regulatory regime,[439] the Productivity Commission has recommended that Part IIIA provide explicitly for public input on declaration and certification applications, and proposed access undertakings, where it is 'reasonable and practical' to do so.[440] The Commonwealth Government supports this recommendation, noting that it accords with the existing practices of the NCC and the ACCC.[441] The qualifier (that public input must be 'reasonable and practical') recognises the inherent trade-off between minimising the regulatory burden and effective public participation.[442] There may be circumstances, for example, in which an extensive public process will not be justified on time or cost grounds – such as where a declaration or undertaking application is made for a service that has strong similarities with a service that has been assessed previously.[443]

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436 Cf s 152AL(3) of the telecommunications access regime in Part XIC of the *Trade Practices Act* which requires the ACCC to hold a public inquiry about a proposal to make a declaration under that regime.

437 F Zumbo, 'Access to Essential Facilities in Australia' [2000] *New Zealand Law Journal* 13, 14.

438 Section 44ZZA(4). Access undertakings are considered in part 4.8 of this chapter.

439 *PC Position Paper* (above n 20) 244.

440 *PC Report* (above n 11) Recommendation 15.4. In the case of access undertakings, this would replace the existing requirement in s 44ZZA(4) that the ACCC call for public submissions in respect of proposed undertakings.

441 *Final Response* (above n 22) 19.

442 On the one hand, public participation allows for a full examination of the issues; on the other hand, it considerably increases the costs of regulation: J Church and R Ware, *Industrial Organization: A Strategic Approach* (McGraw-Hill, Boston, 2000) 861.

443 *PC Position Paper* (above n 20) 245.

The principle of transparency suggests that Part IIIA decision-makers should also be obliged to explain their recommendations and decisions.[444] Hence, the Productivity Commission has proposed that the NCC, Ministers and the ACCC be required to publish *reasons* for their recommendations or decisions relating to applications for declaration and certification, and proposed undertakings.[445] Although the NCC has always followed this practice, any legislative requirement in respect of publication is presently limited to Ministerial decisions on declaration and certification.[446] Not surprisingly, therefore, this proposal has also met with approval from the Commonwealth Government.[447]

### C *Duration of declarations*

Every declaration must include an expiry date.[448] In this regard, the NCC has indicated that a flexible approach is required and that the period for declaration of an infrastructure service will need to be considered on a case-by-case basis.[449] Relevant factors have been identified by the NCC as including the need to balance the benefits of long-term certainty for businesses against the potential for technological development, reform initiatives, and industry changes which could undermine the grounds for declaration.[450] In the *SIA* application, the NCC accepted legal advice that the declaration must expire on a specific date, and could not be linked to the happening of an event in the future.[451]

Access seekers have commonly argued for as long a period as possible, given the outlay required to compete with the facility owner in related markets, the time involved in

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444 Ibid.
445 *PC Report* (above n 11) Recommendation 15.5.
446 Sections 44H(7) and 44N(4).
447 *Final Response* (above n 22) 20.
448 Section 44H(8).
449 *NCC Declaration Guide* (above n 28) [11.1].
450 Eg, *Specialized Container Transport* [1997] ATPR (NCC) 70-004, 70,377; *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,414; and *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 47. See, also, *NCC Declaration Guide* (above n 28) [11.2].

recovering that investment, the need to reduce uncertainty and encourage investment and financing, and the necessity of developing business goodwill based on an ability to provide continuity of service. In light of these arguments, declaration periods of 15 years[452] and five years[453] have been granted thus far by the NCC.

Evans has highlighted the importance of temporal considerations when assessing the declaration criteria under Part IIIA.[454] For example, the proposed timeframe may affect whether or not declaration will promote competition, in that the time period chosen can impact on the structure of the market (eg, declaration for a lengthy period of time may act as a disincentive to investment in competing infrastructure).[455] Similarly, as the NCC noted in the *Carpentaria* application, the duration of the declaration can impact on whether or not the facilities would be uneconomical to duplicate.[456]

A declaration continues in operation until its expiry date, unless it is earlier revoked.[457] The NCC may recommend to the Minister that a declaration should be revoked if it is satisfied that, at the time of its recommendation, the Minister would be prevented from declaring the service because one of the criteria in s 44H(4) would not be made out.[458] The Minister may not

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451 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,156.

452 Eg, *Specialized Container Transport* [1997] ATPR (NCC) 70-004, 70,377; *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,414; and *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,455.

453 Eg, *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,156, in respect of the services at SIA; confirmed by the ACT in *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,799. The duration of the declaration of the Wirrida-Tarcoola rail track was also for five years: *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 47.

454 Evans (above n 238) 12.

455 Ibid 15.

456 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,297. As explained previously, the NCC now considers whether it would be uneconomic to *develop* either new or existing facilities.

457 Section 44I(3).

458 Sections 44J(1) and 44J(2). The NCC's recommendation in *Queensland Gas Pipelines* [2001] ATPR (NCC) 70-008 is illustrative of the considerations taken into account by the NCC when considering an application for revocation of access coverage. In August 2000, the NCC received applications to revoke coverage of three Queensland gas pipelines (the Peabody-Mitsui

revoke without a revocation recommendation from the NCC.[459] On receiving a revocation recommendation, the Minister must either revoke, or not revoke, the declaration,[460] and publish his/her decision.[461] The provider of a service may apply to the ACT for review of the Minister's decision not to revoke a declaration,[462] but there is no appeal against a decision to revoke. Because the revocation power under Part IIIA is exercisable in the same way as the declaration power, the same concerns of delay and double-handling also apply.[463]

### D *Encouraging investment*

The Productivity Commission has proposed the introduction of the following measures to improve investment incentives for essential infrastructure under Part IIIA:

- *Immunity via competitive tenders*

  Under this measure, where the right to construct and operate a government-sponsored essential infrastructure facility is to be determined on the basis of 'favourable' terms and conditions of access offered in a competitive tender, the facility's services would be granted immunity from declaration by the ACCC.[464]

- *Binding advance rulings against declaration*

  This measure would allow investors in a proposed essential infrastructure facility to seek a binding ruling from the designated Minister (following a recommendation from

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Pipeline, the Dawson Valley Pipeline and the Kincora Pipeline). Each application for revocation was required by s 1.31 of the NGC to be examined by the NCC against the four criteria in s 1.9 of the NGC. The NCC recommended that coverage of each pipeline be revoked as criteria (a) and (d) were no longer satisfied (ie, regulated access would not promote competition in another market and was contrary to the public interest). The Commonwealth Minister followed the NCC's recommendation and decided to revoke coverage.

459 Section 44J(6).

460 Section 44J(3).

461 Section 44J(4).

462 Section 44L(1).

463 Hood and Corones (above n 63) 103-104.

464 The immunity would apply for the term of the tender. However, it may be revoked if the conduct of the tender fails to conform with the arrangements on which the ACCC's decision was based. Revocation of the immunity would be subject to review by the ACT, but not the ACCC's initial decision. See *PC Report* (above n 11) Recommendation 11.2.

the NCC) that the facility's services would not meet the criteria for declaration in Part IIIA and should be exempt from declaration.[465]

- *Fixed-term access holidays*

  Under this measure, a new or proposed infrastructure facility which was expected to be only marginally profitable would be exempt from declaration for a designated period (the access holiday), thereby providing the owner with the opportunity to recoup capital costs free of the threat of declaration.[466]

The Commonwealth Government has expressed strong support for the first measure above, stating that it has the capacity to provide regulatory certainty for government-sponsored infrastructure investment that is likely to benefit the community and economy.[467] In contrast, the Government has indicated that the practicality of the second and third measures should be investigated in the context of industry-specific regimes, before any decision to incorporate them into Part IIIA is made.[468]

The author takes a somewhat sceptical view of all three measures, pointing out that:

- the first measure is redundant – since the infrastructure operator intends to make access to the facility's services available on favourable terms and conditions, any threat of declaration of those services can be expected to be minimal;
- implementation of the second measure will be problematical – that is, there will be difficult practical issues as to the extent to which the NCC, and Minister, would be in a position to form an opinion on whether the declaration criteria are met; and

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465 The ruling would apply in perpetuity, unless revoked by the Minister, on recommendation from the NCC, on the grounds of a material change in circumstances. Revocation of the ruling would be subject to review by the ACT. See *PC Report* (ibid) Recommendation 11.1.

466 Ibid Recommendation 11.3.

467 *Final Response* (above n 22) 15. However, the Government prefers that the relevant terms and conditions of access be 'reasonable' (rather than 'favourable'): ibid.

468 Ibid 14 and 15-16, respectively.

- even though Gans and King have argued that access holidays are 'a regulatory concept "whose time has come" in Australia',[469] if a reasonable rate of return[470] is set for the new or proposed facility (should the threat of declaration of any of the facility's services materialise), this third measure is also unnecessary.

## 4.6 NEGOTIATE/ARBITRATE FRAMEWORK

The ACT recognised explicitly in the *SIA* review that declaration creates an obligation to negotiate shared use of infrastructure services, supported by binding arbitration of disputes by the ACCC.[471] Commenting on the two-stage process for achieving access under the declaration route, the ACT said:

> The first stage requires a declaration of the service which, of itself, does not entitle any person or organisation access to the service. Rather the declaration opens the door, but before an applicant to use the service can become entitled to use the service the applicant must progress to the second stage and either reach agreement for access with the service provider or, in default of agreement, have its request for access determined through an arbitration by the ACCC.[472]

This part of the chapter examines the negotiate/arbitrate framework underlying stage two of the declaration process.

### A *Negotiation*

It is not the NCC's role under s 44G, nor the designated Minister's under s 44H, to recommend or declare, respectively, the terms upon which access is to be granted by the service provider.[473]

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469 J Gans and S King, 'Access Holidays for Network Infrastructure Investment' (2003) 10 *Agenda* 163, 176.

470 This concept is fully explained in Chapter 5.

471 Willett (above n 136) 3.

472 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,755.

473 This reflects the Hilmer Committee's recommendation that, wherever possible, the parties to an access dispute should be allowed to come to their own access arrangements: *Hilmer Report* (above n 2) 253.

If a service is declared, the service provider and access seeker must attempt to negotiate an access arrangement.[474]

Pursuant to s 44Y(1)(c), such negotiations must be conducted 'in good faith'.[475] Although doubts have been expressed about the scope of this duty,[476] it is submitted that the standard of good faith at least requires a party involved in commercial negotiations to actively facilitate and participate in those negotiations; to act honestly and consistently with good conscience; and to have regard to the other party's legitimate interests, particularly where the other party is under a special disability or at an information disadvantage.[477]

In its submission to the Productivity Commission, AAPT Ltd, a telecommunications company, highlighted the importance of good faith negotiations when it summarised the difficulties faced by access seekers thus:

> An access provider will often take steps to delay the granting of access. This can take the form of unnecessary delays in access negotiations, or offers being made which are commercially unreasonable … One of the major problems confronting an access seeker is 'information asymmetry'. The access provider will always have a significant advantage in negotiation and arbitrations by virtue of the fact that it understands the technical operation and the costing structure of the service far better than an access seeker ever could.[478]

Certainly, a facility owner who competes with the access seeker in another market will have strong incentives to stall access negotiations for as long as possible, so as to hinder the access seeker's activities in that other market.[479] To avoid protracted post-declaration

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474 Part IIIA does not expressly provide for a right to negotiate. However, before a person seeking access can notify the ACCC of an access dispute under s 44S, presumably some access negotiations must have taken place: A Hood, 'Third Party Access in Queensland: Lessons for all Australian States' (1999) 7 *Trade Practices Law Journal* 4, 12.

475 Section 44Y(1)(c) permits the ACCC to terminate an arbitration if it thinks that the party who notified the dispute has not engaged in negotiations in good faith.

476 J Cripps, 'Disputes Over Access and Charges for the Use of Publicly Owned Facilities' (1997) 53 *Australian Construction Law Newsletter* 19, 22; and Hood and Corones (above n 63) 56.

477 C Boge, 'Does the Trade Practices Act Impose a Duty to Negotiate in Good Faith? Part I' (1998) 6 *Trade Practices Law Journal* 4, 7-8; and Hood (above n 474) 12.

478 Submission by AAPT Ltd (sub 42, January 2001) 9.

479 King (above n 194) 276; and Hood and Corones (above n 63) 57. Such conduct occurs in the

negotiations, the author advocates the implementation of a proposal floated by the Productivity Commission in its position paper, but not pursued in its final report – namely, that arbitration should commence 30 days after declaration of a service, unless both parties to the dispute notify the ACCC that a resolution is imminent.[480] This contrasts with calls to deter delaying tactics via the introduction of some form of sanction or penalty for failure to negotiate in good faith.[481] Although the latter proposal may have initial appeal, in practice, it would complicate the operation of Part IIIA by necessitating an investigation into what constitutes genuine commercial negotiation.[482]

It is also the case that an access seeker's ability to negotiate fair terms and conditions of supply of a declared service depends largely on the information that party has available to it to evaluate any offers made by the service provider.[483] However, as noted in AAPT Ltd's submission, the service provider will have a far greater appreciation than the access seeker of matters such as the cost and price structures of the services in question, their technical operation, the degree of spare capacity, and so on.[484] This information imbalance weakens the bargaining position of the access seeker.[485]

In recommending the introduction of mandatory 'two-sided' information disclosure requirements,[486] the Productivity Commission has taken an even-handed approach to the problem of information asymmetry in access negotiations. The recommendation obliges the

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pre-declaration stage as well. As was noted in *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,424, one of SCT's reasons for seeking declaration of Westrail's services was that Westrail had been 'dilatory' in negotiating a formal access agreement.

480 *PC Position Paper* (above n 20) Proposal 6.4.

481 In its submission to the Productivity Commission's review of the national access regime, Sydney Airports Corp Ltd suggested that, where the ACCC terminates an arbitration under s 44Y(1)(c), the ACCC should be empowered to charge its costs to the party who failed to negotiate in good faith: (sub 114, March 2001) 61.

482 *PC Position Paper* (above n 20) 156.

483 As Grant points out, 'access seekers cannot negotiate cost-based prices in the absence of any information regarding those costs': A Grant, '1997 Telecommunications Regime – One Year On' (1998) 2 *TeleMedia* 45, 46.

484 See text accompanying n 478 above.

485 Grant (above n 483) 46; and *PC Position Paper* (above n 20) 153-154.

access seeker to provide 'sufficient information' to enable the service provider to respond to the request for access.[487] In turn, the service provider must give 'sufficient information' to the access seeker to facilitate effective negotiation on the terms and conditions of access.[488]

However, the generality of the language used in the above recommendation directs attention to the difficulties of specifying the exact nature of the information the negotiating parties must disclose. This concern led the Commonwealth Government to conclude that it would be preferable for the ACCC to publish non-binding guidelines indicating to service providers and access seekers the type of information that is likely to best facilitate negotiations after declaration of a service.[489] The author shares the Government's disquiet that mandatory disclosure requirements may simply lead to additional disputation about the sufficiency of the information each party furnishes.

Should negotiations between the service provider and access seeker culminate in an access agreement, this operates as a commercial contract between those parties. The agreement does not have to be registered, although it can be if the ACCC accepts an application by the parties to the contract for its registration.[490] It is strongly submitted, however, that all privately negotiated contracts should be subject to regulator approval before becoming legally binding.[491]

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486 *PC Report* (above n 11) Recommendation 8.1.

487 Ibid.

488 The Productivity Commission has suggested that this should comprise information on the availability of the service, including any reasons why the service is not available on the conditions sought by the access seeker; an offer of the terms and conditions of access to the service; and 'sufficient information' (such as the costs of operating the facility and providing the service) to enable the access seeker to make a reasonable judgment of the basis on which the terms and conditions of access were determined: ibid.

489 *Final Response* (above n 22) 8.

490 Section 44ZW(1). In making that decision, the ACCC must take into account the public interest and the interests of all persons who have rights to use the service to which the contract relates: s 44ZW(2). The ACCC must publish a decision not to register a contract and give the parties to the contract reasons for the decision: ss 44ZW(3) and 44ZW(4). A review of that decision may then be sought from the ACT, which has the power to affirm the ACCC's decision or register the contract: s 44ZX.

491 King (above n 194) 277. Indeed, it was the Hilmer Committee's view that all access contracts, whether achieved through negotiation or arbitration, should pass a registration process: *Hilmer Report* (above n 2) 267. The registration of such contracts has the additional benefit of allowing a base of industry-specific terms to be built up: Hood and Corones (above n 63) 56.

Where prices are set by negotiation, the access literature discloses a significant risk that the service provider and the access seeker will collude to share any monopoly profit that can be made by extracting monopoly rent from end users.[492] In other words, negotiated access agreements are likely to preserve monopoly pricing in the final product market.[493] According to this literature, the threat of arbitration, rather than increasing the prospect of a service provider negotiating in good faith,[494] merely strengthens the bargaining power of the access seeker, so that it gains a greater share of the monopoly profit available.[495]

### B *Arbitration*

If negotiations break down, then either the access seeker and/or the service provider may notify the ACCC that an 'access dispute' exists.[496] The ACCC must then resolve the dispute by arbitration,[497] taking into account the following matters set out in s 44X(1): [498]

> (a) the legitimate business interests of the provider, and the provider's investment in the facility;
> (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
> (c) the interests of all persons who have rights to use the service;
> (d) the direct costs of providing access to the service;
> (e) the value to the provider of extensions whose cost is borne by someone else;
> (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
> (g) the economically efficient operation of the facility.[499]

The arbitral process concludes when the ACCC makes a written determination on access by the third party to the service.[500] Pursuant to s 44V(2), the determination may deal

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492 See, eg, S King, 'Guaranteeing Access to Essential Infrastructure' (1995) 2 *Agenda* 423, 426-427; King and Maddock (above n 113) 98-101; J Tamblyn, 'Pricing Criteria for Determining Access' (1996) 3 *ACCC Journal* 3, 6; and Hood and Corones (above n 63) 55.

493 The emphasis in Part IIIA on negotiated access thereby 'disenfranchises' final consumers: King (ibid) 430.

494 Hood and Corones (above n 63) 57.

495 King and Maddock (above n 113) 103.

496 Section 44S(1).

497 For the provisions governing the arbitration of access disputes, see Part IIIA, Division 3, Subdivision C (ss 44U-44Y).

498 The ACCC is also entitled to take into account any other matters it thinks relevant: s 44X(2).

with 'any matter relating to access by the third party', including requiring the third party to pay for access to the service, and specifying the terms and conditions of the third party's access.[501] However, the determination must not cause any of the effects listed in s 44W(1), such as interfering with the future use of the facility by the existing user.[502] Also, the determination does not have to require that the provider grant access to the third party, notwithstanding that access was declared by the Minister.[503]

The parties to the arbitration may apply in writing to the ACT for a review of the ACCC's determination.[504] The ACT's review amounts to a re-arbitration of the matter,[505] at the conclusion of which the ACT may either affirm or vary the ACCC's determination.[506] An appeal from the ACT's decision lies to the Federal Court on a question of law only.[507]

Notwithstanding the fact that the arbitration provisions of Part IIIA are yet to be tested, each of the following points has the potential to improve the process outlined above:

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499 More detailed consideration of the matters in s 44X(1) may be found in Chapter 5.

500 Alternatively, s 44Y permits the ACCC to terminate an arbitration (without making a determination) for various reasons, including, eg, that it thinks the notification of the dispute was vexatious, or the subject matter of the dispute is trivial, misconceived or lacking in substance: s 44Y(1)(a) and (b).

501 Section 44V(2)(b) and (c). For detailed discussion of the principles intended to guide the ACCC's deliberations when setting terms and conditions (particularly price) of access, see Chapter 5.

502 Section 44W(1)(a). The term 'existing user' is defined, in s 44W(5), to include the service provider. These provisions reflect the Hilmer Committee's concern to ensure that, particularly in the case of privately owned facilities, 'an obligation to provide access does not unduly impede an owner's right to use its own facility, including any planned expansion of utilisation or capacity': *Hilmer Report* (above n 2) 256.

503 Section 44V(3).

504 Section 44ZP(1). The application must be made within 21 days of the ACCC's determination, otherwise that determination has effect: s 44ZP(2), s 44ZO(1).

505 Section 44ZP(3). For the purposes of the review, the ACT has the same powers as the ACCC: s 44ZP(4).

506 Section 44ZP(6).

507 Section 44ZR.

- There are obvious time/cost advantages to the parties in seeking mediation before the arbitration provisions of Part IIIA are brought into play.[508] It would be useful if the parties were encouraged to consider this option.[509]

- At present, Part IIIA arbitrations are conducted on a bilateral basis.[510] This means that issues of general concern to access seekers (or, indeed, service providers) will need to be considered afresh in each arbitration.[511]

  Not surprisingly, the Productivity Commission's response to concerns about the efficacy of bilateral arbitration was to recommend that the ACCC be granted the discretion to conduct multilateral arbitrations.[512] The Commonwealth Government supports this recommendation,[513] as does the author.

- Section 44V(2) permits the ACCC's determination to deal with 'any matter' relating to the access seeker's request for access (even where the parties have resolved most issues and only a few outstanding matters remain). This is clearly unnecessary and time consuming. The author joins the Commonwealth Government[514] in endorsing the Productivity Commission's recommendation that the ACCC, when arbitrating terms and conditions for declared services, should generally limit its involvement to matters in dispute between the parties.[515]

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508 R Shogren, 'Telecommunications Access – A View from the ACCC' (1997) 1 *TeleMedia* 117, 118-119.

509 Eg, through the ACCC's publicly available information booklets on the national access regime.

510 Pursuant to s 44U, the parties to the arbitration are the service provider, the access seeker and any other person accepted by the ACCC as having a sufficient interest in the matter.

511 Submission to the Productivity Commission's review of the national access regime by AAPT Ltd (sub 42, January 2001) 10.

512 *PC Report* (above n 11) Recommendation 8.5.

513 *Final Response* (above n 22) 9. To enhance transparency in regulatory processes, the Government has indicated that provision will be made to require the ACCC to explain its reasons for conducting multilateral hearings in arbitrations: ibid 10.

514 Ibid 8.

515 *PC Report* (above n 11) Recommendation 8.2. Where matters agreed between the parties are subject to reassessment, the ACCC should be required to explain its reasons for doing so in the post-arbitration report: ibid. For discussion of these reports, see text accompanying n 528ff.

- Section 44V(2)(d), which states that the ACCC's determination may require the provider to extend the facility, must be read with s 44W(1)(e), which stipulates that the determination must not have the effect of requiring the provider to bear some or all of the costs associated with extending the facility. Section 44W(1)(e) contemplates an access seeker undertaking the necessary extensions itself and gaining access to the existing facility through interconnection. However, the feasibility of this depends on the arbitrator having the power to require such interconnection – a power presently unavailable to the ACCC under s 44V. This oversight necessitated the Productivity Commission's call for s 44V to be amended to allow the ACCC, in arbitrating an access dispute, to require a service provider to permit interconnection to its facility by an access seeker.[516] Naturally, there is support from the Commonwealth Government for this amendment.[517]

- Pursuant to s 44W(1)(c), the ACCC's determination must not have the effect of depriving any party of a 'protected contractual right' (ie, a right under a contract that was in force at the beginning of 30 March 1995).[518] The *Hamersley Iron* case, previously considered in connection with the production process exclusion to the definition of 'service' in s 44B,[519] also raised the matter of protected contractual rights.

  In relation to the latter issue, Hamersley claimed that certain agreements it had entered into with the Western Australian government in 1963 contained protected contractual rights within the meaning of s 44W(1)(c).[520] In effect, Hamersley's argument was that the NCC should not be permitted to recommend declaration of the rail service because

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516 *PC Report* (above n 11) Recommendation 8.4.

517 *Final Response* (above n 22) 9.

518 Section 44W(5). Interference with pre-existing contractual rights may impact adversely on economic efficiency by discouraging innovation and investment. Hence, such rights are 'protected' under Part IIIA. See, further, Hood and Corones (above n 63) 30.

519 Refer to the discussion of this case in part 4.3(A) of this chapter.

520 [1999] ATPR 41-705, 43,040-43,041. The development of major infrastructure facilities is often assisted by government via, eg, project-specific legislation, development grants, and special landholding concessions.

the ACCC would be compelled to deny access at the arbitration stage of proceedings (since any other outcome would deprive Hamersley of its protected contractual rights).

Kenny J was not required to consider this issue, having interpreted the production process exclusion in Hamersley's favour. However, her Honour made it clear that, under Part IIIA, the question of protected contractual rights was a constraint imposed only on the ACCC in arbitrating an access dispute; it was not a constraint imposed on the NCC in recommending for/against declaration of a service, or on the Minister in deciding whether to declare that service.[521]

But why leave the determination of whether a protected contractual right should deny access until an access dispute has been referred to the ACCC? It would make far greater sense if the matter were considered much earlier in the declaration process.[522] Logically, this would be when the NCC is considering whether to recommend declaration of a service. For this reason, the author submits that the declaration criteria should be amended to address the issue of protected contractual rights expressly.

- As no time limits are presently imposed, arbitration of access disputes may be as lengthy and cumbersome as having a matter heard before a court.[523] The target time limits[524] of six months for access determinations by the ACCC, and four months for reviews of such determinations by the ACT, proposed by the Productivity Commission[525] are intended to enhance the timeliness of arbitrated outcomes. These reasonable limits are supported by the Commonwealth Government.[526]

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521 Ibid 43,043.

522 Aliprandi (above n 58) 45; and Hood and Corones (above n 63) 30.

523 B Owen, 'Determining Optimal Access to Regulated Essential Facilities' (1990) 58 *Antitrust Law Journal* 887, 893. Smaller access seekers, in particular, may be unwilling or unable to take a dispute to arbitration because they may be unable to withstand the cost and delay involved: Tamblyn (above n 492) 6.

524 See n 430 above.

525 *PC Report* (above n 11) Recommendation 15.3.

526 *Final Response* (above n 22) 19. The Government also intends to provide discretion to the ACCC to grant interim arbitration determinations and to backdate a final determination to the date negotiations commenced: ibid.

- Part IIIA fails to provide for public access to information about arbitrated access arrangements.[527] To redress this situation, the Productivity Commission considered that the ACCC should be required to publish reports on completed arbitrations under Part IIIA.[528] Subject to the proviso that any information disclosed does not unduly harm the legitimate business interests of parties to the dispute, post-arbitration reports are intended to inform subsequent access seekers about the broad parameters within which an arbitration has occurred and the methodologies underpinning the determination of terms and conditions.[529] Post-arbitration reports will enhance regulatory transparency, and are endorsed by the Government[530] and this author for that reason.

- Access arrangements sanctioned under Part IIIA (including arbitrated determinations) are not shielded from the operation of the restrictive trade practices provisions in Part IV,[531] or the authorisation provisions in Part VII, of the *Trade Practices Act*.[532] If an access arrangement could be regarded as anti-competitive under Part IV, the parties must consider whether to apply to the ACCC for an authorisation under Part VII to 'validate' the arrangement.[533]

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527 The ACCC is required to keep a register of declarations, but there is no requirement that the terms of an access arbitration be made public: L Carver, 'The Hilmer Report and Competition Policy: A Consumer Perspective', Paper presented at *Trade Practices: A New Regime in the Making*, University of New South Wales and Trade Practices Commission, Sydney, 3 November 1994, 10. Cf the treatment of negotiated outcomes: see text accompanying n 490 above.

528 *PC Report* (above n 11) Recommendation 15.6. A case for similar disclosure would also logically extend to aspects of the terms and conditions of undertakings. However, this could be accommodated as part of the requirement for the ACCC to publish the reasons for its undertaking decisions (see the discussion of Recommendation 15.5 in part 4.8(B) of this chapter), rather than requiring a separate report.

529 Ibid 411. Thus, post-arbitration reports are expected to contain matters such as the decision-making framework and methodologies underpinning the arbitrated outcome; discussion of any implications of the determination for subsequent access seekers; justification of reassessment of matters previously agreed between the parties; and explanations of decisions on whether or not to engage in multilateral arbitrations: ibid Recommendation 15.6.

530 *Final Response* (above n 22) 21.

531 Particularly, ss 45, 46 and 47.

532 Section 44ZZNA.

533 *PC Position Paper* (above n 20) 254.

It seems incongruous that regulated access arrangements could possibly be found to be in breach of Part IV of the *Trade Practices Act*, but the possibility creates uncertainty for investors, facility owners and access seekers alike. The Productivity Commission acknowledged the concern in its position paper,[534] but the matter was not pursued in its final report.[535] The author submits that the Commission's position paper proposal has obvious merit and should be implemented. According to this proposal, the terms and conditions of the following Part IIIA access arrangements would be exempt from exposure to Parts IV and VII of the *Trade Practices Act*: arbitrated determinations for declared services; agreements reached under certified regimes with the involvement of the relevant regulator; agreements negotiated under accepted undertakings; and registered private agreements in respect of declared services.[536]

### C *Extending the role of the NCC*

The two-stage process for obtaining access via declaration that was enacted in Part IIIA is not the model proposed in the Hilmer Report.[537] There it was expected that the NCC would recommend to the designated Minister not only whether a third party should be granted access to an essential facility, but also (if access were approved) the pricing principles, and other terms and conditions of access, that should apply.[538] It was also envisaged that the terms of access recommended by the NCC would be made public and be binding on the Minister.[539] Any declaration by the Minister would therefore have to include the pricing principles governing access to the facility, plus other terms and conditions necessary to protect the legitimate

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534 Ibid.

535 The Commission's view was that '[t]he materiality of any problems arising from the current overlap between Parts IIIA and IV of the *Trade Practices Act* is not clear': *PC Report* (above n 11) Finding 15.3.

536 *PC Position Paper* (above n 20) Proposal 10.1.

537 Evans (above n 16) 47.

538 *Hilmer Report* (above n 2) 255.

539 Ibid 255-256.

interests of the facility owner.[540] Then, if the parties were unable to agree on an access price or other terms, either party could seek a binding arbitration in accordance with the declared principles under the auspices of the ACCC.[541]

In contrast, Part IIIA has reposed in separate bodies the declaration of a service (NCC and designated Minister) and the terms upon which access is to be granted (ACCC).[542] Yet the matters about which the NCC and Minister must be satisfied under ss 44G and 44H are likely to be inextricable from any decision about the terms on which access should be granted. It seems inevitable that issues previously covered by both the NCC and the Minister will be examined for a third time by the ACCC – particularly when the ACCC is entitled to determine whether the service provider should in fact be required to provide access to a third party, notwithstanding that access has already been declared by the Minister.[543]

To assist the efficient operation of the access regime, the author has previously argued for more substantive decision-making by the NCC at the 'front-end' of declaration proceedings, and the abolition of the Minister's role in respect of such applications. Further streamlining of procedures could sensibly be achieved by rethinking the current division of responsibility in Part IIIA between the NCC and the ACCC. The author disputes the need for both bodies to be involved and favours a single national regulator for access to infrastructure services, as proposed by the Productivity Commission in its position paper.[544]

As far as the declaration route is concerned, the great advantage of a single regulator model is that it would enable issues presently confined to stage one or stage two to be

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540 Ibid 266-267.

541 Ibid 256.

542 Thus, '[n]o decision making entity has the power to consider these various matters as one overall issue': W Pengilley, 'Competition Regulation in Australia: A Discussion of a Spider Web and its Weaving' (2001) 8 *Competition & Consumer Law Journal* 255, 281.

543 Section 44V(3).

544 *PC Position Paper* (above n 20) Proposal 9.2. This proposal goes a step further than the Hilmer model, which, as previously explained, anticipated the involvement of both the NCC and the

considered together.[545] Not only would this save time and money, it would allow an holistic approach to the consideration of particular applications – for example, ensuring that the rationale upon which declaration is based is properly reflected in the access pricing process.[546]

Yet this was the very basis on which most respondents to the Productivity Commission who commented on the single regulator approach opposed the proposal. The argument repeatedly made in those submissions was that the separation of declaration from the specification of terms and conditions of access should be maintained as a justifiable division between adjudicatory and regulatory processes.[547] However, that argument does not sit comfortably with the present provisions of Part IIIA. As noted above, in circumstances where declaration of a particular service has already occurred, the ACCC, in arbitrating a dispute over terms and conditions of access to the service, is entitled to reconsider 'any matter relating to access by the third party'[548] and 'does not have to require the provider to provide access to the service by the third party'.[549] Plainly, these powers are more adjudicatory than regulatory. The argument is also at odds with the existence of other access regimes administered by a single regulator.[550]

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ACCC: see text accompanying n 537ff.

545 Corones (above n 242) 144. As Pengilley has said, 'Surely all issues should be considered at one time by one body': W Pengilley, 'Comment on "Part IIIA: Unleashing a Monster"' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 161, 167.

546 Concern that Part IIIA does not presently permit this was expressed in F Hanks, 'The Competition Law Framework for Deregulation of Public Utilities in Australia' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 2, 10.

547 See, eg, the submissions cited in *PC Report* (above n 11) 382-384. The argument reflects Pengilley's early view that there is a conceptual distinction between adjudication of the service and orders for access: Pengilley (above n 281) 272. Cf Pengilley's more recent comments in n 545 above.

548 Section 44V(2).

549 Section 44V(3).

550 Consider, eg, the telecommunications-specific access regime in Part XIC of the *Trade Practices Act*, which is administered by the ACCC; and the general access regime in Part 5 of the *Queensland Competition Authority Act* 1997 (Qld), which is administered by the Queensland Competition Authority. Under each of those regimes, the relevant regulator acts as both the recommending body in respect of applications for declaration of access, and the arbitrator of access disputes.

In its final report, the Productivity Commission resiled from the single regulator model advanced in its position paper and concluded, disappointingly, that '[t]he current division of administrative responsibility in Part IIIA between the NCC and the ACCC is appropriate.'[551] In strongly disagreeing with the Commission on this issue, the author maintains that the national access regime should be administered by a single body,[552] and that the regulator should be the NCC.[553]

To support the submission that access regulation should fall within the exclusive domain of the NCC, the author cites Pengilley's observation that the ACCC has amassed 'vast regulatory powers over a wide range of industries and practices'.[554] This behaviour, which is consistent with the empire building scenario hypothesised for the competition watchdog in Chapter 2,[555] has led to fears that the ACCC is now 'at or near the limits of the functions it can absorb'[556] and ensuing calls for some of its responsibilities to be taken away.[557]

For the following reasons, the author contends that Part IIIA is an appropriate place to begin pruning the ACCC's operations:

- First, the explanatory material accompanying the draft version of Part IIIA sought to justify the reduction of the NCC's role (from that contemplated for it by the Hilmer Committee) on the grounds that the formulation of terms and conditions of access 'will

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551 *PC Report* (above n 11) Finding 14.2. As noted previously, the Productivity Commission also disappointed with its finding that the role of the Minister should be retained: see text accompanying n 417 above.

552 This submission finds support in Samuel (above n 284) 15; Calleja (above n 76) 213; and *PC Position Paper* (above n 20) Proposal 9.2.

553 Cf the conclusion that the national access regulator should be the ACCC reached in Samuel (ibid); Calleja (ibid) 221; and *PC Position Paper* (ibid).

554 Pengilley (above n 542) 264. For a detailed description of the role and functions of the ACCC, see A Fels, 'Watersheds, Minefields and the Role of the Commission' in R Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, Sydney, 2000) 25, 35-59.

555 See part 2.4(B) of that chapter.

556 R Bannerman, 'Reflections on the Changing Role of the Commission' (2000) 8 *Trade Practices Law Journal* 166, 170. (Mr Bannerman was the first Chairman of the TPC.)

557 R Featherston, 'Australian Competition and Consumer Commission: Too Many Hats?', Paper presented at *Trade Practices Workshop*, Business Law Section of the Law Council of Australia, Melbourne, 7-9 August 1998, 7. See, also, W Pengilley, 'Some Ramblings and Reflections of

require some experience in the industry concerned … which is unlikely to be readily available to a small, high level body such as the Council.'[558] However, this ignores the Hilmer Committee's point that the NCC could appoint technical experts from particular industries to its staff, and, if necessary, commission work from outside parties, to assist in establishing appropriate pricing principles or other terms.[559] Insofar as access pricing is concerned, there is no basis for believing that the ACCC possesses unique skills which the NCC would be unable to acquire.[560]

- Second, the ACCC is widely perceived as a consumer-oriented authority.[561] Irrespective of the validity of such concerns, there would be significant apprehension among service providers if the ACCC were solely responsible for administering Part IIIA.[562] Perceptions of the NCC are not coloured in this way.[563]

- Third, the ACCC is a Commonwealth body, whereas the NCC is a creation of the Council of Australian Governments.[564] It is reasonable to expect that the eight State/Territory Governments, on whose continued co-operation the access compact depends, are likely to be discomfited by the prospect of the ACCC determining the application of Part IIIA to significant State/Territory assets.[565] As Professor Hilmer recognised, these governments would have greater confidence in the NCC.[566]

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"Un Commissar Ancien"' (2002) 10 *Trade Practices Law Journal* 163, 165.

558 Explanatory Memorandum, *National Competition Policy Draft Legislative Package* (AGPS, Canberra, 1994) [1.14].

559 *Hilmer Report* (above n 2) 320. Obviously, this contemplates increases to the NCC's budget, so that it is properly staffed and resourced.

560 Pengilley (above n 557) 166.

561 *PC Report* (above n 11) 381; and Pengilley (ibid) 165.

562 Pengilley (above n 545) 169; and *PC Report* (ibid) 385

563 Nevertheless, the NCC has its detractors too – see, eg, the extremely critical assessment of the NCC's activities in S Rix, 'National Competition Policy: Parliamentary Democracy, Public Policy and Utilities' (1999) 7 *Competition & Consumer Law Journal* 170. Cf the more balanced account in S Cohen, 'National Competition Policy: Parliamentary Democracy, Public Policy and Utilities – A Response to Stephen Rix' (2000) 7 *Competition & Consumer Law Journal* 281.

564 Hood and Corones (above n 63) 43.

565 *PC Report* (above n 11) 385-386.

566 Hilmer (above n 409) xii.

In the author's view, concerns that a single regulator model would blur the distinction between the certification and undertakings mechanisms are unfounded.[567] As parts 4.7 and 4.8 of this chapter will evidence, these other two paths to access involve different processes and are intended to serve different purposes. This would not change simply because the NCC assumes responsibility for accepting access undertakings as well as certifying effective access regimes.

## 4.7 CERTIFICATION

### A *Assessing the effectiveness of State/Territory access regimes*

Assessments of the effectiveness of State/Territory access regimes will be triggered in the following circumstances:[568]

- *Applications for declaration*

  The declaration provisions of Part IIIA stipulate that the NCC cannot recommend, and the designated Minister cannot decide, that a service be declared if it is already the subject of an effective access regime.[569] Accordingly, if a non-certified State/Territory access regime covers the service for which declaration is sought, the NCC (and, in turn, the Minister) is obliged to determine whether that regime is effective.[570] If the access regime is found to be effective, then declaration is not available.

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567 Submission to the Productivity Commission's review of the national access regime by the NCC (sub 99, July 2001) 57.

568 *PC Report* (above n 11) 231-232.

569 Sections 44G(2)(e) and 44H(4)(e). This avoids regulatory duplication by ensuring that declaration is not extended to areas where 'effective' access arrangements already apply: *PC Position Paper* (above n 20) 168.

570 If the regime has previously been certified as effective, the NCC and the Minister must follow that decision, unless they believe that there have been substantial modifications of the access regime during the intervening period: ss 44G(4) and 44H(6).

- *Applications for certification*

  The effectiveness of State/Territory access regimes may be 'pre-determined',[571] on application by the relevant Premier/Chief Minister, under the certification mechanism in Part IIIA.[572] If the Commonwealth Minister, after receiving a recommendation from the NCC, certifies the State/Territory access regime as effective, then the declaration provisions of Part IIIA cannot apply to the services covered by that regime.[573] Instead, the State/Territory regime exclusively governs access to those services.[574]

Whether the issue arises in the context of declaration or certification, the effectiveness of a State/Territory access regime must be assessed according to the criteria set out in cl 6(2)-(4) of the CPA (these criteria are commonly referred to as the cl 6 principles).[575] Box 4.1 contains a summary of the relevant principles, which, pursuant to s 44DA(1), have the status of guidelines rather than binding rules.[576] Introduced into Part IIIA in 1998, this provision permits greater flexibility in judging the effectiveness of State/Territory regimes, by enabling the NCC and Commonwealth Minister to regard a State/Territory regime as effective even though aspects of the regime may not strictly comply with the cl 6 principles. 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.[577]

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571 *PC Report* (above n 11) 232.

572 Certification of State/Territory access regimes is provided for in Part IIIA, Division 2, Subdivision C (ss 44M-44Q).

573 See n 569 above.

574 *NCC Certification Guide* (above n 312) [1.2].

575 Sections 44G(3) and 44H(5) import the cl 6 principles into the declaration process; and ss 44M(4) and 44N(2) import them into the certification process.

576 Section 44DA(2) further specifies that 'an effective access regime may contain additional matters that are not inconsistent with CPA principles'.

577 R Steinwall, 'Competition Developments on Access and Mergers and their Impact on State and Territory Governments' (1998) 14 *Australian & New Zealand Trade Practices Law Bulletin* 85, 86.

**BOX 4.1: Summary of the clause 6 principles**

Clause 6(2) recognises that a State/Territory regime governing access to a particular infrastructure facility may be 'ineffective' where the influence of the relevant facility extends beyond the jurisdictional boundaries of that State/Territory, or substantial difficulties arise from the facility being situated in more than one jurisdiction

Clause 6(3) limits the coverage of 'effective' State/Territory access regimes to services provided by means of significant infrastructure facilities where it would not be economically feasible to duplicate the facility, access to the service is necessary in order to permit effective competition in dependent markets, and the safe use of the facility by the person seeking access can be ensured at an economically feasible cost.

Clause 6(4) requires an 'effective' State/Territory access regime to incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.
(b) Where such agreement cannot be reached, a right for persons to negotiate access should be established.
(c) Any right to negotiate access should provide for an enforcement process.
(d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.
(e) The facility owner should use all reasonable endeavours to accommodate the requirements of access seekers.
(f) Terms and conditions of access need not be the same for all access seekers.
(g) If negotiation fails, disputes should be referred to a dispute resolution body.
(h) Decisions of the dispute resolution body should bind the parties.
(i) In deciding on the terms and conditions of access, the dispute resolution body should take into account: (i) the owner's legitimate business interests and investment in the facility; (ii) the costs to the owner of providing access, but not costs associated with losses arising from increased competition in upstream or downstream markets; (iii) the economic value of any additional investment that the access seeker or owner has agreed to undertake; (iv) the interests of all persons holding contracts for use of the facility; (v) contractual obligations of the owner or other persons already using the facility; (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility; (vii) the economically efficient operation of the facility; and (viii) the benefit to the public from having competitive markets.
(j) The facility owner may be required to extend the facility.
(k) If there is a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.
(l) The dispute resolution body should not impede the existing right of a person to use a facility unless compensation issues have been considered and, if appropriate, determined.
(m) The facility owner should not engage in conduct that hinders access to the facility.
(n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.
(o) The dispute resolution body should have access to financial statements and other accounting information pertaining to a service.
(p) Where more than one State/Territory regime applies to a service, those regimes should be consistent and provide a single process for access.

The ACT's decision in *Freight Victoria Ltd*[578] confirms that the effectiveness of a State/Territory access regime must be determined on the basis of the regime as it exists, not on the basis of proposed amendments to the regime. The factual background to that decision involved various applications under Part IIIA of the *Trade Practices Act* by Freight Victoria Ltd (which traded as Freight Australia) and the State of Victoria.

In May 2001, Freight Australia, the lessee of the Victorian Railway Intra-State Rail Network, lodged an application with the NCC asking it to recommend to the designated Minister that the point-to-point line service provided by the leased facility be declared. Two months later, in July 2001, the State of Victoria applied to the NCC to have its rail access regime in Part 2A of the *Rail Corporations Act* 1996 (Vic) certified as an effective access regime for the same service.

Freight Australia's application culminated in the NCC's recommendation, and the Minister's decision, that the particular service not be declared. In the course of its recommendation, the NCC noted that the Victorian rail access regime failed to satisfy all the relevant criteria in cl 6(2)-(4) of the CPA and was therefore not an effective access regime. Observing these proceedings from the sidelines, the State of Victoria immediately indicated that it was prepared to make amendments to the *Rail Corporations Act* to satisfy the NCC.

When Freight Australia applied to the ACT for a review of the Minister's decision not to declare, the State of Victoria sought to have Freight Australia's application stayed until the Minister had made a decision in relation to its own certification application. In dismissing the State of Victoria's application for a stay, the ACT considered that, as a matter of general principle, a matter should be determined on the basis of the law as it exists at the time of the

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578 [2002] ATPR (ACT) 41-884.

determination.[579] The ACT held that it would be inappropriate to anticipate or speculate as to alterations in the law that may occur in the future.[580] Thus, to be effective, a State/Territory access regime must satisfy the cl 6 principles *at the time* the NCC (and, then, the Minister) considers an application for declaration or an application for certification.

### B *Should the clause 6 principles be moved to Part IIIA?*

In the course of its inquiry, the Productivity Commission queried whether the effectiveness criteria in cl 6 of the CPA should be embodied within Part IIIA itself, hypothesising that the inclusion of the criteria for all access routes within the one document would increase the standing of Part IIIA as the framework access regime.[581] However, in its final report, the Commission concluded that the principles for assessing the effectiveness of industry-specific access regimes should continue to be located within the CPA.[582]

There are sound reasons for keeping the content of cl 6 outside of any jurisdiction's legislation. To the extent that the cl 6 principles represent a 'bridge'[583] between Part IIIA and State/Territory-based industry-specific regimes, retaining the principles within an inter-governmental agreement, rather than transferring them to the Commonwealth *Trade Practices Act*, affords the States/Territories appropriate status as parties to the access compact with the Commonwealth,[584] and preserves the means by which the States/Territories can influence the framework of the national access regime.[585] In the author's view, critics of the pace of microeconomic reform in Australia too quickly overlook the difficulties of winning political

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579 Ibid 45,128.
580 Ibid.
581 *PC Position Paper* (above n 20) 174.
582 *PC Report* (above n 11) Finding 9.1.
583 Ibid 231.
584 Particularly since certification involves a consultative approach with the States/Territories: Willett (above n 136) 6.
585 See, further, E Harman and F Harman, 'The Potential for Local Diversity in Implementation of the National Competition Policy' (1996) 55 *Australian Journal of Public Administration* 12, 22; and Argy (above n 386) 34.

co-operation and support for Commonwealth initiatives without the active involvement of the States/Territories.[586]

Such political sensitivities no doubt led the Commonwealth Government[587] to endorse the Productivity Commission's recommendation[588] that modifications to the cl 6 principles be pursued through co-operative efforts between the parties to the CPA. This exercise is expected to focus the parties' attention on the Commission's finding that an effective access regime should include the following:[589]

- an objects clause;
- coverage arrangements that focus mainly on services for which it would be uneconomic to develop another facility to provide the service;
- clearly specified dispute resolution arrangements and provisions to establish the terms and conditions of access;
- clearly specified pricing principles applying to regulated terms and conditions;
- effective appeal and enforcement provisions;
- revocation and review requirements for all determinations;
- where relevant, provisions to facilitate consistency across multiple State/Territory access regimes applying to a particular service; and
- where relevant, provision for measures to facilitate efficient new investment.

When the matters above are compared to the existing effectiveness criteria in cl 6(4), it is apparent that inter-governmental negotiations are likely to focus on the introduction of additional criteria requiring the inclusion of an objects clause and pricing principles within effective State/Territory access regimes. Issues relating to the purpose and form of an

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586 See, also, M Keating and J Wanna, 'Remaking Federalism' in M Keating, J Wanna and P Weller (eds), *Institutions on the Edge?* (Allen & Unwin, Sydney, 2000) 126, 139.

587 *Final Response* (above n 22) 11.

588 *PC Report* (above n 11) Recommendation 9.2.

589 Ibid Finding 9.2.

appropriate objects clause were addressed in Chapter 2. In Chapter 5, the Productivity Commission's recommendations in respect of pricing guidelines (intended to provide the basis for guidelines to be incorporated into all industry-specific regimes) will be reviewed.

### C *The certification process*

A State/Territory government is able to implement an access regime without having the regime certified under Part IIIA of the *Trade Practices Act*. However, if the State/Territory access regime is not certified as effective, the services covered by that regime remain exposed to a Part IIIA declaration.[590] Certification of a State/Territory regime provides certainty about how access to the 'covered' services will be regulated.[591]

The certification process commences when, by written application to the NCC, the Premier/Chief Minister of a State/Territory that is a party to the CPA requests the NCC to recommend that the Commonwealth Minister certify a particular State/Territory access regime as effective.[592] The NCC forwards its recommendation on the matter to the designated Commonwealth Minister,[593] who then decides whether to certify the regime.[594] In recommending whether a State/territory access regime is effective, the NCC must: (i) apply the cl 6 principles; and (ii) not consider any other matters.[595] The Commonwealth Minister must do likewise in deciding whether the regime is effective.[596] See Table 4.3 for a 'snapshot' of certification activity under Part IIIA.

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590 See n 569 above.
591 *NCC Certification Guide* (above n 312) [1.3].
592 Sections 44M(1) and 44M(2).
593 Section 44M(3).
594 Section 44N(1). The Commonwealth Minister is required to publish his/her decision: s 44N(4).
595 Section 44M(4). The NCC has said that it assesses State/Territory access regimes 'holistically': *NCC Certification Guide* (above n 312) [2.10].
596 Section 44N(2).

**TABLE 4.3: ‘Snapshot’ of certification decisions to date**

| *Application for certification of State/Territory access regime* | *Did the NCC recommend certification?* | *Did the Minister decide to certify?* |
|---|---|---|
| **Gas** | | |
| NSW gas distribution networks regime (Oct 1996) | Yes (May 1997) | Yes (Aug 1997) – as an interim measure, prior to implementation of NSW gas access regime |
| SA gas access regime (Jun 1998) | Yes (Sep 1998) | Yes (Dec 1998) – regime certified for 15 years |
| QLD gas access regime (Sep 1998) | No (Nov 2002) | *Decision pending* |
| NSW gas access regime (Oct 1998) | Yes (Mar 1999) | Yes (Mar 2001) – regime certified for 15 years |
| ACT gas access regime (Jan 1999) | Yes (Jul 2000) | Yes (Sep 2000) – regime certified for 15 years |
| WA gas access regime (Feb 1999) | Yes (Feb 2000) | Yes (May 2000) – regime certified for 15 years |
| VIC gas access regime (Jul 1999) | Yes (Apr 2000) | Yes (Mar 2001) – regime certified for 15 years |
| NT gas access regime (Mar 2001) | Yes (Jun 2001) | Yes (Oct 2001) – regime certified for 15 years |
| **Rail** | | |
| NSW rail access regime (Jun 1997) | Yes (Apr 1999) | Yes (Nov 1999) – regime certified until 31 Dec 2000 |
| QLD rail access regime (Jun 1998) | *Not applicable* | *Not applicable (application withdrawn)* |
| WA rail access regime (Feb 1999) | *Not applicable* | *Not applicable (application withdrawn)* |
| NT/SA rail access regime (Mar 1999) | Yes (Feb 2000) | Yes (Mar 2000) – regime certified until 31 Dec 2030 |
| VIC rail access regime (Jul 2001) | *Not applicable* | *Not applicable (application withdrawn)* |
| **Shipping** | | |
| VIC commercial shipping channels access regime (Dec 1996) | Yes (May 1997) | Yes (Aug 1997) – regime certified for 5 years |
| SA ports and maritime services access regime (Aug 2001) | *Not applicable* | *Not applicable (application withdrawn)* |
| **Electricity** | | |
| NT electricity access regime (Dec 1999) | Yes (Dec 2001) | Yes (Mar 2002) – regime certified for 15 years |

The relevant Premier/Chief Minister may apply to the ACT for a review of the Commonwealth Minister's decision.[597] Although such an application is yet to be lodged, the review operates as a reconsideration of the Minister's decision,[598] and the ACT may affirm, vary or reverse that decision.[599]

Table 4.3 demonstrates that the certification mechanism has been used predominantly in the gas industry. See Box 4.2.

**BOX 4.2: National Gas Code**

In November 1997, the Council of Australian Governments entered into the Natural Gas Pipelines Access Agreement, under which the parties agreed to introduce a National Third Party Access Code for Natural Gas Pipeline Systems (the National Gas Code, or NGC) and to implement a uniform Gas Pipelines Access Law (GAPL) to give effect to the NGC. Pursuant to the Agreement, each participating State/Territory submitted a gas access regime (comprising the GAPL and the NGC) for certification as an effective access regime under Part IIIA.[600] As Table 4.3 reveals, the only gas access regime that the NCC has recommended not be certified is Queensland's.[601] Although the Commonwealth Minister's decision in this matter is yet to be announced, it may be noted that the Minister has followed the NCC's recommendation in respect of all certification applications thus far.

Jointly developed by the industry, gas users, government and regulators, the NGC establishes a uniform national framework for third party access to natural gas pipelines. Where, previously, such access arrangements were regulated by a plethora of State/Territory-based regulators, the ACCC is now the nominated regulator of third party access to gas transmission pipelines in all States and Territories (except Western Australia, which has vested its State regulator with responsibility for both gas transmission and distribution).[602]

The owner or operator of a pipeline covered by the NGC[603] must lodge an access arrangement with the relevant regulator, detailing proposed terms and conditions for third party access to its services. The NGC sets out the principles to be applied by the regulators in assessing an access arrangement, involving a balancing of the interests of the pipeline owner and access seekers, as well as the public interest. It also provides for binding arbitration of disputes between pipeline owners and access seekers over issues such as spare or developable pipeline capacity, terms of access, trading policies, and interconnection.

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597 Section 44O(1). The application for review must be made within 21 days after publication of the Commonwealth Minister's decision: s 44O(2).

598 Section 44O(3).

599 Section 44O(6). Pursuant to s 44O(7), a decision of the ACT is taken to be the decision of the Commonwealth Minister.

600 K McDonald, 'Access to Gas Trunk Pipelines in Queensland' (1998) 17 *Australian Mining and Petroleum Law Journal* 138, 138.

601 The NCC had fundamental concerns relating to dispute resolution processes, review arrangements and information flows to access seekers under that regime. See *Queensland Access Regime for Gas Pipeline Services* (unreported, NCC, November 2002).

To enhance timely decision-making under the certification process, the Productivity Commission has recommended the introduction of a target time limit of six months for assessments by the NCC of certification applications,[604] and a 60 day statutory limit for decisions by the Commonwealth Minister on certification recommendations from the NCC.[605] The Commission has further recommended that the parties to the CPA give consideration to allowing 'interim' and 'conditional' certifications.[606]

The Commonwealth Government supports a target time limit for the NCC's certification recommendation;[607] but says that the Minister should also operate within a non-binding timeframe, as a statutory deadline of 60 days on certification decisions would risk compromising the decision-making process.[608]

Citing the same arguments raised in connection with the declaration process, the author again submits that ministerial decision-making under Part IIIA is unnecessary and should be abolished. Rather than making mere recommendations in respect of declaration and certification applications, the NCC should be empowered to declare relevant services, and to certify State/Territory access regimes as effective – with full merit review of the NCC's decisions available from the ACT in both instances. However, if the Minister's role is to continue, there is no reason why the existing 60 day statutory time limit for ministerial decisions on declaration recommendations should not be transposed to the certification process.[609]

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602 Fels (above n 426) 200.

603 Covered pipelines are exempt from declaration under Part IIIA.

604 *PC Report* (above n 11) Recommendation 15.3.

605 Ibid Recommendation 15.2.

606 Ibid Recommendation 9.3.

607 *Final Response* (above n 22) 19.

608 Ibid 18.

609 See s 44H(9). The Government considers that certification is generally a 'more detailed and complex' process than declaration: *Final Response* (ibid). However, since the Minister has the full benefit of the NCC's recommendation in respect of the certification application, it is difficult to accept that his/her decision-making will be compromised by a 60 day statutory time limit.

On the question of allowing interim and conditional certifications, the author shares the Government's view that this should be advantageous to all parties.[610] Infrastructure owners and investors will benefit from the decision-maker indicating early in the process what would be required in the future to attain effective certification.[611] At the same time, the mechanism will assist access seekers to gain access as early as possible.[612]

If the Commonwealth Minister does decide to certify a State/Territory access regime as effective, the Minister must also specify the period for which certification will be in force.[613] Acting rationally, a facility owner will seek to have certification granted for as long a period as possible, in order to maximise certainty in its operation of the facility. The access regime for the Tarcoola-Darwin railway (the NT/SA rail access regime in Table 4.3) presents a case in point.[614] That regime covers the rail services provided by the existing rail infrastructure from Tarcoola (north-west of Adelaide) to Alice Springs, and a new railway line which will be constructed between Alice Springs and Darwin at an estimated cost of $1 billion. On 23 March 2000, the Commonwealth Treasurer certified the regime until 31 December 2030, announcing that:

> The thirty year certification period for the access regime has been granted because of the consortium's need for certainty in its operation of the rail facilities. Without that certainty in the regulatory regime it is uncertain whether the project could continue.[615]

The duration of this certification reflects the commercial realities of the investment involved and 'provides a risk reduction mechanism to assist in ameliorating the considerable risk faced by the consortium in constructing and upgrading the rail line.'[616]

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610 *Final Response* (ibid) 11.

611 Ibid.

612 Ibid.

613 Section 44N(3). The NCC must also provide a recommendation on this matter: s 44M(5).

614 See, generally, J Zaverdinos, 'Certification of the Access Regime for the Tarcoola to Darwin Railway' (2000) 8 *Trade Practices Law Journal* 171.

615 'Certification of Access Regime for Tarcoola-Darwin Railway', Commonwealth Treasurer's press release, 23 March 2000.

A certification remains in force for the duration specified in the Commonwealth Minister's decision.[617] As the certification approaches expiry, the relevant Premier/Chief Minister has the option of re-applying for certification to maintain immunity from declaration of services covered by the access regime.[618] Expiry of certification exposes the services covered by the State/Territory access regime to the declaration provisions of Part IIIA, but does not otherwise alter the legal operation of the access regime within that jurisdiction.

So that certifications may be expeditiously rolled over, the Productivity Commission has recommended that Part IIIA include explicit provision to permit extensions of certifications as follows:

- six months prior to the expiry of a certification, the NCC would be required to seek public comment on the need for any change to the existing arrangements;
- on the basis of that input and other relevant information, the NCC would have the option of making a case for change;
- if the NCC did not do so, and the service provider did not wish to make changes, extension of the arrangement in question would be automatic;
- the duration of the extension would be determined by the Minister on advice from the NCC .[619]

However, to conserve the resources of the NCC, the Commonwealth Government has reasonably proposed that the NCC should only be required to assess cases if requested to do so by the service provider, six months prior to expiry.[620]

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616 Zaverdinos (above n 614) 171.

617 The certification of an effective State/Territory access regime cannot be revoked unless the State/Territory ceases to be a party to the CPA: s 44P(a).

618 *NCC Certification Guide* (above n 312) [1.9].

619 *PC Report* (above n 11) Recommendation 15.7.

620 *Final Response* (above n 22) 21-22.

As is evident from the preceding discussion, only State/Territory access regimes can be certified as effective under Part IIIA. There is no certification process for Commonwealth access regimes.[621] However, the Productivity Commission sensibly considered that it would be desirable for *all* industry-specific access regimes to be tested against the Part IIIA framework, recommending that cl 6 of the CPA be amended to allow the Commonwealth Government to seek certification of its access regimes.[622]

The Commonwealth Government deems this unnecessary, since Commonwealth access regimes are reviewed at least once every ten years, through a public consultation process, in accordance with CPA commitments.[623] However, if the Commonwealth Government is committed to discouraging unwarranted divergence from the national access framework, it should be prepared to submit its own access regimes for testing against the effectiveness criteria.[624] The author concurs with the view that there is no justification for an 'entirely *independent* family'[625] of Commonwealth access regimes.

## 4.8 ACCESS UNDERTAKINGS AND ACCESS CODES

### A *Lodgment*

As an alternative to a service being declared and terms of access being decided by arbitration, Part IIIA provides for a scheme of access undertakings.[626] Under this scheme, depicted

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[621] Nor is there a certification process for private access regimes. However, private individuals or businesses may obtain immunity from the declaration provisions of Part IIIA by having the ACCC approve an access undertaking. See the discussion of access undertakings and access codes in part 4.8 of this chapter.
[622] *PC Report* (above n 11) Recommendation 9.1.
[623] *Final Response* (above n 22) 10.
[624] Indeed, this mechanism could replace existing review processes.
[625] *PC Position Paper* (above n 20) 171 (emphasis in original).
[626] For the provisions governing access undertakings for non-declared services, see Part IIIA, Division 6 (ss 44ZZA-44ZZC).

diagrammatically in Figure 4.2, a service provider can volunteer to give the ACCC[627] a written undertaking in connection with the provision of access to the service.[628] Alternatively, an industry body can give the ACCC a written code setting out rules for access to a service.[629]

The latter approach seeks to take advantage of the efficiencies that arise from permitting a code of conduct setting out rules for access to an industry's infrastructure to be determined by industry participants and accepted by the ACCC, and then allowing individual service providers to submit undertakings based on the code.[630] For example, the need for public consultation in respect of undertakings that are consistent with the code is obviated,[631] thereby streamlining the undertakings assessment process.

By submitting an access undertaking, the service provider hopes to avoid the declaration process altogether. If the undertaking is accepted, the service to which it applies cannot be declared.[632] On the other hand, once a service is declared under Part IIIA, the service provider is unable to submit an undertaking in respect of it.[633]

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627 Under the single regulator model advanced by the author in part 4.6(C) above, the NCC (rather than the ACCC) would be responsible for the undertakings process. However, to avoid unnecessary confusion with the existing terms of Part IIIA, the discussion in this part of the chapter acknowledges the present involvement of the ACCC. Nevertheless, the references to the ACCC may be read as references to the NCC.

628 Section 44ZZA(1) specifies that an undertaking may be lodged by 'a person who is, or expects to be, the provider of a service'. In s 44B, the term 'provider' is defined to mean 'the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service'. The inability of those who do not own infrastructure facilities to submit undertakings has been a source of frustration to some. Eg, the Australian Rail Track Corporation, formed by agreement between the Commonwealth and State governments in 1997 to promote the use of the national rail network by providing a single point of access for rail service providers whose operations cross State jurisdictions, has been unable to submit an undertaking covering the entire interstate rail network because it is not the service provider in New South Wales, Queensland or parts of Western Australia: see Fels (above n 426) 201. However, the Productivity Commission concluded that the problem was not sufficiently general to warrant changing the current provisions in Part IIIA: *PC Report* (above n 11) Finding 10.1. The author agrees with the Commission that there would be 'in principle concerns and legal problems in allowing non-owners to lodge undertakings': ibid 269.

629 Section 44ZZAA(1).

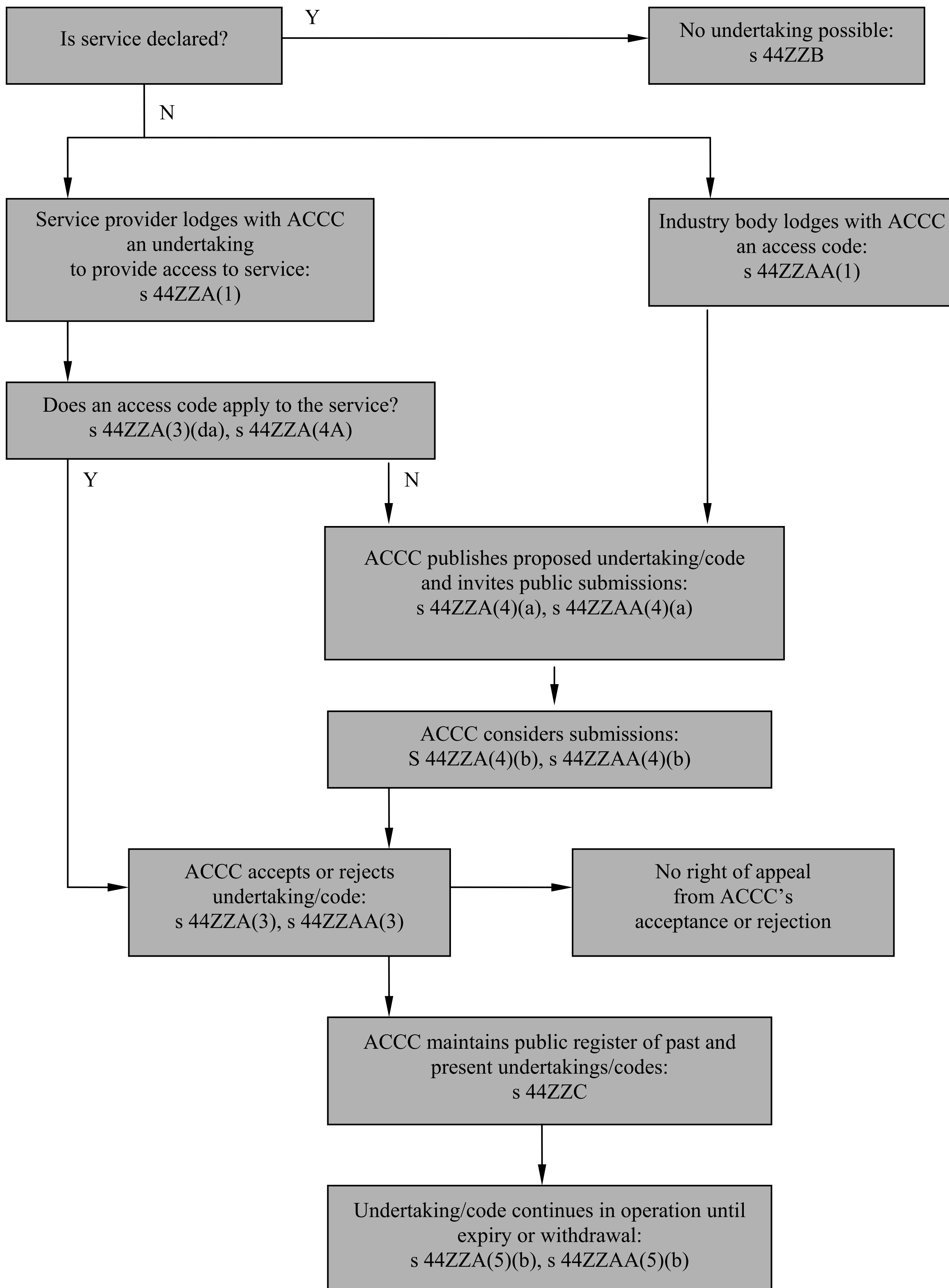
630 Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 February 1997, 658.

631 Section 44ZZA(4A).

632 Section 44G(1). Thus, the service provider will use the undertaking to outline 'its price, terms and conditions of granting access': Zumbo (above n 437) 16.

633 Section 44ZZB.

**FIGURE 4.2: Access undertakings and access codes**



However, there is no compelling reason for not allowing undertakings to be submitted after a service has been declared.[634] Indeed, it may well improve certainty for service providers and access seekers by avoiding the need to determine terms and conditions through negotiation-arbitration.[635] Hence, the Productivity Commission has recommended that service providers should be permitted to lodge post-declaration undertakings.[636] The Commonwealth Government supports this recommendation.[637]

At present, there is scope for a service provider to submit an access undertaking under Part IIIA in circumstances where the service provided by the infrastructure could also be covered by a certified access regime.[638] However, this undermines the objective of certification. To eliminate the possibility of dual coverage and associated incentives for forum shopping, the author endorses the Productivity Commission's recommendation that the ACCC not be allowed to accept an undertaking if the service concerned is subject to a certified access regime.[639] The Commonwealth Government has recognised that this will support the use of certified regimes.[640]

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634 *PC Position Paper* (above n 20) 186.

635 Submission to the Productivity Commission's review of the national access regime by the NCC (sub 43, January 2001) 44.

636 *PC Report* (above n 11) Recommendation 10.1.

637 *Final Response* (above n 22) 12.

638 *PC Report* (above n 11) 270. Eg, AGL Energy Sales & Marketing Ltd's application to the NCC in 2000 for coverage of the Eastern Gas Pipeline under the NGC coincided with Duke's submission of an access undertaking to the ACCC in respect of the same pipeline.

639 Ibid Recommendation 10.4.

640 *Final Response* (above n 22) 13-14. In a related move, the Productivity Commission has also recommended that the NGC should be amended to provide that, where a pipeline owner potentially covered by the Code lodges a Part IIIA undertaking, this should trigger an assessment by the NCC to determine whether the pipeline meets the requirements for coverage under the Code: *PC Report* (ibid) Recommendation 10.3. The Commonwealth Government does not oppose this change, but expects amendments to the NGC to be addressed in the independent review of that Code: *Final Response* (ibid) 13.

Under Part IIIA, the ACCC does not have power to require a service provider to submit an access undertaking, or to impose an undertaking unilaterally. To permit this would fundamentally alter the voluntary nature of undertakings.[641] Concerns have been raised, however, that the ACCC may threaten a service provider with, for example, s 46 proceedings if an access undertaking is not submitted.[642] Although the basis of such concerns is challenged by the author in Chapter 6,[643] the perception that the ACCC could act in this way reinforces the merit of appointing the NCC as sole access regulator.

As to the content of an access undertaking, amendments to s 44ZZA(1) have removed the requirement for an undertaking to include 'details' about the terms and conditions of access.[644] This does not mean that an access undertaking cannot contain highly detailed terms and conditions. Rather, the ACCC may accept a less detailed undertaking when it thinks it is appropriate to do so.[645] Practically speaking, it is a matter for determination by the ACCC and service providers on a case-by-case basis as to the level of detail to be included in an access undertaking.[646]

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641 *PC Report* (ibid) 262.

642 W Pengilley, 'The Access Regime in the 1995 National Competition Policy Package' (1995) 9 *Commercial Law Quarterly* 12, 16 (reiterated in W Pengilley, 'Access to Essential Facilities: A Unique Antitrust Experiment in Australia' (1998) 43 *Antitrust Bulletin* 519, 542); and Hood and Corones (above n 63) 123.

643 See part 6.2(B) of that chapter.

644 Following the enactment of the *Trade Practices Amendment (Industry Access Codes) Act* 1997 (Cth), s 44ZZA(1) now simply states that a 'written undertaking' may be given to the ACCC. A note to the section indicates the kinds of matters that might be dealt with in the undertaking (eg, procedures for determining terms and conditions of access to the service, and an obligation on the provider not to hinder access to the service). For further discussion of the 1997 amendments, see R Steinwall, 'Amendments to the Commonwealth Access Regime' (1997) 4 *Competition & Consumer Law Journal* 252.

645 Where an undertaking sets out procedures for establishing access arrangements, rather than detailed terms and conditions of access, it will generally be desirable for the undertaking to confer power on an institution or person to resolve disputes and make decisions about access. Should service providers wish to confer such powers on the ACCC, s 44ZZA(6A) authorises the ACCC to exercise these powers.

646 Individual contracts are used to spell out the access arrangements, including a specific access price, between the service provider and third parties: Explanatory Memorandum, *Trade Practices Amendment (Industry Access Codes) Bill* (Commonwealth of Australia, Canberra,

Nevertheless, the ACCC has stated that it must be satisfied that the undertaking is sufficiently detailed to be court enforceable.[647] Beyond the statutory requirement that an expiry date be specified,[648] the ACCC considers that undertakings should:

- specify what services are subject to the undertaking;
- specify what terms and conditions are open to negotiation;
- provide a framework for negotiations;
- provide relevant information necessary for meaningful negotiations; and
- include provisions for dispute resolution.[649]

These points reinforce that the role of an undertaking is not to set up a specifically enforceable contract, but to establish a framework for negotiation.

### B *Assessment*

The ACCC's acceptance of an access undertaking affords the service provider some degree of certainty concerning the terms and conditions on which it will provide access to the service.[650] The down-side is a lack of flexibility:[651] once an undertaking is accepted, the service provider

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1996) 2-3.

647 *ACCC Undertakings Guide* (above n 378) 19.

648 Section 44ZZA(2). The equivalent provision applying to access codes is s 44ZZAA(2).

649 See *ACCC Undertakings Guide* (above n 378) 19-20, and, more generally, Chapters 3 and 4 of that Guide entitled 'Guidelines on Undertakings' and 'Procedures for Assessment/Lodgment of Access Undertakings'. Parties considering submitting an undertaking are encouraged to have discussions with the ACCC before lodgment in order to obtain initial feedback on the proposed undertaking: ibid 64.

650 Zumbo (above n 437) 13. In addition to increasing its 'certainty parameters', it is possible that these terms may be more favourable than those that might otherwise have been negotiated with access seekers: C Binks, 'The Access Regime – Lessons from Telecommunications for Part IIIA of the Trade Practices Act', Paper presented at *Trade Practices Seminar – Current Issues*, Business Law Section of the Law Council of Australia and Law Society of South Australia, Adelaide, 18 July 1997, 12.

651 Binks (ibid) 14.

is committed; thereafter, the undertaking may be varied or withdrawn only with the ACCC's consent.[652]

Moreover, the fact that an undertaking has been accepted by the ACCC does not protect the service provider from action under Part IV of the *Trade Practices Act*.[653] If the undertaking gives rise to conduct that could place the service provider and other parties at risk of contravening the provisions of Part IV, the service provider should seek authorisation of the undertaking.[654] The approval of an undertaking or a code by the ACCC is not to be taken as a de facto authorisation. The incongruity of this situation has been previously highlighted by the author, and the argument advanced that regulated terms and conditions of access established under Part IIIA should be exempt from the operation of Parts IV and VII of the *Trade Practices Act*.[655]

To date, the use of undertakings has been limited.[656] No undertakings have been accepted by the ACCC, except in relation to the National Electricity Market. See Box 4.3.

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652 Section 44ZZA(7). The equivalent provision applying to access codes is 44ZZAA(6).
653 Section 44ZZNA.
654 *ACCC Undertakings Guide* (above n 378) 73.
655 See text accompanying n 536 above.
656 Willett (above n 136) 9.

**BOX 4.3: National Electricity Code**

In April 1995, the Commonwealth Government and the Governments of New South Wales, Victoria, South Australia, Queensland, and the Australian Capital Territory agreed to establish a National Electricity Market (NEM),[657] to permit trade in electricity across State/Territory borders on a competitive basis.[658]

The NEM, which commenced operation in December 1998, is governed by the National Electricity Code (NEC).[659] Developed jointly by the industry, electricity users, government and regulators in the participating States and Territories, the NEC comprises three separate but related elements:

- *access arrangements* – rules governing the ways in which participants gain access to and connect with transmission network, including the principles for regulating access prices;
- *market rules* – rules governing how generators and customers trade through the NEM, and how the physical system is controlled; and
- *administrative provisions* – rules governing how disputes are settled, how the code is enforced and changed, and establishing transitional arrangements for each participating jurisdiction.[660]

The access arrangements to the transmission network have been approved by the ACCC as an industry access code under Part IIIA.[661] In accordance with this approval, providers of network services must submit to the ACCC an individual access undertaking consistent with the industry access code. Under the NEC, the ACCC is the regulator of transmission access and revenues. The State/Territory regulators have jurisdiction over distribution and retail pricing.[662]

Part IIIA is not stringent in its requirements for accepting an undertaking. Section 44ZZA(3) simply provides that the ACCC may accept an undertaking, if it thinks it appropriate to do so having regard to the following matters:

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657 In addition to implementing other electricity industry reforms, including structural separation of integrated electricity monopolies. For further discussion, see A Fels, 'Access to Essential Facilities – Implementing the New Access Regime', Paper presented at *Conference of Economists*, Economic Society of Australia, Hobart, 28 September - 1 October 1997, 9-11. The NEM is managed by the National Electricity Market Management Company Ltd (NEMMCO), which is owned by the participating State and Territory Governments.

658 The different State and Territory grids are physically connected through high voltage transmission wires known as interconnects. Tasmania will join the NEM through the Basslink interconnect: see, further, S Writer and B Kumar, 'Basslink: Tasmania to Join the National Electricity Market' (2002) 10 *Trade Practices Law Journal* 167.

659 The NEC is administered by a separate company, the National Electricity Code Administrator Ltd (NECA). However, the access-related parts of the NEC are under the supervision of the ACCC.

660 G Anderson, 'Energy Market Review' (2002) 13 *Business Law Section Newsletter* 58, 59.

661 *National Electricity Market Access Code* [1998] ATPR (ACCC) 50-268.

662 Fels (above n 426) 200.

(a) the legitimate business interests of the provider;
(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
(c) the interests of the person who might want access to the service;
(d) whether access to the service is already the subject of an access regime;
(da) whether the undertaking is in accordance with an access code that applies to the service;[663]
(e) any other matters that the Commission thinks are relevant.

The matters to which the ACCC should have regard in deciding whether to accept an access code are set out in s 44ZZAA(3); the list is similar to that above in respect of access undertakings.[664]

Part IIIA imposes an additional requirement of public consultation before an undertaking/code may be accepted by the ACCC.[665] The ACCC must publish the access undertaking/code, invite submissions about it within a specified time, and 'consider' those submissions.[666] The ACCC is only able to accept an undertaking without first engaging in the public consultation process if the proposed undertaking accords with an operational access code.[667]

To achieve congruence between the various routes for access, the Productivity Commission has recommended that the criteria for assessing proposed undertakings and codes (in ss 44ZZA and 44ZZAA) should be aligned, as closely as practicable, with those applying to arbitrations for declared services (in s 44X) and the cl 6 principles for certification of effective access regimes.[668]

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663 Thus the ACCC is able to reject an undertaking which is inconsistent with the industry-wide access arrangements.
664 All access undertakings/codes accepted by the ACCC are kept on a public register: s 44ZZC. Variations are also recorded on the register.
665 Sections 44ZZA(4)(a) and 44ZZAA(4) for undertakings and codes, respectively.
666 Ibid. However, it is difficult to ascertain the extent to which the ACCC 'considers' public input, when the ACCC is not required to give reasons for its decision to accept or reject a proposed undertaking/code.
667 Section 44ZZA(4A).
668 *PC Report* (above n 11) Recommendation 10.2.

In dismissing this proposal as neither necessary or appropriate,[669] the Commonwealth Government makes the valid point that the arbitration process concerns disputes between the service provider and an identified access seeker after private commercial negotiations have failed; whereas the undertaking process assesses proposed access terms for several different access seekers (including future, as yet unidentified, access seekers whose specific requirements cannot be known).[670] In short, both processes aim to facilitate terms and conditions for granting access, but their scope of operation and level of detail are justifiably different.[671] The author shares this assessment and the Government's view that sufficient 'alignment' of the undertakings, arbitration and certification processes can be expected to arise through the requirement that the ACCC must have regard to the proposed objects clause,[672] and the recommended pricing principles,[673] in assessing proposed undertakings.[674] As the Government has explained, '[T]he proposed new requirements, that all decision-makers have regard to the same objects clause and the same pricing principles, should ensure appropriate consistency in approach to decision-making under Part IIIA.'[675]

In order to encourage timely decision-making and enhance regulatory accountability, the Commonwealth Government has endorsed the Productivity Commission's sound recommendations that the target time limit for assessments of undertaking/code applications be six months,[676] and that the ACCC be required to give reasons for its decision to accept or reject a proposed undertaking/code.[677] The Government has also expressed in principle support for the Commission's recommendation that Part IIIA include explicit provision to expedite

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669 *Final Response* (above n 22) 12. Paradoxically, the Government prefaced this conclusion by stating that it supports Recommendation 10.2 'in principle': ibid.

670 Ibid 12-13.

671 Ibid 12.

672 Refer to the discussion of the proposed objects clause in Chapter 2, part 2.5(C).

673 These pricing principles are discussed in Chapter 5.

674 *Final Response* (above n 22) 13.

675 Ibid.

676 *PC Report* (above n 11) Recommendation 15.3; *Final Response* (ibid) 19.

677 *PC Report* (ibid) Recommendation 15.5; *Final Response* (ibid) 20.

extensions of undertakings, relying on the same process proposed in respect of certifications[678] (but under the control of the ACCC, not the NCC).[679]

Currently, there is no provision for merit review of an ACCC decision on a proposed undertaking. With declaration, certification and arbitration decisions all subject to merit review, the absence of a similar right for decisions on undertaking applications is something of an anomaly in the existing Part IIIA arrangements.[680] Accordingly, the Productivity Commission has recommended, and the Commonwealth Government agrees,[681] that merit review by the ACT of decisions by the ACCC on proposed undertakings should be introduced.[682]

## 4.9 CONCLUSION

Perhaps the most important outcome of the Productivity Commission's inquiry into Part IIIA was the implicit confirmation of the worth of the national access regime.[683] That, in and of itself, undoubtedly vindicates the radical vision of the Hilmer Committee as to why an explicit mechanism for facilitating third party access to essential facilities was warranted.

In fact, as explained in this chapter, three such mechanisms are established by the regulatory schema in Part IIIA: declaration of services, certification of effective State/Territory access regimes, and acceptance of access undertakings. A generic regime setting out

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678 See text accompanying n 619 above.

679 *PC Report* (above n 11) Recommendation 15.7; *Final Response* (above n 22) 21-22. Again, the Government expects the process to be triggered by a request from the service provider: *Final Response* (ibid) 22.

680 Pengilley (above n 542) 283; and *PC Position Paper* (above n 20) 239.

681 *Final Response* (above n 22) 17.

682 *PC Report* (above n 11) Recommendation 15.1. Based on the appeal provisions applying to declaration recommendations, this most likely would entail a right of appeal by a service provider against the rejection of a proposed undertaking, and a right of appeal by an access seeker against proposed terms and conditions accepted by the ACCC.

683 Ibid Finding 4.1.

alternative routes to access is innovative by international standards. Australia's legislators deserve particular credit for the mainly careful articulation of the regime's provisions.

To the extent that the application of Part IIIA has revealed oversights and impediments in the legislation, the Productivity Commission's final report contains numerous eminently sensible recommendations intended to enhance the timeliness and transparency of regulatory processes,[684] and to achieve greater procedural consistency across the three paths to access.[685] These administrative proposals have been highlighted throughout the chapter, and the author's support for them made plain. Beyond these minor changes, however, the report makes no attempt to effect a more substantial, but equally necessary, refashioning of the regime's architecture.[686]

In particular, the author condemned in this chapter the failure of the Productivity Commission to recommend the abolition of the Minister's role in the declaration and certification processes. If any aspect of Part IIIA's operation to date has been noteworthy, it is the inability of the designated Minister to achieve anything more than the NCC had already delivered – careful, considered recommendations, treating the respective legislative requirements in accordance with sound principles and precedent. Ministerial decision-making is a layer of regulatory activity that must be excised from Part IIIA.[687]

The author was equally critical of the Productivity Commission's support for retaining the present division of responsibility in Part IIIA between the NCC and the ACCC. In the

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[684] Eg, requiring all decision-makers under Part IIIA to adhere to statutory or target time limits, and to publish reasons for their decisions.

[685] Eg, the introduction of merit review of decisions on access undertakings.

[686] The Productivity Commission acknowledged the importance of considering a range of 'higher level issues': *PC Report* (above n 11) 369. In the end, however, the Commission made relatively few recommendations for systemic or structural change to Part IIIA: Thomson and Writer (above n 249) 97.

[687] To quote Pengilley's colourful description, the proliferation of decision-making bodies makes the access regime 'the epitome of the adage that a camel is a horse created by a committee': Pengilley (above n 542) 279.

author's view, the dual involvement of these bodies in the declaration process exemplifies regulatory excess; while the assignment of the NCC to the certification route, and the ACCC to the undertakings path, is somewhat arbitrary. Hence, it was argued in this chapter that Part IIIA should move to a single regulator model, with the NCC nominated as the preferred regulator.

The Productivity Commission's decision to recommend one change to the declaration criteria, and that merely the insertion into criterion (a) of the word 'substantial', is also inadequate. While that particular amendment to criterion (a) is supported, it was argued in this chapter that criterion (c) should be recast to focus on the significance of services (rather than facilities) to the national economy; that the public interest test in criterion (f) should be abolished; and that a further criterion, addressing the issue of protected contractual rights, should be introduced.

In addition, the Productivity Commission's proposals for encouraging investment in essential infrastructure facilities were criticised on the basis that such measures are either unnecessary or problematical; whereas the converse criticism was levelled at the Commission's unwillingness to propose any measures to avoid protracted post-declaration negotiations, to require regulator approval of privately negotiated access contracts, to encourage mediation of access disputes, or to eliminate the current overlap between Part IIIA and Parts IV and VII of the *Trade Practices Act*.

The Commonwealth Government's response to the Productivity Commission's final report is not beyond reproach either. Disapproved in this chapter were the Government's refusal to contemplate that the designated Minister's failure to decide a declaration application within the statutory time limit should be treated as a deemed acceptance of the NCC's prior recommendation; its unwillingness to include a statutory deadline for Ministerial decisions on

certification applications; and its opposition to opening the certification process to Commonwealth access regimes.

The next chapter of this dissertation continues the detailed examination of the national access regime begun here, but with particular focus on the processes under the regime for determining terms and conditions of access. As with the present chapter, the analysis in Chapter 5 comprises explanation and critique of the existing regime, the Productivity Commission's recommendations in respect of Part IIIA, and the Commonwealth Government's response to these recommendations.

# CHAPTER 5

## ACCESS PRICING

### 5.1 INTRODUCTION

Specifying the terms and conditions on which access should be granted is a vital element of an access regime. In particular, it has been contended that unless the *price* at which access will be offered is set, mandating access to an essential facility is 'an economically useless remedy'.[1]

But how should access prices be determined? Access seekers and end users naturally have concerns that the price of access is not set too high,[2] at levels which deliver excessive returns to the facility owner.[3] Yet, if the price is set too low, the facility owner will not recover its costs, placing it in financial jeopardy and reducing or eliminating its incentives to invest in extra capacity.[4] More generally, if the perception exists that low access prices will be the norm, 'investment in all facilities likely to be subject to access regulation will be cut'.[5] Evidently, a great deal depends on 'getting the price of access right'.[6]

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1 G Hay, 'Reflections on Clear' (1996) 3 *Competition & Consumer Law Journal* 231, 231-232. Obviously, if the facility owner retains the ability to determine the price of access, it will be able to retain most or all of the monopoly profits, thereby perpetuating the access problem: A Fels and J Walker, 'Competition Policy and Economic Rationalism', in S King and P Lloyd (eds), *Economic Rationalism: Dead End or Way Forward?* (Allen & Unwin, Sydney, 1993) 169, 178.

2 Too high an access price discriminates against entrants, raising their costs, discouraging efficient entry, and creating inappropriate incentives for entrants to by-pass the facility: J Church and R Ware, *Industrial Organization: A Strategic Approach* (McGraw-Hill, Boston, 2000) 872.

3 K Davis, 'Access Pricing and Asset Valuation' (2002) 9 *Agenda* 223, 223.

4 Church and Ware (above n 2) 872. In addition, too low an access price provides a subsidy to entrants, promoting excessive and inefficient (ie, 'cream skimming') entry: K Hylton, 'Economic Rents and Essential Facilities' [1991] *Brigham Young University Law Review* 1243, 1269-1270.

5 A Mitchell, 'Super-Fine Judgement Required', *The Australian Financial Review*, 9 April 1997, 23. See, also, Church and Ware (ibid) 768.

6 Mitchell (ibid). See, also, Church and Ware (ibid) 872.

Together, Part IIIA of the *Trade Practices Act* 1974 (Cth)[7] and cl 6 of the Competition Principles Agreement provide limited guidance on the question of access pricing across the three paths to access.[8] Consequently, an expected outcome of the Productivity Commission's review of the national access regime was the recommendation that access pricing principles be included within the regime's architecture with specific application to arbitrations for declared services, assessments of access undertakings and evaluations of whether existing access regimes are effective.[9] Importantly, however, the proposed pricing principles (discussed in part 5.4 of this chapter) are general in nature and are not intended to replace reliance on economic pricing models in the determination of specific access fees.

The economics literature discloses the existence of a broad range of access pricing methodologies.[10] No one approach will be suitable for all situations.[11] Indeed, it is the underlying theme of this chapter that workable solutions to the complex problem of access pricing require fee arrangements to be tailored to the unique circumstances of specific service providers and access seekers, and the policy objectives sought to be achieved by granting access. The complexity of access pricing, the objectives that pricing decisions should seek to

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7 All section references in this chapter are to the *Trade Practices Act*, unless otherwise specified.

8 The general arbitration and undertakings provisions of Part IIIA essentially require the ACCC to have regard to three sets of interests in determining access disputes and assessing access undertakings: the legitimate business interests of the service provider; the interests of persons who have, or might seek, access to the service; and the public interest, including the public interest in having competition in markets. See ss 44X(1)(a), (c) and (b) and 44ZZA(3)(a), (c) and (b), pertaining to the arbitration of access disputes and the acceptance of access undertakings, respectively. Likewise, in evaluating the effectiveness of existing access regimes, the NCC is required to consider whether those same three interests are taken into account by the relevant dispute resolution body: see cl 6(4)(i)(i), (iv) and (viii) of the Competition Principles Agreement. Accordingly, in pricing access, the challenge for regulators is to balance these different interests: J Tamblyn, 'Pricing Criteria for Determining Access' (1996) 3 *ACCC Journal* 3, 8.

9 Productivity Commission, *Review of the National Access Regime* (AusInfo, Canberra, report dated 28 September 2001, released 17 September 2002) (hereafter, '*PC Report*') Recommendation 6.3. This outcome was foreshadowed by the Productivity Commission's recommendation, in December 2001, that legislative pricing principles be included in the telecommunications access regime in Part XIC of the *Trade Practices Act*.

10 See the pricing methods discussed in part 5.5 of this chapter.

advance, and a sample of practical pricing approaches are matters elaborated in parts 5.2, 5.3 and 5.5 of this chapter.

## 5.2 COMPLEXITIES OF ACCESS PRICING

### A *An inherently difficult task*

Access pricing is widely described as a difficult task, involving complex conceptual and empirical issues (such as the valuation of relevant assets, determination of the cost of capital, and the implications of information asymmetries).[12] Moreover, the varying economic and physical characteristics of different industries mean that one access pricing method will not be generally applicable.[13]

The Hilmer Committee itself concluded that there is no 'clear answer' to determining an appropriate access fee in all circumstances.[14] The Committee acknowledged that the legitimate interests of the owner of a facility were entitled to protection by the imposition of a 'fair and reasonable'[15] fee for providing access, but recognised that policy judgments would be involved in striking a balance between the owner's interest in receiving a high price (including

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11 A Fels, 'Access to Essential Facilities – Implementing the New Access Regime', Paper presented at *Conference of Economists*, Economic Society of Australia, Hobart, 28 September - 1 October 1997, 6.

12 See, eg, Tamblyn (above n 8) 10; J Kench, 'Part IIIA: Unleashing a Monster' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 122, 149; and Davis (above n 3) 223.

13 Fels (above n 11) 6.

14 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*') 253. The Committee did not recommend a specific approach to the determination of access prices; it simply made passing reference to various possible pricing methods: ibid 253-256 and 279-280. However, in light of the acknowledged complexity of access pricing, it is hardly surprising that the Hilmer Committee 'side-stepped' a detailed analysis of this issue: Kench (above n 12) 149.

15 *Hilmer Report* (ibid). Similar language has been used in the US, where the courts have sought to encourage access prices that are 'just and reasonable', in *United States v Terminal Railroad Association* 224 US 383 (1912), 411; 'fair', in *Hecht v Pro-Football Inc* 570 F 2d 982 (1977), 992; and 'non-discriminatory', in *MCI Communications Corp v American Telephone & Telegraph Co* 708 F 2d 1081 (1983), 1132.

monopoly rents that might otherwise be obtainable) and the access seeker's interest in paying a low price (such as the owner's marginal cost in providing access).[16]

It is the role of regulators to reconcile the conflicting interests of owners of essential infrastructure against those of access seekers and end users.[17] Ideally, access pricing should involve prices low enough to protect access seekers and end users from the exercise of monopoly power, but also high enough to support the investments needed to deliver infrastructure services at efficient levels of quality and quantity.[18]

At present, there are no pricing principles within Part IIIA. The legislative provisions in fact do little more than highlight the need for consideration to be given to the terms and conditions on which access should be granted.[19] Several commentators have noted this with concern,[20] pointing out that even generally worded legislative pricing guidelines would be of value, would give some certainty, and would prevent regulators from acting in a totally discretionary manner.[21]

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16 *Hilmer Report* (ibid).

17 T Parry, 'Access Regulation: Are We Going Down the Right Track?' in R Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, Sydney, 2000) 128, 139; and Davis (above n 3) 223.

18 Submission to the Productivity Commission's review of the national access regime by Network Economics Consulting Group (sub 39, January 2001) 16.

19 See ss 44V(2) and 44ZZA(1), which include 'terms and conditions' of access among examples of matters to be dealt with in access arbitrations and access undertakings, respectively.

20 Eg, A Hood, 'Third Party Access in Queensland: Lessons for all Australian States' (1999) 7 *Trade Practices Law Journal* 4, 15 ('it is unhelpful [for Part IIIA] to simply leave these potentially large dollar questions completely open-ended'); Kench (above n 12) 150 (Part IIIA puts 'the issue of remedies in the "too hard" basket'); and W Pengilley, 'Comment on "Part IIIA: Unleashing a Monster"' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 161, 169 ('the non-specification of price in the access regime' is a particular concern), reiterating the view expressed in W Pengilley, 'The Access Regime in the 1995 National Competition Policy Package' (1995) 9 *Commercial Law Quarterly* 12, 16.

21 W Pengilley, 'Competition Regulation in Australia: A Discussion of a Spider Web and its Weaving' (2001) 8 *Competition & Consumer Law Journal* 255, 281 (fn 51). This is not to diminish the care that must be exercised in articulating 'even generally worded' pricing principles. Regulation of access prices affects the return a facility owner can expect to receive on its investment – hence, any commitment to access pricing principles will affect investment incentives. If the stated principles convey uncertainty and inappropriate signals, this has the potential to impact adversely on investment. See, further, J Gans and P Williams, 'A Primer on

In these circumstances, it is not surprising to find investors in infrastructure facilities demanding future pricing certainty as a pre-requisite to their investment.[22] The access regime for the Tarcoola-Darwin railway,[23] certified by the Commonwealth Treasurer in 2000, provides a relevant example. A key feature of this regime is the manner in which third party access to the freight services provided by the railway will be priced. Two detailed pricing approaches are set out:[24] the first is a competitive constraints approach ('sustainable competitive pricing methodology');[25] and the second is based on an estimate of the access seeker's ability to pay ('floor/ceiling pricing methodology').[26] Indicative of the variety of pricing models available, the selection of these specific methodologies was deemed appropriate in this particular access situation.

### B *Asymmetric information*

The application of access pricing methods can be jeopardised if the pricing information available is incomplete or incorrect.[27] The existence of asymmetric information – which

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Access Regulation and Investment' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 150.

22 Pengilley (ibid) 281.

23 Identified as the NT/SA rail access regime in Table 4.3 of Chapter 4. Refer to part 4.7(C) of that chapter for previous discussion of this regime.

24 For detailed discussion of the two pricing approaches, see S Corones, *Competition Law in Australia*, 2nd ed (LBC Information Services, Sydney, 1999) 436; and J Zaverdinos, 'Certification of the Access Regime for the Tarcoola to Darwin Railway' (2000) 8 *Trade Practices Law Journal* 171, 172.

25 Following an access seeker's request for access under the regime, the relevant rail freight service must be tested to see if it meets the sustainable competitive pricing criteria. In determining this, the question to ask is whether the freight service provided by the railway is under the effective constraint of a non-rail service. If it is, the total freight price is determined by a formula that uses the price of the competing non-rail freight service as its benchmark. See Zaverdinos (ibid).

26 If the rail freight service is not under the effective constraint of a non-rail service, a price for the former will be negotiated within a floor/ceiling band set by the service provider on the basis of the forward-looking efficient costs of the infrastructure necessary to provide the service. See Zaverdinos (ibid).

27 P Leonard, P Waters and B Fisse, 'Essential Facilities in Telecommunications – Part 2' (1995) 3 *Telecommunications Law & Policy Review* 66, 69.

reflects the fact that service providers are at an information advantage compared with access seekers and regulators – is a serious concern.[28]

The twin problems arising from asymmetric information have been termed 'adverse selection' and 'moral hazard'.[29] In the access context, the adverse selection problem occurs because the regulator must rely on information supplied by the service provider (particularly as to cost functions) in order to set prices, even though there may be incentives for the service provider to inflate the reported value of costs.[30] Moral hazard occurs because a service provider has little incentive to reduce costs (or maintain low costs) if this simply leads to a lower regulated return.[31]

These problems may be partially overcome by using alternative information sources (eg, similar facilities operating elsewhere) and by using benchmark comparisons to provide greater incentives for efficient operation.[32] Reliance on industry-specific regulators, rather than a general regulator, is also typically advocated, since this permits greater experience and knowledge of the particular industry (including insights into how pricing information can be used and misused) to be acquired.[33] Such measures may certainly be of assistance, but information asymmetries are still likely to impact on pricing decisions.[34]

## 5.3 OBJECTIVES OF ACCESS PRICING

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28 Leonard, Waters and Fisse (ibid); and S King, 'Pricing for Infrastructure Access' (1997) 4 *Competition & Consumer Law Journal* 203, 216.

29 S King and R Maddock, *Unlocking the Infrastructure: The Reform of Public Utilities in Australia* (Allen & Unwin, Sydney, 1996) 55-56.

30 In this situation, inducements for truth-telling may be warranted: ibid 56.

31 Ibid.

32 Ibid 59; King (above n 28) 216-217; and D Lawrence, 'Benchmarking Infrastructure Enterprises' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra 1998) 54, 62-63.

33 Leonard, Waters and Fisse (above n 27) 69.

It will be recalled from Chapter 2[35] that paragraph (a) of the objects clause recommended by the Productivity Commission for inclusion in Part IIIA stipulates that the access regime should 'promote economically efficient use of, and investment in, essential infrastructure'.[36] The contribution of paragraph (a) is that it identifies efficiency as the explicit objective of Part IIIA – an objective which is directly applicable to access pricing.[37]

However, as was also made plain in Chapter 2, economic efficiency is a multi-dimensional concept.[38] There may be general agreement among economists that access prices should promote economic efficiency,[39] but this means, in theory, that access prices should promote productive efficiency, allocative efficiency and dynamic efficiency.[40]

The difficulty is that while access prices can be used to advance each aspect of economic efficiency individually, it is unlikely that a particular pricing mechanism will be able to promote all three at the same time.[41] A trade-off between the different elements of efficiency will have to be made.[42] As previously explained in Chapter 2, the weakness with paragraph (a) of the objects clause proposed for Part IIIA is that it does not assist in this regard.

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34 King and Maddock (above n 29) 59.

35 Refer to part 2.5 of that chapter, which provides the foundation for the present discussion.

36 *PC Report* (above n 9) Recommendation 6.1. Paragraph (b) states that Part IIIA should provide a framework and guiding principles to discourage unwarranted divergence in industry-specific access regimes.

37 Ibid 323.

38 The tripartite nature of economic efficiency is discussed in part 2.5(B) of Chapter 2.

39 See, eg, M Pickford, 'Pricing Access to Essential Facilities' (1996) 3 *Agenda* 165, 169-171; and King (above n 28) 206-207.

40 Ibid. In other words, access prices should reflect least cost supply, encourage optimal use of existing assets and provide incentives for efficient investment decisions: Tamblyn (above n 8) 8.

41 Eg, a pricing scheme that promotes productive efficiency is likely to discourage efficient investment over time, and a scheme that ensures efficient investment will generally reduce allocative efficiency: King (above n 28) 207.

42 Ibid. This point was recently recognised by the Full Court of the Western Australian Supreme Court in a case involving the interpretation of the National Gas Code: see *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] ATPR 41-886, 45,171-45,172.

Consider this scenario, for example. The benchmark for achieving efficient use of infrastructure is for the price of access to an additional unit of a service to be equal to the cost, or the additional resources used, to produce that unit.[43] Prima facie, this implies that access pricing should be on the basis of short run marginal cost (SRMC).[44] Under perfect competition, SRMC pricing will ensure productive and allocative efficiency. However, where natural monopoly facilities are involved, the typical pattern of high fixed costs and economies of scale (ie, decreasing average costs with increasing output) associated with such facilities means that pricing at SRMC will result in revenues failing to recoup capital costs.[45] This would be inimical to dynamic efficiency, as facility owners would have little or no incentive to maintain or extend existing facilities and/or little or no incentive to invest in the creation of new facilities.[46]

So where should Part IIIA's priority lie? Should access pricing decisions promote static efficiency (ie, productive and allocative efficiency) over dynamic efficiency, or vice versa? It was pointed out in Chapter 2 that dynamic efficiency is the key factor driving productivity improvements in an economy. In other words, dynamic efficiency is central to enhancing long-term economic welfare. Consistent with the reasoning in Chapter 2, therefore, it is submitted that the trade-off between static and dynamic efficiency which access pricing

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43 *PC Report* (above n 9) 323.

44 Ibid, citing a submission by S King (sub 1, October 2000) 17.

45 King and Maddock (above n 29) 64-65; Church and Ware (above n 2) 786; and Productivity Commission, *Review of the National Access Regime* (Position Paper, 29 March 2001) (hereafter, '*PC Position Paper*') 200.

46 King (above n 28) 208-209; and A Hood and S Corones, 'Third Party Access to Australian Infrastructure', Paper presented at *Access Symposium*, Business Law Section of the Law Council of Australia, Melbourne, 28 July 2000, 39. For detailed discussion of the impact of access pricing on investment incentives, see King and Maddock (above n 29) Chapter 7; and J Gans and P Williams, 'Efficient Investment Pricing Rules and Access Regulation' (1999) 27 *Australian Business Law Review* 267, or the more technical treatment in J Gans and P Williams, 'Access Regulation and the Timing of Infrastructure Investment' (1999) 75 *Economic Record* 127.

decisions will inevitably entail should always be in favour of dynamic efficiency.[47] This conclusion was foreshadowed by the Hilmer Committee, as follows:

> Decisions in this area [access pricing] … need to take account of the impact of prices on the incentives to produce and maintain facilities and the important signalling effect of higher returns in encouraging technical innovation. For example, relatively low access prices might contribute to an efficient allocation of resources in the short term, but in the longer term the reduced profit incentives might impede technical innovation.[48]

However, under Part IIIA, it is not clear that economic efficiency is the only goal of access pricing. As mentioned in Chapter 4, s 44X(1)(b) of the *Trade Practices Act* requires the ACCC to take into account the public interest in determining an access dispute and s 44ZZA(3)(b) similarly obliges it to have regard to the public interest in deciding whether to accept an access undertaking. The ACCC has expressly stated that it regards the public interest criteria in Part IIIA as embracing a broad range of issues, including economic efficiency and competitiveness, but also covering matters such as equity, consumer interests and safety.[49] These latter considerations can therefore also be expected to inform the ACCC in setting terms and conditions of access to particular services.

The author's misgivings in relation to public interest criteria were explained at length in Chapter 4.[50] For the same reasons, it is submitted that the retention of ss 44X(1)(b) and 44ZZA(3)(b) is only justified if the public interest criteria therein are interpreted in terms of

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47 R Smith, 'Competition Law and Policy – Theoretical Underpinnings' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra 1998) 16, 17; and G Edwards, 'Going Long: Regulating Local Telecommunications for Dynamic Efficiency' (2001) 9 *Competition & Consumer Law Journal* 146, 148.

48 *Hilmer Report* (above n 14) 253. This accords with recent judicial acknowledgement of 'a growing awareness of the long term disadvantages of striking the balance with too great an emphasis on the interest of consumers in securing lower prices, and without due regard to the interest of the service provider in recovering both higher prices and its investment': *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] ATPR 41-886, 45,171 (Parker J).

49 Australian Competition and Consumer Commission, *Access Undertakings – A Guide to Part IIIA of the Trade Practices Act* (ACCC Publishing Unit, Canberra, 1999) (hereafter, '*ACCC Undertakings Guide*') 11.

50 See discussion in part 4.4(F) of that chapter.

economic efficiency. This accords with the argument in Chapter 2 that competition law should be directed by the objective of economic efficiency,[51] since increases in efficiency will lead to improvements in productivity, economic growth and community welfare.[52] Non-economic objectives are better addressed directly through the taxation and welfare systems, not pursued indirectly through utility prices.[53] This approach is consistent with the view that competition policy (including access regulation) should primarily satisfy efficiency goals, rather than social or other goals.[54]

There has been a positive move in this direction. The Commonwealth Government has endorsed unreservedly[55] the Productivity Commission's recommendation that where the ACCC introduces considerations other than efficiency when arbitrating disputes for declared services or assessing proposed undertakings, it should be required to make this explicit and explain its reasons for doing so.[56]

## 5.4 INCLUSION OF PRICING PRINCIPLES IN PART IIIA

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[51] Refer to part 2.5(A) of that chapter.

[52] King and Maddock (above n 29) 6; M O'Bryan, 'Access Pricing: Law Before Economics?' (1996) 4 *Competition & Consumer Law Journal* 85, 90; N Rochow, 'Recent Reforms in Competition Law' (1998) 20 *Law Society of South Australia Bulletin* 28, 28; and Smith (above n 47) 17.

[53] A Bollard and M Pickford, 'New Zealand's "Light-Handed" Approach to Utility Regulation' (1995) 2 *Agenda* 411, 414; Tamblyn (above n 8) 9; and F Argy, 'National Competition Policy: Some Issues' (2002) 9 *Agenda* 33, 43.

[54] R Officer, 'The Role of Trade Practices Legislation' (1978) 6 *Australian Business Law Review* 2, 9-10; S Begg and S Jennings, 'Assessment of the Commerce Act in Terms of Economic Principles' in A Bollard (ed), *The Economics of the Commerce Act* (New Zealand Institute of Economic Research, Wellington, 1989) 1, 13; and Tamblyn (ibid).

[55] Commonwealth Treasury, 'Government Response to Productivity Commission Report on the Review of the National Access Regime', Canberra, 20 February 2004 (hereafter, '*Final Response*') 9.

[56] *PC Report* (above n 9) Recommendation 8.3. The Commission contemplated, eg, that environmental requirements might necessitate some departure of terms and conditions from those that would be appropriate based on efficiency considerations alone: *PC Position Paper* (above n 45) 164.

Given that Part IIIA presently contains only indirect indicators of legislative intent relevant to the determination of access prices,[57] the Productivity Commission concluded that pricing principles should be expressly embodied within the national access regime.[58] At the very least, the inclusion of pricing principles in Part IIIA can be expected to:

- inform regulatory determinations and ensure that a regulator's own policy attitudes do not unduly influence decision-making;
- focus commercial negotiations so as to increase the likelihood of negotiated access terms; and
- assist the development of pricing frameworks in specific industry regimes.[59]

The Commonwealth Government agrees that legislative pricing principles will guide pricing decisions and contribute to consistent and transparent regulatory outcomes over time, while facilitating commercial negotiations by providing a measure of certainty to service providers and access seekers.[60] Hence, the Government has endorsed the Productivity Commission's recommendation that pricing principles (relevant to arbitrations of access disputes, and assessments of the acceptability of access undertakings and the effectiveness of existing access regimes) be included in Part IIIA.[61]

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57 See n 8 above.

58 *PC Report* (above n 9) 138. The Commission emphasised that the inclusion of pricing principles was intended not so much to prescribe what should happen in a particular situation, but to rule out inappropriate methodologies: ibid 142.

59 Ibid 143. For further discussion, see L Thomson and S Writer, 'A Workable System of Access Regulation: The Productivity Commission's Review of the National Access Regime' (2003) 11 *Trade Practices Law Journal* 92, 94.

60 *Final Response* (above n 55) 4.

61 Ibid 4-5; *PC Report* (above n 9) Recommendation 6.3. Whether the proposed pricing principles will have a direct bearing on certification depends on the implementation of the Productivity Commission's finding that an 'effective' access regime should include appropriate pricing principles. (Refer to the discussion of Finding 9.2 in part 4.7(B) of Chapter 4.) In any event, the proposed pricing principles may be expected to exhibit desirable demonstration properties by providing a template that can be adopted and/or modified to suit the particular circumstances of industry regimes: *PC Report* (ibid) 143.

Interestingly, a perusal of submissions to the Productivity Commission's inquiry into Part IIIA reveals that respondents were fairly evenly divided as to the utility of introducing legislative pricing principles into the access regime. Some, such as the Chamber of Minerals and Energy of Western Australia Inc, considered the proposal 'sensible',[62] but recognised that 'there will be a trade-off between the certainty given and the flexibility required to take account of the industries involved and their individual requirements.'[63] Just as many, however, saw no need at all for pricing principles within Part IIIA. Representative of the latter group, the ACCC argued that 'access is about a large range of issues, only one of which is the price of access'[64] and the introduction of pricing principles would 'over-emphasise pricing issues at the expense of other, equally important, terms and conditions of access.'[65]

Nevertheless, taking its lead from the Productivity Commission, the Commonwealth Government has indicated that the following pricing principles will be included in Part IIIA:[66]

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

62 Submission by the Chamber of Minerals and Energy of Western Australia Inc (sub 66, May 2001) 3.

63 Ibid.

64 Submission by the ACCC (sub 93, June 2001) 26.

65 Ibid 27. This view is at odds with the ACCC's own articulation of three broad pricing principles governing its assessment of access undertakings and arbitrations: (i) access prices should bear some relation to the costs of providing the service; (ii) access prices should not discriminate in a way which reduces efficient competition (eg, by the service provider giving preferential treatment to vertically related operations); and (iii) access prices should not be inflated to reduce competition in dependent markets. See *ACCC Undertakings Guide* (above n 49) 31-32.

66 *Final Response* (above n 55) 5; cf *PC Report* (above n 9) Recommendation 12.1.

(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher.

(c) That access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

There are several points to note in respect of the proposed pricing principles. For convenience, these have been divided into two categories below. Within the first category are comments pertaining to the Commonwealth Government's refinement, in certain minor respects, of the Productivity Commission's original specification of the pricing principles.[67] These comments are as follows:

- Decision-makers will be required only to 'have regard to' the proposed pricing principles, rather than to consider whether each and every one is satisfied.[68] Presumably this is because of the recent decision in *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd*.[69]

  The dispute in that case, between Epic and Dr Michael, the Independent Gas Pipelines Access Regulator (the Regulator) in Western Australia, centred on the interpretation of s 2.24 of the National Gas Code (the NGC).[70] Section 2.24 contains a list of factors relevant to the Regulator's decision as to whether a proposed access arrangement should be approved. Epic claimed that the words 'must take the following into account' in s 2.24 required that the Regulator 'take into account and give … weight as fundamental considerations' each of the factors listed in that section.[71] (In particular, since s 2.24(a) refers to 'the service provider's legitimate business interests and

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67 *Final Response* (ibid) 16. The 'minor modifications' reflect the Government's concern 'not to limit the array of potential price regulation mechanisms or to increase regulatory intrusion': Thomson and Writer (above n 59) 94.

68 *Final Response* (ibid) 4.

69 [2002] ATPR 41-886.

70 The NGC was adopted in Western Australia by the *Gas Pipelines Access (WA) Act* 1998 (WA).

71 [2002] ATPR 41-886, 45,159.

investment in the covered pipeline', Epic asserted that its purchase price of $2.407 billion for the Dampier-Bunbury Natural Gas Pipeline had to be taken into account by the Regulator.) In response, it was argued that all that was required was for the Regulator 'merely to consider' those factors.[72]

The Full Court of the Western Australian Supreme Court held unanimously that s 2.24 of the NGC prescribed mandatory considerations. In delivering judgment for the Full Court, Parker J stated that the phrase 'must take the following into account' in s 2.24 was 'apt to convey as an ordinary matter of language'[73] that the Regulator 'must not fail to take into account each of the indicia listed in that section'.[74] Thus the Regulator was 'required by s 2.24 to take the stipulated factors into account and to give them weight as fundamental elements in assessing a proposed access arrangement with a view to reaching a decision whether or not to approve it.'[75]

- The Commonwealth Government's principal modification of the pricing principles specified by the Productivity Commission was the deletion of recommended pricing principle (a)(iii), requiring that regulated access prices should 'generate revenue from each service that at least covers the directly attributable incremental costs of providing the service.'[76] By recommending the inclusion of this particular pricing principle, the Productivity Commission's objective was to eliminate cross-subsidies between services,[77] since it is generally accepted that a price is subsidy free if it equals, or exceeds, its directly attributable costs of production.[78]

  In access pricing, the issue of cross-subsidies is related to the imposition of community service obligations (CSOs) on incumbent service providers. When CSOs are imposed,

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72 Ibid.
73 Ibid 45,151.
74 Ibid.
75 Ibid.
76 See *PC Report* (above n 9) Recommendation 12.1.
77 Ibid 335.

‘cherry-picking’ firms have an incentive to enter only those profitable market segments which provide the incumbent with the monopoly profit it needs to cross-subsidise the unprofitable segments it is obliged to supply.[79] The service provider will respond by seeking to build in the cost of CSOs to the access price.[80]

By disallowing cross-subsidies, the implication of recommended pricing principle (a)(iii) was that CSOs should be funded directly by government. With the deletion of this pricing principle, Part IIIA remains exposed to the criticism that it fails to address the CSOs of incumbent service providers.[81]

The second category of comments is prefaced by noting that pricing principles (a)(i)-(ii), (b)(i)-(ii) and (c) were left largely untouched by the Commonwealth Government:

- By explicitly linking revenue to costs, proposed pricing principle (a)(i) recognises that prices which deliver monopoly rents are generally not desirable on efficiency grounds;[82] while proposed pricing principle (a)(ii) sets a clear floor to ensure that incentives to invest in essential infrastructure are protected by allowing for a return which is commensurate with risk.[83]

- Proposed pricing principle (b)(i) endorses the use of multi-part pricing and price discrimination.[84] Significantly, however, it does not proscribe other access pricing methods, thereby offering considerable freedom in the determination of appropriate pricing structures.

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78 Ibid.
79 Pickford (above n 39) 172.
80 Hay (above n 1) 239; and Pickford (ibid).
81 Hood (above n 20) 14.
82 *PC Report* (above n 9) 332.
83 Ibid.
84 Ibid 334.

- Where price discrimination is allowed, steps must be taken to ensure that vertically integrated access providers do not create favourable arrangements for their downstream operations, unless the cost of access provision to other operators is higher.[85] This is acknowledged in proposed pricing principle (b)(ii).

- Proposed pricing principle (c) seeks to encourage access pricing methods that promote productivity gains.[86] Given the ongoing debate about how best to achieve this, the Productivity Commission has also recommended the instigation of processes to develop the productivity measurement and benchmarking techniques necessary for regulators to make greater use of productivity-based approaches to setting access prices.[87] However, in light of the highly technical nature of the issues involved, the Commonwealth Government has reasonably concluded that such inquiries should be undertaken in the context of industry-specific access regimes.[88]

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85 *PC Position Paper* (above n 45) 202-203.

86 *PC Report* (above n 9) 335.

87 Ibid Recommendation 12.2.

88 *Final Response* (above n 55) 17.

## 5.5 PRACTICAL PRICING APPROACHES

There are many different approaches to access pricing – all predominantly economics-based. Internationally, rate of return regulation (which gives priority to the generation of a commercial rate of return for the infrastructure owner) is common in the United States, and price cap (which acknowledges the limited ability of the regulator to set efficient prices by capping prevailing market prices) is favoured in the United Kingdom.[89]

Among the alternative models are: pricing at short or long run marginal cost, or long run incremental cost; pricing on the basis of comparative transactions; pricing under the efficient components pricing rule; pricing in accordance with the competitive parity principle; multi-part pricing such as two-part tariffs (involving a lump sum capacity charge and a separate usage charge); and congestion pricing such as peak load or peak period pricing.[90]

In Australia, where access regulation 'is still in its infancy',[91] no pricing method is dominant as yet. Nevertheless, consistent with approaches prevailing overseas – principally in the US and the UK – Australian regulators have demonstrated a preference for the rate of return and price cap methodologies thus far. The discussion that follows briefly summarises these two approaches to access pricing, as well as the multi-part pricing and price discrimination methods favoured by the Productivity Commission, and the efficient components pricing rule of which the Commission implicitly disapproved.

### A *Rate of return*

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89 Davis (above n 3) 224. For discussion of the strengths and weaknesses of these two approaches, see M Crew and P Kleindorfer, 'Incentive Regulation in the United Kingdom and the United States: Some Lessons' (1996) 9 *Journal of Regulatory Economics* 211.

90 For discussion of these methods, see, variously, O'Bryan (above n 52) 86-87; Tamblyn (above n 8) 10; King (above n 28) 209-214; B Marshall and R Mulheron, 'Charging for Admission: A Lawyer's Guide to Access Pricing under Part IIIA of the Trade Practices Act' (1998) 6 *Trade Practices Law Journal* 132, 135-139; *ACCC Undertakings Guide* (above n 49) 28-41; and Kench (above n 12) 149.

In simple terms, rate of return regulation involves valuing the service provider's capital stock to form a 'rate base' and specifying a rate of return to apply to the base.[92] It allows the service provider to set access prices that generate no more than the specified return on this base.[93] The approach requires:

- identification of the service provider's capital stock or asset base;
- valuation of the asset base (and the basis for that valuation); and
- specification of a rate of return that ought reasonably to apply to that asset base.[94]

### (1) *Identifying and valuing assets*

The principal reason for identifying the assets of the service provider is to value those assets. However, asset valuation is a contentious matter.[95] Any increase/decrease in the rate base will raise/lower allowed profits, and thereby impact on final access prices.[96]

While there are a number of common asset valuation methods, debate in the access context has tended to focus on whether an historical cost approach (known as depreciated actual cost – DAC) or a replacement cost methodology (namely, depreciated optimised replacement cost – DORC) is more appropriate.[97]

#### (a) *DAC*

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91 *PC Position Paper* (above n 45) 33.

92 *Access Undertakings Guide* (above n 49) 33.

93 Ibid. Most access pricing methods include a component to provide a return on the assets used to deliver the services in question: *PC Position Paper* (above n 45) 215.

94 A technical exposition of these requirements is provided in S King, 'Access Pricing under Rate-of-Return Regulation' (1997) 30 *Australian Economic Review* 243.

95 Parry (above n 17) 140; and *PC Position Paper* (above n 45) 215.

96 Ibid.

97 *PC Report* (above n 9) 356. For other methods, see *Access Undertakings Guide* (above n 49) 47-48; and W Pengilley, 'Access to Essential Services: What is the Price of Access?' (1999) 14 *Australian & New Zealand Trade Practices Law Bulletin* 119, 120.

Access seekers (and end users) generally argue that infrastructure assets should be valued at actual or historical cost, adjusted for inflation and depreciation.[98] As mentioned above, this method is often referred to as depreciated actual cost (DAC).[99]

The advantages of DAC lie in its relative simplicity, transparency and objectivity, giving rise to potentially lower regulatory costs.[100] The major drawback is that the approach creates incentives for a service provider to over-capitalise (or 'gold plate') its infrastructure facilities in order to increase the value of its asset base and thereby achieve higher profits.[101] To guard against gold plating, regulators may need to scrutinise capital expenditure proposals by infrastructure owners to ensure that these are not over-engineered[102] – although this compromises DAC's tag of simplicity.[103]

Further disadvantages of DAC include the understatement of asset values in times of inflation, and overstatement in times of technological change; unstable prices (eg, prices may rise when newer, more expensive assets replace existing assets); and the fact that relevant historical data may be unavailable or inadequate (eg, if the asset was purchased several periods prior to the valuation).[104] However, these deficiencies can be minimised through adjustments to asset lives, depreciation schedules and rates of return.[105]

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98 Parry (above n 17) 140.

99 In Australia, there are few cases where DAC has been used to set access prices; by contrast, in the US, the method is used almost exclusively: *PC Report* (above n 9) 357.

100 *Access Undertakings Guide* (above n 49) 46; Pengilley (above n 97) 119; and *PC Report* (ibid) 364.

101 *Access Undertakings Guide* (ibid); P Forsyth, 'Monopoly Price Regulation in Australia: Assessing Regulation So Far' in *1999 Industry Economics Conference: Regulation, Competition and Industry Structure* (Productivity Commission and Monash University, Melbourne, 12-13 July 1999) 31, 37; and *PC Report* (ibid).

102 *Access Undertakings Guide* (ibid); and *PC Report* (ibid) 365. In the US, utility regulators typically conduct such 'prudence reviews' to ensure that capital costs have been prudently incurred.

103 *PC Report* (ibid).

104 Pengilley (above n 97) 119.

### (b) *DORC*

Infrastructure owners typically argue that assets should be valued at the cost of replacing them, so as to better reflect their current economic and market worth.[106] Under the valuation method known as DORC (depreciated optimised replacement cost),[107] replacement cost is 'optimised', in that it is the service potential of the assets that is replaced, not necessarily the actual physical assets.[108] Hence, if a new technology can deliver the service at a lower cost than the existing assets, those assets will be valued at the cost of the new technology.[109]

Conceptually, a replacement cost methodology such as DORC is superior to DAC because it seeks to emulate what happens to asset values in competitive markets.[110] The method also provides an incentive for efficient investment decisions, since regulators can reduce asset values once they become aware that equivalent, lower cost alternatives are available.[111] On the other hand, DORC valuations involve a significant element of judgment on the part of valuers and lack the transparency of DAC valuations.[112] In addition, the use of DORC transfers technological risk to asset owners, implying that service providers will require a higher rate of return than under DAC.[113]

The degree of judgment involved in DORC valuations was recently on display in *Application by Epic Energy South Australia Pty Ltd*.[114] The case concerned the Moomba to Adelaide Pipeline System, a 'covered pipeline' under the NGC, which was owned and operated by the applicant, Epic. Consistent with s 8.10(b) of the NGC, Epic sought to fulfil its

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105 Ibid.
106 Parry (above n 17) 140.
107 This is the method used by access regulators in Australia's electricity, gas and telecommunications sectors: *PC Report* (above n 9) 357.
108 *PC Position Paper* (above n 45) 216.
109 Ibid.
110 Ibid 220.
111 Pengilley (above n 97) 119-120.
112 *PC Report* (above n 9) 361.
113 *PC Position Paper* (above n 45) 220-221.

obligations as a service provider by valuing the pipeline using the DORC methodology. However, the ACCC (the relevant regulator) formed the view that Epic's valuation was too high, and commissioned an independent engineering assessment from Microalloying International Inc. Microalloying's report provided the ACCC with information on line pipe prices (in A$ per tonne) in six countries: Greece ($1053); Korea ($1190); Japan ($1235); Australia ($1255); North America ($1270); and Brazil/Argentina ($1340).[115] Although the report also warned that these prices were volatile and that future costs were unpredictable,[116] the ACCC selected the lowest price in the report (the 'Greek price') as the allowable cost per tonne of Epic's line pipe.

On review, the ACT held that the ACCC's decision was unreasonable.[117] The ACT found that the ACCC had treated the figures in the report 'with a degree of specificity and certainty that was inappropriate given the qualifications Microalloying put on its findings',[118] and had provided no evidence that its choice of the Greek price was the result of a 'rigorous and systematic' evaluation process.[119]

The ACT reasoned that while a pipeline operator might logically be expected to accept the lowest bid tendered for the supply of line pipe, it would be 'commercially unwise to plan a pipeline project based on the lowest known line pipe cost'.[120] Indeed, reliance on the Greek price would expose the pipeline owner to a 'highly asymmetric' risk, whereby the likelihood of underestimating the true actual cost was much greater than that of overestimating it.[121]

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114 [2004] ATPR 41-977.
115 Ibid 48,445.
116 Ibid 48,449.
117 Ibid 48,453.
118 Ibid 48,449.
119 Ibid 48,452.
120 Ibid 48,449.
121 Ibid.

The ACT concluded that in the circumstances of the instant case, where the information available was incomplete and imperfect, a prudent pipeline operator would take 'an *average* of the prices recorded for each of the six countries [ie, $1224] … in order to determine a representative expected line pipe costing.'[122]

**(c) *DAC or DORC?***

Given the advantages and disadvantages inherent in both methodologies, neither DAC nor DORC is likely to be appropriate in all circumstances.[123] This point was recognised by the Productivity Commission, which saw little point in binding regulators to one particular approach.[124] Instead, the choice of asset valuation method should be informed by the issues facing specific infrastructure sectors.[125] Thus, industries where costs are readily determined and stable over time may find historical methods suitable; whereas those exposed to technological obsolescence may be better served by replacement cost methodologies.[126]

However, in keeping with its view that historical cost valuations represent a sound starting point,[127] the Productivity Commission also considered that where DORC is applied, there would be value in regulators setting out the reasons for using that approach, rather than the simpler DAC methodology.[128] This view informed the Commission's recommendation that when arbitrating a dispute for a service declared under Part IIIA, the ACCC should outline the

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122 Ibid 48,450 (emphasis added).

123 Pengilley (above n 97) 119; and *PC Position Paper* (above n 45) 219.

124 *PC Report* (above n 9) 366.

125 Ibid.

126 *PC Position Paper* (above n 45) 222.

127 Ibid – thereby revealing the Productivity Commission's preference for DAC. Cf the support for replacement cost methodologies found in H Ergas, 'Valuation and Costing Issues in Access Pricing with Specific Applications to Telecommunications' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 91, 94; and J Gans and P Williams, 'Efficient Investment Pricing Rules and Access Regulation' (1999) 27 *Australian Business Law Review* 267, 276-277.

128 *PC Report* (above n 9) 376.

reasons for its choice of asset valuation methodology in the post-arbitration report.[129] That recommendation will enhance regulatory transparency and, hence, has been endorsed by the Commonwealth Government.[130]

### (2) *Specifying the rate of return*

Once the service provider's assets have been identified and valued, an appropriate rate of return on those assets must be specified.[131] As a general rule, the allowable rate of return is based on the 'cost of capital' – the market-determined rate of return necessary to compensate supplies of capital[132] – for the infrastructure used to deliver the service.[133] A widely accepted methodology for determining the cost of capital for particular infrastructure projects is the capital asset pricing model (CAPM),[134] which is used to develop benchmark rates of return from valuations placed by financial markets on other operations with similar risk profiles.[135]

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129 Ibid Recommendation 13.1. Refer to Chapter 4, part 4.6(B), for discussion of Recommendation 15.6, wherein the Productivity Commission advocates the introduction of post-arbitration reports.

130 *Final Response* (above n 55) 17.

131 The ACCC uses a post-tax nominal rate of return approach, rather than a pre-tax real approach, to the cost of capital: see Australian Competition and Consumer Commission, *Post-Tax Revenue Handbook* (ACCC Publishing Unit, Canberra, 2001). Regarded as more open and transparent, the method avoids controversial questions in converting rates of return from the nominal post-tax to real pre-tax rates: A Fels, 'The Trade Practices Act – Past, Present and Future' (2001) 9 *Trade Practices Law Journal* 5, 9.

132 *ACCC Undertakings Guide* (above n 49) 43; and Davis (above n 3) 223.

133 *PC Report* (above n 9) 353.

134 *ACCC Undertakings Guide* (above n 49) 44; and *PC Position Paper* (above n 45) 215. Alternative methodologies rely on discounted cashflows, price-earnings ratios and risk premiums: see, generally, K Davis and J Handley, 'The Cost of Capital and Access Arrangements' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 161.

135 Key inputs to the CAPM include the risk-free rate of return and the expected risk premium on the market. Users of the model may disagree about the specification of these variables, however, as recently occurred in *Application by GasNet Australia (Operations) Pty Ltd* [2004] ATPR 41-978. The applicant in this case, GasNet, owned the GasNet System, a gas transmission network which was a 'covered pipeline' for the purposes of the NGC. As permitted by s 8.31 of the NGC, GasNet relied on the CAPM to calculate the rate of return on the capital assets which formed its gas network system. In undertaking this calculation, GasNet used a risk-free rate of return based on ten year Commonwealth bonds. However, the ACCC (the relevant regulator) insisted that the risk-free rate should be set by reference to five year Commonwealth bonds, corresponding to the applicable regulatory period. In resolving the matter against the ACCC, the ACT held that GasNet's use of ten year Commonwealth bonds 'was a correct use of the CAPM and was in accordance with the conventional use of a ten year

Australian infrastructure owners are inclined to complain that regulatory rates of return allowed in this country are too low and are stifling investment in new infrastructure.[136] However, according to a report commissioned by the ACCC from NERA (National Economics Research Associates),[137] rate of return determinations by Australian regulators are generous by international standards.[138]

NERA's brief was to provide an assessment of how regulatory rates of return for energy businesses in Australia compared with those approved by North American and UK energy regulators.[139] NERA found that returns in decisions made by the ACCC ranged from 11.2-15.4%.[140] This was higher than those available to comparable energy businesses in the US, Canada and the UK, where recent regulatory decisions had provided returns of 9-12%.[141]

Of course, the imposition of an *allowed* rate of return does remove or reduce the possibility of a facility owner earning upside (ie, above normal) profits.[142] Such 'truncation' of profits may have adverse implications for incentives to invest in new infrastructure facilities.[143] To compensate for so-called regulatory 'clawback' of upside profits, the Productivity Commission has recommended that consideration be given to including a 'truncation premium'

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bond rate by economists and regulators where the life of the assets and length of the investment approximated thirty years': ibid 48,469.

136 A Fels, 'Regulating Access to Essential Facilities' (2001) 8 *Agenda* 195, 205. Refer, also, to the discussion in part 2.4(C)(1) of Chapter 2.

137 National Economic Research Associates, 'International Comparison of Utilities' Regulated Post-Tax Rates of Return in North America, the United Kingdom and Australia', Report prepared for the ACCC, Sydney, March 2001.

138 Fels (above n 136) 205. See, also, the discussion in part 2.4(C)(2) of Chapter 2.

139 Such benchmarking exercises, involving comparisons of 'similar infrastructure enterprises in different regions, states, or in different countries', is strongly supported in Lawrence (above n 32) 54.

140 'ACCC Launches Post-Tax Revenue Model for Utility Industries', ACCC Media Release, 25 October 2001.

141 Ibid. The ACCC's determinations also compared favourably to the average return from equity investments in the Australian share market (over the ten year period to 2001) of 11.3%, and the average return on Australian superannuation funds (over the three year period to 2001) of 10.4%.

142 *PC Report* (above n 9) 299.

143 As the Productivity Commission has explained, if returns in each year are limited to the regulated rate of return, this removes the possibility of a successful project earning higher

in the allowed rate of return.[144] However, given the additional complexities and uncertainties associated with the truncation premium mechanism,[145] the Commonwealth Government has indicated that the approach should be investigated in the context of industry-specific regimes before any decision is made to pursue its adoption under Part IIIA.[146] The author suggests that this investigation should be broadened to examine the merits of existing alternatives to the introduction of truncation premiums, particularly the use of CPI-X price or revenue caps, an established pricing methodology (discussed below) that specifically addresses the profit-earning concerns of facility owners.[147]

### B *Price/revenue caps*

In Australia, price and revenue caps have been embraced by the ACCC,[148] as the method tends to ensure pricing at levels not too far above costs,[149] while providing incentives for cost savings.[150] However, the method also requires monitoring of service levels and standards to ensure that cost cutting comes about from efficiency gains rather than declining service quality.[151]

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profits 'and thereby effectively reduces the expected ex ante return for the project. Other things being equal, some investments will be deterred': ibid.

144 Ibid Recommendation 11.3. This premium has to be 'large enough for the resulting regulated rate of return to equal or exceed the expected returns to investors under the majority of the upside outcomes factored into the investment calculus': ibid 299-300.

145 Indeed, the Productivity Commission's own view was that the calculation of project-specific truncation premiums 'would inevitably become an additional source of gaming and disputation between investors and regulators': ibid 300.

146 *Final Response* (above n 55) 15-16.

147 For support for this suggestion, see the submission to the Productivity Commission's review of the national access regime by the Office of the Regulator-General, Victoria (sub 112, July 2001) 6.

148 Eg, the ACCC administers a price cap regime for aeronautical services, and a revenue cap in both electricity and gas: Fels (above n 131) 9.

149 In other words, it constrains monopoly pricing.

150 See, further, S King, 'Principles of Price Cap Regulation' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 45.

151 *PC Position Paper* (above n 45) 210. The incentive to undersupply quality arises because the price/revenue cap method 'limits the ability of the firm to gain full advantage from its quality choices by stopping it from charging more when it delivers higher quality': P Forsyth, 'Environmental Externalities, Congestion and Quality under Regulation' in M Arblaster and M

The ACCC's approach involves setting a price/revenue cap of the CPI-X variety, wherein price/revenue increases over the regulatory horizon (often the next five years) are limited to increases in the Consumer Price Index (CPI) less X, a percentage reflecting the productivity improvements the facility owner is expected to achieve each year.[152] The pricing structure is intended to be incentive based.[153] Throughout the regulatory period, the service provider is entitled to retain all profits gained from efficiency improvements above the X factor. In other words, the lower its operating costs, the greater its profits.[154] However, when the cap is reset, attention is inevitably paid to the level of profits, and cost savings gained between reviews are passed on to consumers, at least partially.[155] Not doing so will tend to reduce the incentives of the service provider to reduce costs between reviews.[156]

To derive the CPI-X price/revenue cap path, the ACCC uses a 'building block' approach in which the expected size of key cost components of service provision is quantified and a revenue target sufficient to meet those costs is calculated for each year of the regulatory period.[157] In quantifying cost components, rate of return considerations enter through the inclusion of a required return on capital as one of the costs to be covered.[158] The other vital cost components are the allowance for return of capital invested over the life of the assets

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Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 185, 185.

152 For further explanation, see *ACCC Undertakings Guide* (above n 49) 36-37; Australian Competition and Consumer Commission, *Infrastructure Industries – Energy: Gas and Electricity* (Commonwealth of Australia, Canberra, 2000) 8-9; and Davis (above n 3) 224.

153 Fels (above n 136) 204; and Davis (ibid) 225. By way of background, see S Berg, 'Introduction to the Fundamentals of Incentive Regulation' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 37.

154 Thus, the method promotes productive efficiency.

155 King (above n 150) 47; and Fels (above n 136) 204.

156 King (ibid).

157 *Post-Tax Revenue Handbook* (above n 131); and Davis (above n 3) 224-225.

158 Ibid.

involved (depreciation), and for operating and maintenance costs – forecasts of which are based on anticipated demand and expected productivity gains.[159]

In its final report, the Productivity Commission was highly critical of the building block approach, on which most price/revenue caps of the CPI-X type are based.[160] As the Commission pointed out, the approach not only has a tendency to merge into rate of return regulation,[161] giving rise to incentives for gold plating of assets,[162] it is also highly information-intensive, requiring the regulator to obtain detailed information on current and future costs, and capital expenditure.[163]

An alternative approach to CPI-X regulation involves setting the X factor with reference to external measures of industry or economy-wide productivity[164] – such as total factor productivity (TFP) for the relevant industry.[165] Under this approach, instead of examining a facility's costs, the prices or revenue of the facility would be allowed to rise by no more than the CPI less the productivity factor.[166]

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159 Ibid.

160 *PC Report* (above n 9) 343.

161 Ibid, citing submissions by the Australian Council for Infrastructure Development (sub 11, December 2000) 13, and Energex Ltd (sub 14, December 2000) 7.

162 See text accompanying n 101 above.

163 *PC Report* (above n 9) 343. The ACCC's recent difficulties in *Application by Epic Energy South Australia Pty Ltd* [2004] ATPR 41-977 and *Application by GasNet Australia (Operations) Pty Ltd* [2004] ATPR 41-978 (see text accompanying n 114ff above, and discussion in n 135 above, respectively) reinforce this criticism.

164 *PC Report* (ibid) 344.

165 TFP is a widely used productivity measure, which has been identified as having the following benefits: it has clear, unambiguous and powerful incentive effects; it has a theoretical foundation and applies objective measures that are transparently based on external data rather than regulatory judgments; and it creates minimal regulatory risk and has low transaction and administration costs. See Independent Pricing and Regulatory Tribunal, 'Regulation of Electricity Network Service Providers – Incentives and Principles for Regulation', Discussion Paper DP-32, Sydney, January 1999, 16.

166 *PC Report* (above n 9) 344.

Productivity-based approaches are not faultless, however. For example, they tend to be less precise than cost-based approaches, and may not align prices as closely with costs.[167] Developing robust productivity benchmarks is not a costless exercise either;[168] and there is often scope for the applicability of such benchmarks to be disputed.[169]

### C *Multi-part pricing and price discrimination*

As noted previously in connection with proposed pricing principle (b)(i), the Productivity Commission favours the use of multi-part pricing and price discrimination as general access pricing principles.[170] The ACCC has also expressed enthusiasm for these approaches, but recognises that their implementation can be administratively complex and that the necessary information will often be unavailable.[171]

Multi-part pricing involves the facility owner charging an upfront fee for access to the infrastructure service, plus a per unit price based on SRMC or incremental cost.[172] Provided the upfront fee does not deter potential entrants, or reduce demand for the service, this approach will allow the facility owner to cover its full costs while also encouraging efficient use of the relevant infrastructure.[173]

A practical example of multi-part pricing (involving a simple two-part tariff) is set out in Box 5.1.[174]

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167 Ibid.
168 Ibid.
169 Eg, because TFP measures are affected by demand growth, which is largely outside the control if utilities: ibid.
170 Indeed, where natural monopoly is involved, multi-part (or non-linear) pricing schemes, such as two-part tariffs, are likely to be superior to any uniform price set above SRMC: King and Maddock (above n 29) 80-81.
171 *ACCC Undertakings Guide* (above n 49) 39. See, also, *PC Position Paper* (above n 45) 44.
172 King (above n 28) 209; and *PC Position Paper* (ibid) 200.
173 Ibid.
174 This example is based on that in *ACCC Undertakings Guide* (above n 49) 40. It originally appeared in J Freebairn and K Trace, 'Efficient Railway Freight Rates: Australian Coal' (1992)

**BOX 5.1: Applying a two-part tariff**

A service provider supplies rail freight services to transport coal from mines to ports. Coal producers wish to use the rail freight services owned by the service provider.

To transport one million tonnes of coal over 200 kilometres (from mine to port), it is estimated that the following annual costs will be incurred:

| | |
|---|---|
| Operating costs | $2.6M |
| Capital costs | $1.13M |
| Damage to the rail-line per year | $0.53M |

Depreciation costs on the rail infrastructure are estimated to be $8.39M per year.

Based on the above, the recommended two-part tariff is as follows:

- Upfront fee: a proportional amount of the $8.39M (so that the service provider can recover its fixed costs in supplying the service).[175]
- Per unit (marginal) cost: $2.6 + $1.13 + $0.53 = $4.26M per million tonnes of coal carried over 200 kms.

The first-part tariff covers the capital costs of the infrastructure, while the second -part tariff is a per unit of product charge based on marginal costs. Under this approach, all costs are recovered and the rail freight services remain commercially viable.

Inevitably, however, the imposition of a lump sum access charge will deter some customers from using the service.[176] Another approach (which allows a facility owner to recover its costs, while minimising reductions in service use) is to charge individual customers different amounts depending on how highly they value the service.[177] This is known as price discrimination (or Ramsey pricing).

There are many ways of implementing price discrimination. It can be implemented, for instance, under a single price structure, which involves individual customers paying a different

22 *Economic Analysis & Policy* 23, 25, and was derived from detailed case studies of actual operations.

175 Recouping its fixed costs gives the service provider an incentive to maintain the infrastructure.

176 King (above n 28) 210; and *PC Report* (above n 9) 326.

177 As King explains, the approach promotes efficient use of the facility: King (ibid). See, also, *PC Report* (ibid).

per unit charge for the service,[178] or under a multi-part pricing scheme. To give one example of the latter approach: All customers pay the same charge for each unit of the service used, but those customers who value the service highly pay a relatively high upfront fee, thereby making a relatively large contribution to fixed costs.[179] In contrast, marginal users who value the service less highly pay a lower upfront fee, so as not to deter them from taking up the service.[180]

Where price discrimination is permitted, the challenge for regulators is to ensure that terms and conditions of access offered by service providers apply equally to third parties as to related parties.[181] The particular concern here is that the owner of a vertically integrated facility might charge less to its own downstream operations than it charges to other access seekers for the same type of service.[182] As explained in part 5.4 above, proposed pricing principle (b)(ii) is intended to prevent this.[183]

### D *Efficient components pricing rule*

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178 *PC Report* (ibid). That is, quantity discounts apply – a form of falling 'block tariff'.

179 Ibid.

180 Ibid.

181 Parry (above n 17) 139. Thus, eg, on 15 August 2002, the ACCC issued 'ring-fencing' guidelines (available at www.accc.gov.au/electric/regulation/statement_pr/trans_ring_fenc.html) for electricity transmission network service providers, as required by Chapter 6, Part G of the National Electricity Code. The guidelines require that each transmission network service provider (TNSP) is not to preferentially deal with itself and any related utility in such a way as to discriminate against other access seekers. In particular, the prices that the TNSP charges access seekers should not disadvantage them when competing with the TNSP or an associate of the TNSP in another market. (Similar guidelines also apply under the NGC.)

182 *PC Report* (above n 9) 327.

183 In its role as telecommunications access regulator, the ACCC is committed to monitoring differences between the access prices offered by a service provider to third parties and the prices charged by that service provider to its own vertically-integrated operations. One reason that may justify a higher price to competitors is differences in the economic costs of supply. See Australian Competition and Consumer Commission, 'Access Pricing Principles: Telecommunications – A Guide', ACCC Information Paper, July 1997, 4. This is also contemplated by proposed pricing principle (b)(ii).

The efficient components pricing rule (ECPR) was succinctly explained by the New Zealand High Court in *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd*[184] as follows:

> Where ... [a] firm supplies components or intermediate goods to another firm ... and thereby gives up some capacity that it would otherwise have used itself, then the supplier firm must be permitted to price the article in question at a level sufficient to compensate it for the profit it is forced to sacrifice because of its supply to the other firm. Economists refer to the sacrifice of profit ... as the opportunity cost of that activity.[185]

In other words, under the ECPR, an appropriate access fee equals the sum of the direct incremental production costs incurred by the service provider in supplying access, plus the opportunity cost associated with that supply.[186] This means that the service provider recovers not only its production costs, but also any foregone profit from final product sales as a result of the additional competition provided by access seekers.[187]

Successful implementation of the ECPR depends on final market price controls being in place.[188] If the rule is used without regulation of final market prices, it has the same effect as allowing unconstrained monopoly pricing of access.[189]

Proposed pricing principle (a)(i)[190] has confirmed that use of the ECPR will not be sanctioned under Part IIIA of the *Trade Practices Act*. This is not surprising. The Explanatory

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184 (1992) 5 TCLR 166. The case is discussed at length in Chapter 3, part 3.4(B).

185 Ibid 203 (Ellis J and M Brunt). The application of the ECPR in the circumstances of this case is considered in M Ross, 'New Zealand's Experiment in Pricing Access to Essential Facilities' (1995) 2 *Agenda* 366.

186 For further explanation, see Pickford (above n 39) 167-168; and M Jamison, 'Regulatory Techniques for Addressing Interconnection, Access and Cross-Subsidy in Telecommunications' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 113, 115-117.

187 King (above n 28) 212.

188 The rule was developed for regulated markets in the US, where price or other controls restrict monopoly profits. In markets that are subject to light-handed regulation where there are no such controls, such as in Australia or New Zealand, the rule's effect is blunted. See Pickford (above n 39) 169.

189 Hay (above n 1) 234; O'Bryan (above n 52) 101; and *ACCC Undertakings Guide* (above n 49) 41.

Memorandum to the *Competition Policy Reform Bill* noted that the matters to be considered by the ACCC under s 44X(1) in determining an access dispute specifically include 'legitimate business interests of the provider'[191] and 'direct costs of providing access to the service'[192] in order to preclude arguments that the service provider should be reimbursed by the party seeking access for consequential costs which the service provider may incur as a result of increased competition in an upstream or downstream market.[193] These comments have provided the basis for the consistent observation that the ECPR is unlikely to be adopted as a basis for determining access prices in Australia.[194]

## 5.6 CONCLUSION

Practical access pricing involves compromise. Ultimately, the selection of a particular pricing mechanism will reflect choices across a wide spectrum of policy issues. Those choices require trade-offs to be made in balancing the interests of facility owners, access seekers and end-users; in prioritising among the elements of economic efficiency; in advancing administrative simplicity or regulatory effectiveness; and so on. Therein lies the complexity of access pricing.

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[190] Refer to discussion in part 5.4 of this chapter.

[191] Section 44X(1)(a).

[192] Section 44X(1)(d).

[193] Explanatory Memorandum, *Competition Policy Reform Bill* (Commonwealth of Australia, Canberra, 1995) [217].

[194] Eg, O'Bryan has argued that the 'intentional distinction' drawn between direct costs and opportunity costs in s 44X(1)(d) is intended to convey that a service provider should not be compensated for its opportunity costs – pointing out that this interpretation of s 44X(1)(d) is consistent with cl 6(4)(i)(ii) of the Competition Principles Agreement which states, 'In deciding on the terms and conditions for access, the dispute resolution body should take into account … the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets': O'Bryan (above n 52) 100. For similar arguments, see Fels (above n 11) 7; and King (above n 28) 214. The ACCC has also stated that it does not consider the ECPR to be consistent with the matters it must consider under s 44ZZA(3) when deciding whether to accept an access undertaking 'unless appropriate final market price controls are in place': *ACCC Undertakings Guide* (above n 49) 41.

Against that background, it will be appreciated that there is simply no substitute for a case-by-case approach to the setting of specific access fees.[195] A careful assessment of the relevant circumstances must be undertaken in every case 'to determine the economically efficient approach for pricing competitive access'.[196] The inclusion in Part IIIA of the proposed pricing principles reviewed in part 5.4 of this chapter will provide general, but still beneficial, guidance to access regulators in selecting a pricing model appropriate to a particular situation.

To facilitate a comparison of common access pricing methods, Table 5.1 summarises the advantages and disadvantages of the approaches examined in this chapter.[197]

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195 W Tye, 'The Price of Inputs Sold to Competitors: Response' (1994) 11 *Yale Journal on Regulation* 203, 224.

196 Ibid.

197 Table 5.1 draws on Marshall and Mulheron (above n 90).

**TABLE 5.1: Advantages/disadvantages of common access pricing methods**

| ***Rate of return*** | |
|---|---|
| **Advantages** | **Disadvantages** |
| Service provider sets access prices that generate a specified rate of return on the provider's infrastructure. | Possibility of rewarding over-capitalisation in infrastructure by the service provider. |
| Long history of use in the US. | Upside profits accruing to a service provider will be removed or reduced. |
| ***Price/revenue caps*** | |
| **Advantages** | **Disadvantages** |
| Service provider has an incentive to reduce production costs and increase productive efficiency. | Cost cutting may result from declining service quality. |
| Long history of use in the UK. | The building block approach to CPI-X price/ revenue caps is similar to rate of return regulation. |
| ***Multi-part pricing and price discrimination*** | |
| **Advantages** | **Disadvantages** |
| Possibility of a price 'menu' which allows access seekers to choose between different combinations of upfront and per unit charges. | Service provider may not have sufficient information on costs to implement the approach. |
| Upfront fee can accommodate circumstances of individual access seekers (eg, a lower upfront fee for a low value user). | Service provider has little incentive to reduce per unit costs because any improvement in productive efficiency translates into lower access prices. |
| ***Efficient components pricing rule*** | |
| **Advantages** | **Disadvantages** |
| Service provider is fully compensated for opportunity cost. | Only designed to work with final market price controls in place; otherwise it allows unconstrained monopoly pricing of access. |
| Promotes productive efficiency in the downstream market by deterring the entry of inefficient firms. | All entrants may be excluded unless the incumbent suffers from substantial productive inefficiency. |

Drawing on Table 5.1, and the more detailed discussion in part 5.5 of this chapter, the author submits the following policy recommendations:

- Multi-part pricing should be employed in most situations. The upfront access charge should contribute to the capital costs of the infrastructure facility and provide a rate of return commensurate with an international benchmark for the industry. The per unit price should be based on SRMC.

- Price discrimination on the upfront access fee should be allowed, to accommodate the different circumstances of individual access seekers.

- The access fee should also be subject to a price or revenue cap based on a CPI-X scheme. Here, the X factor should be productivity focused, with particular reference to TFP measures.

- Because it provides an incentive for efficient investment decisions, the replacement cost method DORC should generally be used to value infrastructure assets for the purposes of rate of return calculations.

Of course, in the event that access prices are negotiated privately, the resulting charges may not be based on any established pricing method,[198] nor accord with any of the pricing principles proposed for Part IIIA. This reinforces the point, made previously in Chapter 4,[199] that negotiated access outcomes should be reviewed by an independent regulator.

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198 King (above n 28) 217.

199 Refer to part 4.6(A) of that chapter.

# *CHAPTER 6*

## THE RESIDUAL ROLE OF SECTION 46 IN RESOLVING ACCESS DISPUTES

### 6.1 INTRODUCTION

Chapter 3 of this dissertation explored the perceived inadequacy of s 46 of the *Trade Practices Act* 1974 (Cth)[1] to deal with access disputes, focusing on the concerns raised by the Hilmer Committee.[2] However, Kench provides an alternative perspective, as follows:

> Whatever the true position might … be about the capability of s 46 and our courts to address 'essential facilities' cases, the simple reality was that in the first half of the 1990s the Federal Government was in too much of a hurry to enlist the States and Territories in a wide-ranging reform agenda based on a national uniform competition policy. The government was not prepared to let time pass to see whether s 46, in largely private sector litigation, fought to the very end in the High Court, would produce an acceptable precedent, or excuse, for further reform which the States and Territories might not then accept in isolation.[3]

Kench argues that, for the Hilmer Committee, the ability of the courts to determine access liability and appropriate supply orders under s 46 was a secondary matter. The real issue driving the Committee's dissatisfaction with the provision was the unlikely prospect that 'one set of access and supply orders in favour of one plaintiff in one s 46 dispute' would be productive of significant microeconomic reform.[4] The argument is compelling. There can be little doubt that, in comparison to s 46, the introduction of a codified access regime appeared to offer 'a more comprehensive and immediate set of answers'[5] to access questions in Australia.

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1 All references in this chapter to 's 46' are to s 46 of the *Trade Practices Act*.

2 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*') 243-244.

3 J Kench, 'Part IIIA: Unleashing a Monster' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 122, 144-145.

4 Ibid 145.

5 Ibid.

The subsequent enactment of Part IIIA of the *Trade Practices Act* has established a statutory mechanism for gaining access to the services provided by Australian infrastructure facilities.[6] That outcome is accepted in this dissertation as a reasonable policy response to the access problem.[7] Accordingly, there is no intention to revisit in this chapter the threshold question of whether such regulation was necessary at all[8] or whether it would have been preferable to strengthen the existing misuse of market power provision, either by embodying aspects of the essential facilities doctrine within s 46[9] or by other amendment.[10] Instead,

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6 As explained fully in Chapter 4, Part IIIA is concerned with essential 'services' rather than 'facilities'. This recognises that, while one facility may provide a range of services, only one of those services may be essential to enable competition in an upstream or downstream market. Under Part IIIA, the focus is on that particular service.

7 Refer to Chapter 2, part 2.4(A).

8 Cf W Pengilley, 'Comment on "Part IIIA: Unleashing a Monster"' in F Hanks and P Williams (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) 161, 161-163.

9 Cf W Pengilley, 'Hilmer and "Essential Facilities"' (1994) 17 *University of New South Wales Law Journal* 1, 36, where it is suggested that s 46 should be amended to incorporate the doctrine, by the insertion of 'a criteria based evaluation … found in American precedent'.

10 There has been considerable debate in Australia as to whether the purpose test in s 46 should be replaced by an effects test. The Hilmer Committee advised against such a change, concluding that it 'would not … constitute an improvement on the current test': *Hilmer Report* (above n 2) 70. However, the debate flared again recently, with the Trade Practices Act Review Committee (Dawson Committee) receiving submissions from various august bodies in respect of this issue. Eg, the ACCC's submission argued, inter alia, that the purpose test in s 46 should be supplemented by an effects test: see R Steinwall, 'Dawson Committee Review of the Trade Practices Act' (2002) 10 *Competition & Consumer Law Journal* 102, 102. No doubt this proposal was well-received by proponents of an effects test; see, eg: M O'Bryan, 'Access Pricing: Law Before Economics?' (1996) 4 *Competition & Consumer Law Journal* 85, 96; S Hardy, 'Misuse of Market Power – Purpose or Effect?' (1997) 5 *Trade Practices Law Journal* 114, 119; and S Corones, 'The Characterisation of Conduct under Section 46 of the Trade Practices Act' (2002) 30 *Australian Business Law Review* 409, 412-413. Cf M Landrigan, A Peters and J Soon, 'An Effects Test under s 46 of the Trade Practices Act: Identifying the Real Effects' (2002) 9 *Competition & Consumer Law Journal* 258, 276, where the authors conclude that the misuse of market power provision in the telecommunications-specific Part XIB of the *Trade Practices Act*, s 151AJ(2), which contains an effects test, has not operated more effectively than would s 46. See, also, B Buffier, 'Shoot First, Ask Questions Later: The Rapid Response Powers of the ACCC to Regulate Anticompetitive Conduct in Telecommunications Markets' (2002) 10 *Trade Practices Law Journal* 5, 20, where it is advocated that the effects test in s 151AJ(2) 'be repealed'. In the result, the Dawson Committee did not recommend the inclusion of an effects test in s 46 (see n 11 below). For the record, this author, concerned about the impact a broader effects test would have on aggressive conduct that is nevertheless efficient, also supports the existing purpose test in s 46.

accepting the terms of s 46,[11] and mindful of the ambit of Part IIIA, this chapter addresses the 'residual role'[12] now played by s 46 in the resolution of access disputes.[13]

For the reasons outlined above, the analysis that follows is based on the present wording and current interpretation of s 46 – drawing support, where relevant, from the antitrust jurisprudence of the United States, the European Union and New Zealand.[14] Despite Kench's scepticism, it appears that the Hilmer Committee anticipated correctly the difficulty of establishing a contravention of s 46 and recognised that this would significantly constrain the usefulness of the provision as a means of facilitating access to essential facilities.

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[11] These terms now appear embedded in Australian competition law, following the Dawson Committee's recent recommendation that s 46 not be amended in any way: see Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act* (Commonwealth of Australia, Canberra, report dated 31 January 2003, released 16 April 2003) Recommendation 3.1. Cf even more recent proposals by the Senate Economics References Committee aimed at clarifying aspects of s 46, particularly in relation to the provision's threshold requirement of 'a substantial degree of power in a market': see Economics References Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (Commonwealth of Australia, Canberra, March 2004) Recommendations 1-6.

[12] In the access context, this expression derives from the title of the following article: A Abadee, 'The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?' (1997) 5 *Trade Practices Law Journal* 27.

[13] In contrast to this chapter – which draws on the author's work in B Marshall, 'The Resolution of Access Disputes under Section 46 of the Trade Practices Act' (2003) 22 *University of Tasmania Law Review* 9 – the focus of Chapters 4 and 5 was the author's concern that Part IIIA should operate as effectively and efficiently as possible.

[14] As explained in Chapter 3, ss 1 and 2 of the *Sherman Act* 1890 (US), Art 82 of the *EC Treaty* and s 36 of the *Commerce Act* 1986 (NZ) are jurisdictional variations on the misuse of market power theme. It is hardly surprising, therefore, that in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, the High Court's first exegesis of s 46, Mason CJ and Wilson J (188-190), Dawson J (200-202) and Toohey J (210) relied on US and European authorities, in particular, in interpreting and applying Australia's misuse of market power provision. The similarity between s 46 and New Zealand's s 36 speaks to the relevance of trans-Tasman cases as well.

## 6.2 SECTION 46 AND ESSENTIAL FACILITIES

### A *Continuing relevance of section 46*

Section 46(1) of the *Trade Practices Act* provides:

> A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of –
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
> (b) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.[15]

Three critical elements of the provision can be identified. A breach of s 46 is established if:

- a corporation possessing a substantial degree of market power;
- takes advantage of that power;
- for one or more of the prohibited purposes in s 46(1)(a), (b) or (c).

Facility owners will find it reassuring that, under s 46, it is not the possession of market power which offends per se.[16] Rather, it is the conduct of the powerful, or market-dominant, corporation that is subject to scrutiny. In the context of New Zealand antitrust law, the point has been expressed succinctly:

> A firm ... may have a dominant position in a market. That is not unlawful. The firm, in that dominant position, may trade in a competitive fashion. That is not unlawful ... It is only when the dominant firm oversteps that mark and 'uses' its dominant position for anti-competitive purposes ... that the law steps in.[17]

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15 Section 46 was amended in significant respects by the *Trade Practices Revision Act* 1986 (Cth).

16 As the Explanatory Memorandum to the *Trade Practices Revision Bill* points out, 'The section is not directed at size as such, nor at competitive behaviour as such. What is prohibited, rather, is the misuse by a corporation of its market power': Explanatory Memorandum, *Trade Practices Revision Bill* (Commonwealth of Australia, Canberra, 1986) [17.47].

17 *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 49-352, 103,789 (McGechan J).

Less comforting, however, must be the warning that 'as in many sporting encounters, there exists a fine line between good hard play and what can be called "reportable incidents".'[18]

Conduct that *may* give rise to a breach of s 46 certainly includes a refusal to supply goods or services.[19] The affirmative authority is no less than *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*,[20] the High Court's landmark ruling on the interpretation of s 46, where BHP's refusal to supply a competitor was held to amount to a misuse of market power. Interestingly, at first instance in this case, Pincus J observed that he had been referred 'to no authority in the United States or in Europe, in support of the view that ... a vendor of property may be forced to accept a new customer except where there was a history of trading enabling one to conclude that the would-be customer was being discriminated against.'[21] However, there is no reason why a 'history of trading' should give rise to a greater obligation to continue to supply,[22] and the High Court's decision on appeal implicitly recognises that the distinction between a refusal to supply an existing customer and a refusal to supply a new customer is irrelevant to the question of whether the refusal is a misuse of market power. This view is consistent with US[23] and European[24] authorities on point.

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18 D Round, 'Prohibiting the Abuse of Market Power: Rediscovering S 46' in R Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, Sydney, 2000) 102, 121.

19 The Explanatory Memorandum to the *Trade Practices Revision Bill* lists, without further elaboration, 'refusal to supply' as a type of conduct that could be in breach of s 46: (above n 16) [17.53]. The expression 'refusal to supply' is simply another way of describing a refusal to deal or a refusal to grant access.

20 (1989) 167 CLR 177 (hereafter, '*Queensland Wire*').

21 [1987] ATPR 40-810, 48,820. This was before the European Court of Justice, affirming the judgment of the European Court of First Instance, decided *Radio Telefis Eireann and Independent Television Publications Ltd v European Commission* [1995] ECR I-743 (hereafter, the '*Magill*' case).

22 K McMahon, 'Refusals to Supply by Corporations with Substantial Market Power' (1994) 22 *Australian Business Law Review* 7, 7.

23 As the Court of Appeals (Sixth Circuit) explained in *Byars v Bluff City News Co* 609 F 2d 843 (1979), 864, 'There exists no theoretical distinction between ordering a monopolist to deal with a former customer and ordering the monopolist to deal with anyone who comes along.'

24 Eg, the *Magill* case [1995] ECR I-743.

Given that the essential facilities problem is 'centrally about refusal to supply',[25] logic dictates the applicability of s 46 to access disputes. The Hilmer Committee itself accepted the potential application of s 46 to essential facility situations.[26] Referring to the three elements of the section, the Committee noted: first, if a facility is truly essential, its owner will always have a substantial degree of market power within the meaning of s 46; second, a refusal to grant access to an essential facility will usually constitute a 'taking advantage' of market power, given that, in the absence of such power, access to the facility would probably be available; and third, the refusal to deal could conceivably occur for any of the proscribed purposes in s 46(1)(a), (b) or (c).[27]

Academic commentators have endorsed this position as well,[28] pointing to a history of access-type determinations under s 46 prior to the introduction of Part IIIA, notably in *Queensland Wire*,[29] but also in cases such as *MacLean v Shell Chemicals (Australia) Pty Ltd*,[30] *O'Keeffe Nominees Pty Ltd v BP Australia Ltd*,[31] *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd*,[32] *Dowling v Dalgety Australia Ltd*[33] and *General Newspapers Pty Ltd v Telstra Corp*.[34] However, very few of these decisions are in fact concerned with essential facilities; rather, they are concerned with the supply of a tangible or intangible product.[35]

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25 O'Bryan (above n 10) 88.

26 *Hilmer Report* (above n 2) 243.

27 Ibid.

28 Eg, Pengilley (above n 9) 58 and (above n 8) 163; S King and R Maddock, *Unlocking the Infrastructure: The Reform of Public Utilities in Australia* (Allen & Unwin, Sydney, 1996) 70; O'Bryan (above n 10) 88; P Shafron, 'QWI v BHP: A Flash in the Section 46 Pan?' (1998) 72 *Australian Law Journal* 53, 60; F Zumbo, 'Access to Essential Facilities in Australia' [2000] *New Zealand Law Journal* 13, 14; and Kench (above n 3) 141.

29 (1989) 167 CLR 177 (refusal to supply the product 'Y-bar' on reasonable terms).

30 [1984] ATPR 40-462 (refusal to supply the raw material 'cypermethrin' on reasonable terms).

31 [1990] ATPR 41-057 (refusal to supply petroleum products on reasonable terms).

32 [1991] ATPR 41-109 (refusal to supply electronic stock exchange information on reasonable terms).

33 [1992] ATPR 41-165 (denial of access to saleyards in Goondiwindi). As Pengilley notes, this was the first Australian case directly related to the exclusion of a competitor from a 'facility': W Pengilley, 'Denying a Competitor Access to Facilities' (1992) 8 *Australian & New Zealand Trade Practices Law Bulletin* 11, 11.

34 [1993] ATPR 41-274 (imposition of restrictive conditions in printing contracts denying alternative publishers the use of certain sophisticated printing equipment).

35 See nn 29-34 above.

In cases where a true essential facility is involved, two points must be borne in mind. First, a denial of access to the essential facility will not automatically result in a contravention of s 46. It must be established that the constituent elements of the provision are satisfied, particularly that the impugned conduct involved a taking advantage of market power for one of the three proscribed purposes. Second, in any event, such cases invariably will be pursued under Part IIIA of the *Trade Practices Act*, the dedicated access regime. There is no suggestion in this chapter, or elsewhere in this dissertation, that Part IIIA should be abandoned and reliance placed exclusively on s 46.

In respect of the second point above, however, it must be noted that Part IIIA has limited scope.[36] Accordingly, s 46, and not the access regime, will apply to services which are not within the Part IIIA definition of 'service';[37] and services that do not meet the criteria for declaration under Part IIIA,[38] such as services provided by infrastructure which may be uneconomical to duplicate, but which is not of 'national significance'.[39] Thus, s 46 is 'properly available as a fall-back mechanism'[40] to deal with cases not covered by the access regime. This is its 'residual' role.

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36 The ambit of Part IIIA is fully discussed in Chapter 4.

37 It will be recalled from Chapter 4 that the definition of 'service' in s 44B of the *Trade Practices Act* (the definitions section in Part IIIA) specifically excludes 'the supply of goods', 'the use of intellectual property' and 'the use of a production process'.

38 Chapter 4 contains a comprehensive discussion of the declaration criteria in s 44G(2) of the *Trade Practices Act*.

39 W Pengilley, 'The Access Regime in the 1995 National Competition Policy Package' (1995) 9 *Commercial Law Quarterly* 12, 14; and A Hood and S Corones, 'Third Party Access to Australian Infrastructure', Paper presented at *Access Symposium*, Business Law Section of the Law Council of Australia, Melbourne, 28 July 2000, 105. Abadee's analysis of the 'residual role' of s 46 concludes by predicting that the provision will play 'a sweeping role in picking up local facilities': Abadee (above n 12) 47.

40 Submission to the Productivity Commission's review of the national access regime by the Law Council of Australia (sub 37, January 2001) 9.

### B Interrelationship with Part IIIA

The parallel application of s 46 was anticipated when the access regime was introduced. Section 44ZZNA specifically states that Part IIIA does not affect the operation of Part IV (which contains s 46) of the *Trade Practices Act*. This does not mean that parties seeking access to essential facilities may use the access regime, or s 46, or both, although several commentators have expressed alarm in considering the possibility that this might be so.[41] Hood, for example, has argued that s 46 could become a negotiating tool for access seekers,[42] who will threaten s 46 litigation against access providers in order to create advantages for themselves.[43]

Such concerns are not shared by this author. Of the three scenarios hypothesised by Pengilley to explain the interaction of s 46 and the access regime – (i) s 46 and the access regime are both applicable in essential facilities cases; (ii) the access regime is a complete access code making s 46 inapplicable where the access regime applies; and (iii) s 46 and the

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41 Eg, Pengilley (above n 39) 13; S King, 'National Competition Policy' (1997) 73 *Economic Record* 270, 278; A Hood, 'Third Party Access in Queensland: Lessons for all Australian States' (1999) 7 *Trade Practices Law Journal* 4, 15; and N Calleja, 'Access to Essential Services – Have the Hilmer Reforms Been Successfully Implemented?' (2000) 8 *Trade Practices Law Journal* 206, 222.

42 Hood (above n 41) 15. More generally, Dammery has warned that s 46 'should not be permitted to become a "trump card" to be played when it becomes commercially advantageous. Allegations of misuse of market power are readily made but difficult to refute': R Dammery, 'Section 46 of the Trade Practices Act: The Need for Prospective Certainty' (1998) 6 *Competition & Consumer Law Journal* 246, 257. The same point is made in W Pengilley, 'Misuse of Market Power: The Unbearable Uncertainties Facing Australian Management' (2000) 8 *Trade Practices Law Journal* 56, 56.

43 As foreshadowed in part 4.8(A) of Chapter 4, Pengilley has also argued that s 46 could be used by the ACCC to obtain access undertakings from access providers, constructing the following scenario: The ACCC may prosecute for breach of s 46 and could then 'suggest' that an undertaking be given to it – so that s 46 prosecutions will become a 'backdoor method of compelling undertakings'. Alternatively, the ACCC, 'in order to settle a s 46 prosecution or in substitution for it, may suggest that the access regime be utilised.' See Pengilley (above n 39) 16; reiterated in W Pengilley, 'Access to Essential Facilities: A Unique Antitrust Experiment in Australia' (1998) 43 *Antitrust Bulletin* 519, 542. The same point is made in Hood and Corones (above n 39) 123.

access regime are each applicable where they do not overlap[44] – it is submitted that the second scenario is correct. This interpretation is consistent with the author's previous explanation of the residual role left for s 46 in access matters – that is, as a 'fall-back mechanism'[45] for cases not covered by Part IIIA. It finds further support in two sources.

First, the Hilmer Committee recommended that upon declaration of a facility, the access regime should provide 'an exhaustive statement of access rights',[46] excluding any claims under s 46, 'to the extent that they relate to allegations of a refusal to provide access to a declared facility'.[47] The Committee also noted that the regime 'should be applied sparingly, focusing on key sectors of strategic significance to the nation. Concerns over access to facilities that do not share these features should continue to be addressed under the general conduct rules.'[48] The clear implication from these recommendations is that the regime was intended to be exclusive, but limited.[49]

Second, the Explanatory Memorandum to the *National Competition Policy Draft Legislative Package* distinguishes between the proposed access regime and restrictive trade practices provisions such as s 46 as follows:

> [Section 46] is proscriptive by nature, providing for potentially heavy penalties where corporations engage in prohibited conduct. By contrast a legislative access regime would largely operate in a non-proscriptive manner, seeking to facilitate agreement between the parties on access, and where such agreement cannot be reached, providing an arbitration mechanism to settle the issues in dispute. Such a regime should be able to deal with access disputes in a more timely manner than through court action for a purported contravention of s 46.[50]

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44 W Pengilley, 'The National Competition Policy Draft Legislative Package: The Proposed Access Regime' (1995) 2 *Competition & Consumer Law Journal* 244, 251, where the first scenario is favoured.

45 See n 40 above.

46 *Hilmer Report* (above n 2) 260.

47 Ibid.

48 Ibid.

49 Abadee (above n 12) 37.

In the author's opinion, Abadee correctly inferred from the above passage that the intention of Parliament is plain: in cases falling within the ambit of Part IIIA, 'the administrative regime is ascendant, and reliance upon s 46 is jettisoned'.[51]

Recent support for the ascendancy of Part IIIA can be found in the Full Federal Court's decision in *NT Power Generation v Power & Water Authority*.[52] The respondent, PAWA, a statutory authority established as a body corporate by the *Power and Water Authority Act* 1987 (NT), generated electricity and distributed it, across its own power transmission lines, for sale to consumers in the Northern Territory. The appellant, NT Power, wished to sell electricity, produced by its own generation facilities, to persons in the Northern Territory, in competition with PAWA. NT Power sought access to PAWA's electricity distribution infrastructure, as the cost of constructing its own transmission lines and associated facilities was prohibitive. After months of negotiations, PAWA refused to grant the access which had been sought. NT Power claimed that this refusal amounted to a misuse by PAWA of its market power.

The case turned on the interpretation of s 2B of the *Trade Practices Act*, which confirms that the provisions of Part IV of the Act (including s 46) bind the Crown 'so far as the Crown carries on a business'. In addressing this issue, it was the unanimous conclusion of the Full Federal Court that PAWA was an emanation of the Crown.[53] However, in what must now be regarded as a major obstacle to dealing with denials of access by public utilities under s 46, a majority of judges held that PAWA merely used its infrastructure as the means by which it carried on its business of generating and supplying electricity; it did not trade in the service of providing access to its infrastructure.[54] Since PAWA's conduct in refusing access was not

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50 Explanatory Memorandum, *National Competition Policy Draft Legislative Package* (AGPS, Canberra, 1994) [1.11]. These comments are not limited to any of the particular paths to access, such as declaration.

51 Abadee (above n 12) 38.

52 [2003] ATPR 41-909.

53 Ibid 46,548 (Lee J); 46,560 (Branson J); and 46,570 (Finkelstein J).

54 Ibid 46,549 (Lee J); and 46,562 (Branson J); Finkelstein J dissenting (46,571).

undertaken in the course of carrying on a business, s 46 could have no application to that conduct.[55]

Most interesting to the present discussion are the observations of the majority judges, Lee and Branson JJ, that Part IIIA provides the regime which should have been followed in the circumstances of the instant case. As Lee J remarked, it 'should not be assumed that it was the intention of the legislature that the scheme introduced in Part IIIA is a mere alternative to the provisions of s 46.'[56] In a similar vein, Branson J noted that there was no discernible legislative intention that s 2B, together with s 46, should provide 'an alternative means to the complex process established by Part IIIA'.[57]

Of course, an amendment to the *Trade Practices Act* to the effect that s 46 should not apply to cases falling within the ambit of Part IIIA would put the matter beyond doubt.[58] Such an amendment would eliminate further conjecture on the interface between Part IIIA and s 46.[59]

## 6.3 SEMINAL SECTION 46 DECISIONS

As mentioned previously, three elements must be satisfied before a contravention of s 46 of the *Trade Practices Act* will arise: (i) a corporation with a substantial degree of *market power*; (ii)

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55 Ibid. Mansfield J's decision in *NT Power Generation v Power & Water Authority* [2001] ATPR 41-814 was thereby affirmed.

56 [2003] ATPR 41-909, 46,550.

57 Ibid 46,563.

58 Hood and Corones (above n 39) 100. Consistent with the dicta of the Full Federal Court in the *NT Power* case, the author anticipates that s 46 would not be available to an applicant who might have cast its case under Part IIIA. Practically speaking, this may involve the adjournment of s 46 proceedings to allow a declaration to be sought. If the case turned out not to satisfy the Part IIIA criteria for declaration, the applicant's action under s 46 would resume.

59 That is, when taken together with the author's earlier submission, in part 4.6(B) of Chapter 4, that access arrangements sanctioned under Part IIIA should be shielded from the operation of Part IV (including s 46) of the Act.

must *take advantage* of that power; (iii) for a *purpose* proscribed by s 46(1)(a), (b) or (c).[60] In the context of refusal to supply (and, by logical extension, refusal to grant access), two substantive expositions on the three elements of s 46 have been handed down by the High Court to date: *Queensland Wire*[61] in 1989 and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[62] in 2001.[63]

Prior to *Queensland Wire*, commentators had lamented the lack of legal principle governing refusals to supply. As Corones remarked:

> Under what circumstances can a corporation with a substantial degree of market power refuse to supply goods or services to a distributor or customer? This is perhaps the most vexed question in the whole area of Trade Practices Law.[64]

Now, the High Court's decisions in *Queensland Wire* and *Melway* have established an authoritative framework for the interpretation and application of s 46. In light of these determinations, it has become clear that a pivotal factor in refusal to supply cases under s 46 is whether the respondent company can justify its conduct.[65] Indeed, this author contends that

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60 These elements should be appraised sequentially. If the first element is not satisfied, there is no need to examine the other two. Likewise, if the first element is satisfied, but the second not, it is unnecessary to consider the third. Of course, should a particular element not be satisfied, a hypothetical assessment of the subsequent element(s) is always permissible.

61 (1989) 167 CLR 177. The Full Federal Court's decision is *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1988] ATPR 40-841; and the Federal Court's is *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1987] ATPR 40-810.

62 [2001] ATPR 41-805. The Full Federal Court's decision is *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [1999] ATPR 41-693; and the Federal Court's is *Robert Hicks Pty Ltd v Melway Publishing Pty Ltd* [1999] ATPR 41-668. (Hereafter, the case is '*Melway*'.) Note that Robert Hicks Pty Ltd traded as Auto Fashions Australia.

63 The High Court's third s 46 decision, *Boral Besser Masonry Ltd v ACCC* [2003] ATPR 41-915 (hereafter, '*Boral*'), concerned 'predatory pricing'. (Boral Besser Masonry Ltd was referred to throughout the proceedings as BBM, and that convention is maintained in this chapter.) In *Rural Press Ltd v ACCC; ACCC v Rural Press Ltd* [2003] ATPR 41-965, the High Court's fourth and most recent encounter with s 46, the impugned conduct involved threats to enter a rival's market; again, refusal to supply was not in issue.

64 S Corones, 'Are Corporations with a Substantial Degree of Market Power Free to Choose their Distributors and Customers?' (1988) 4 *Queensland University of Technology Law Journal* 21, 21.

65 Cf Pengilly's nomination of *Queensland Wire* as one of Australia's ten worst trade practices decisions and his claim that 'it created in business an impression that there was an obligation to supply in virtually all circumstances': W Pengilley, 'The Ten Most Disastrous Decisions made Relating to the Trade Practices Act' (2002) 30 *Australian Business Law Review* 331, 340.

critics who assert a 'lack of certainty'[66] in the application of s 46 in refusal to supply cases[67] have overlooked the significance of legitimate business reasons offered (or omitted) by the respondent corporation in justification of its conduct.[68] As the s 46 cases repeatedly demonstrate, a refusal to supply will be excused by the courts provided there is some legitimate business explanation for it.[69] Of necessity, this approach requires a case-by-case examination of the relevant factual matrix, but within the parameters established by judicial pronouncement.

These comments apply equally to those residual essential facilities cases that fall for determination under s 46. There, again, the pivotal issue relates to the legitimacy of reasons for refusing access. As Kench has explained:

> Section 46 is capable of applying to an outright or constructive or discriminatory refusal by the owner of an essential facility to supply services using that facility … A non-integrated facility owner will be dealing with third party suppliers and customers, and … faces serious issues about *proper business justifications* for refusing to deal. A vertically integrated essential facility owner, by virtue of its ownership interest, needs to take even greater care about the formulation of a *legitimate business reason* for its refusal to deal.[70]

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66 D Clough, 'Misuse of Market Power – "Would" or "Could" in a Competitive Market?' (2001) 29 *Australian Business Law Review* 311, 312.

67 Eg, M O'Bryan, 'Section 46: Law or Economics?' (1993) 1 *Competition & Consumer Law Journal* 64, 64 ('unpredictable outcomes'); McMahon (above n 22) 19 (no 'coherent framework'); W Seah, 'Fair Competition or Unfair Predation: Identifying the Misuse of Market Power under Section 46' (2001) 9 *Trade Practices Law Journal* 236, 267 ('practical difficulties'); Pengilley (above n 42) 56 (it is 'impossible … to make managerial decisions in certain conformity with the law'); and D Meltz, '"Market Entry – See Adjoining Map": Melway and the Right Not To Supply' (2002) 10 *Trade Practices Law Journal* 96, 109 ('the hoped for clarity … has not transpired'). Cf S Welsman, 'In Queensland Wire, the High Court has Provided an Elegant Backstop to "Use" of Market Power' (1995) 2 *Competition & Consumer Law Journal* 280, 312 (there are 'evidence outcome "certainties"'); and R Smith and D Round, 'The Puberty Blues of Competition Analysis: Section 46' (2001) 9 *Competition & Consumer Law Journal* 189, 192 (firms 'do have certainty given the legal framework and existing precedent').

68 A similar view was expressed by the author, pre-*Melway*, in B Marshall, 'Refusals to Supply under Section 46 of the Trade Practices Act: Misuse of Market Power or Legitimate Business Conduct?' (1996) 8 *Bond Law Review* 182. Post-*Melway*, the author has pursued the point in B Marshall, 'The Relevance of a Legitimate Business Rationale under Section 46 of the Trade Practices Act' (2003) 8 *Deakin Law Review* 49.

69 See, eg, the cases discussed in part 6.5 of this chapter.

70 Kench (above n 3) 141 (emphasis added). As explained in part 2.2(B) of Chapter 2, the access problem is regarded by many as potentially more severe where the essential facility is vertically integrated into upstream or downstream markets than where it is not.

The balance of this chapter re-examines the seminal principles articulated by the High Court in *Queensland Wire* (where, it should be emphasised, BHP failed to offer a legitimate business reason for its behaviour) and *Melway* (where Melway did provide a legitimate business rationale),[71] and applied by the Federal Court in subsequent refusal to supply decisions. This analysis, which is undertaken by focusing on the three elements of s 46 and then considering the mitigating impact of legitimate business reasons, is intended to clarify the application of the misuse of market power provision in refusal to supply cases. Brief recitals of the facts of *Queensland Wire* and *Melway*, set out below, provide contextual background to the discussion that follows in parts 6.4 and 6.5 of this chapter.

### A *Queensland Wire revisited*

BHP, responsible for approximately 97 per cent of Australia's steel output, produced Y-bar,[72] which it sold exclusively to its wholly owned subsidiary Australian Wire Industries (AWI). AWI produced fence posts from the Y-bar and sold these as a producer. Queensland Wire Industries (QWI) sought supply of the Y-bar produced by BHP in order to produce fence posts and compete against AWI in the rural fencing market. BHP offered to supply the Y-bar at prices which were so high that its conduct amounted to a constructive refusal to supply.[73] Before the High Court, QWI successfully claimed that BHP had misused its market power in

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[71] Arguably, the *Boral* case sustains this theme (in that BBM was found to have provided a legitimate business rationale for its conduct), although the case involved predatory pricing, not refusal to supply: see the discussion of *Boral* in part 6.5(C) of this chapter.

[72] Y-bar is used to produce star picket posts by cutting the Y-shaped steel into fence post lengths and drilling holes through which wire will pass. Star picket fencing is the most popular form of rural fencing in Australia.

[73] The High Court's decision in *Queensland Wire* (1989) 167 CLR 177 confirms that supply on unreasonable or restrictive terms amounts to constructive refusal to supply. According to Mason CJ and Wilson J (185), the offer by BHP was at 'an excessively high price relative to other BHP products'; Deane J (197) described it as an 'unrealistically high' price; and Toohey J (204) identified a refusal to supply at a 'competitive' price.

contravention of s 46 of the *Trade Practices Act*.[74] The parties then settled their dispute out of court in confidential negotiations.

### B *The Melway case*

Melway published a street directory for the Melbourne metropolitan area and had captured 80-90 per cent of the local street directory market. The company attributed its success, in part, to its wholesale distribution system, under which it supplied directories to a limited number of distributors who were authorised to sell those directories only in the particular market segments allocated exclusively to them. Auto Fashions had been the appointed distributor for the automotive parts segment of the market for a number of years when Melway terminated its distributorship. On being informed by Auto Fashions that it nevertheless wished to obtain copies of the directory (30,000-50,000 per annum) for sale to the retail market, Melway refused supply. On appeal to the High Court, Melway was found not to have breached s 46.[75]

## 6.4 ELEMENTS OF SECTION 46

### A *A substantial degree of market power*

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74 For case note discussion of the High Court's decision, see K MacDonald, 'Queensland Wire Industries v BHP' (1989) 19 *Queensland Law Society Journal* 131.

75 For case note discussion of the High Court's decision, see P Williams, 'Melway Publishing Pty Ltd v Robert Hicks Pty Ltd' (2001) 25 *Melbourne University Law Review* 831.

As a threshold requirement to the operation of s 46, a corporation must have a 'substantial degree of power in a market'.[76] Acknowledged by the courts as an economic concept,[77] 'market power' refers to the ability of a firm to raise price with no loss of sales to existing competitors, or new entrants, such as would render the price rise unprofitable.[78] This explanation was specifically adopted by Mason CJ and Wilson J in their Honours' joint judgment in *Queensland Wire*.[79]

In exploring the issue further, Mason CJ and Wilson J, relying on *Europemballage Corp and Continental Can Inc v European Commission*,[80] stated that, although large market shares are evidence of market power, barriers to entry (ie, the ease with which new competitors can enter a market) must also be considered.[81] Barriers to entry were identified as legal barriers (such as contractual and statutory rights) and those resulting from large economies of scale.[82] Their Honours' view has enjoyed wide support, with Kiefel J remarking in *Photo-Continental Pty Ltd v Sony (Aust) Pty Ltd*[83] that cases since *Queensland Wire* demonstrate that barriers to entry are the primary consideration in determining market power.[84]

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76 See, generally, S Corones, 'The New Threshold Test for the Application of Section 46 of the Trade Practices Act' (1987) 15 *Australian Business Law Review* 31.

77 See, eg, *Plume v Federal Airports Corp* [1997] ATPR 41-589, 44,131.

78 F Scherer and D Ross, *Industrial Market Structure and Economic Performance*, 3rd ed (Houghton Mifflin, Boston, 1990) 10-11.

79 Their Honours said, 'Market power can be defined as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product': (1989) 167 CLR 177, 188. See, also, the judgment of Dawson J: ibid 200.

80 [1973] CMLR 199.

81 (1989) 167 CLR 177, 189-190. Of course, this had also been said by the Trade Practices Tribunal in its seminal determination in *Re Queensland Co-operative Milling Association Ltd* [1976] ATPR (TPT) 40-012, 17,246.

82 (1989) 167 CLR 177, 190. Dawson J pointed out that market power may also be manifested by practices directed at excluding competition, such as exclusive dealing and tying arrangements: ibid 200.

83 [1995] ATPR 41-372.

84 Ibid 40,120.

It is not anticipated that the first element of s 46 will be difficult to satisfy in essential facility cases. As the Hilmer Committee noted, if a facility 'is truly essential, its owner will always have a substantial degree of market power within the meaning of s 46'.[85]

Generally speaking, whether a corporation in fact possesses substantial market power is an issue inextricably linked to the way in which the relevant market is defined.[86] In light of the Hilmer Committee's conclusion above, it is not considered necessary to elaborate on the complex process of defining a market and establishing the power of a corporation therein.[87] For present purposes, suffice it to say that this is often a complicated, and controversial, matter in restrictive trade practices cases.[88]

Often, but not always. In *Queensland Wire*, the High Court had little difficulty in establishing the threshold requirement under s 46.[89] Their Honours were unanimous in holding that BHP possessed a substantial degree of power in the Australian market for steel and steel

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85 *Hilmer Report* (above n 2) 243. For further support, see O'Bryan (above n 10) 88; and R Smith, 'Competition Law and Policy – Theoretical Underpinnings' in M Arblaster and M Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (AusInfo, Canberra, 1998) 16, 23.

86 Eg, actions based on s 46 were defeated in the following refusal to supply cases, due to the adoption of relatively wide market definitions which led to findings of insufficient market power on the part of the respondent corporation: *Broderbund Software Inc v Computermate Products (Australia) Pty Ltd* [1992] ATPR 41-155; *Dowling v Dalgety Australia Ltd* [1992] ATPR 41-165; *Helicruise Air Services Pty Ltd v Rotorway Australia Pty Ltd* [1996] ATPR 41-510; and *Regents Pty Ltd v Subaru (Aust) Pty Ltd* [1998] ATPR 41-647.

87 It is noted, however, that M Brunt, 'Market Definition Issues in Australian and New Zealand Trade Practices Litigation' (1990) 18 *Australian Business Law Review* 86 remains particularly instructive on these matters. See, also, G Hay, 'Market Power in Australasian Antitrust: An American Perspective' (1994) 1 *Competition & Consumer Law Journal* 215.

88 For further discussion, see R Smith, 'The Practical Problems of Market Definition Revisited' (1995) 23 *Australian Business Law Review* 52; and B Marshall, 'The Dilemma of Market Definition' (1996) 31 *Australian Lawyer* 7. Most recently, there has been criticism of the High Court's findings in respect of market power in the *Boral* case: see, eg, R Smith and R Trindade, 'The High Court on Boral: A Return to the Past?' (2003) 10 *Competition & Consumer Law Journal* 336. Cf the positive critique in G Hay, 'Boral – Free at Last' (2003) 10 *Competition & Consumer Law Journal* 323.

89 Compare the joint judgment of the Full Federal Court in *Queensland Wire* [1988] ATPR 40-841, in which Bowen CJ, Morling and Gummow JJ held that the action failed on the point that there was no market for Y-bar and, hence, there could be no possibility of market power.

products.[90] In *Melway*, it was not even disputed in the High Court that Melway had a substantial degree of power in the wholesale and retail market for street directories in Melbourne.[91] In contrast, in *Boral Besser Masonry Ltd v ACCC*,[92] the appellant's successful appeal turned on the finding, by six of the seven High Court justices,[93] that the company did not have a substantial degree of power in Melbourne's concrete masonry products market.[94] The decision in *Boral* provides a useful reminder of the primacy of the market power element in establishing a breach of s 46.

### B *Taking advantage of market power*

#### (1) *Competitive market test*

The Hilmer Committee considered that that there would be 'little difficulty'[95] in establishing that a refusal to deal in an essential facility context constitutes a taking advantage of the facility owner's market power because, it said simply, 'in the absence of such market power access to the facility would be available'.[96] The author agrees with that conclusion,[97] but acknowledges that the Committee's statement does not elucidate the test of taking advantage adopted by the High Court in *Queensland Wire*, and confirmed in *Melway*.[98] The discussion here, and in part

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90 *Queensland Wire* (1989) 167 CLR 177, 192 (Mason CJ and Wilson J); 197 (Deane J); 201 (Dawson J); and 211 (Toohey J). In this respect, their Honours upheld the decision of Pincus J at first instance in *Queensland Wire* [1987] ATPR 40-810.

91 *Melway* [2001] ATPR 41-805, 42,750. The conclusion of the trial judge, Merkel J, on this point in *Melway* [1999] ATPR 41-668, 42,520-42,521 was not challenged.

92 [2003] ATPR 41-915.

93 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting.

94 [2003] ATPR 41-915, 46,686 (Gleeson CJ and Callinan J); 46,695 (Gaudron, Gummow and Hayne JJ); 46,717 (McHugh J); Kirby J dissenting (46,721).

95 *Hilmer Report* (above n 2) 243.

96 Ibid.

97 For reasons encapsulated in Finkelstein J's judgment in the *NT Power* case. See the discussion in part 6.4(B)(2) of this chapter.

98 Cf F Hanks, 'The Competition Law Framework for Deregulation of Public Utilities in Australia' in M Richardson (ed), *Deregulation of Public Utilities: Current Issues and Perspectives* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1996) 2, 6, where it is contended that the Hilmer Committee 'did not understand the nature of the inquiry required by the test of taking advantage'.

(2) below, explains the test and illustrates its practical application, both generally and in relation to essential facilities.

In *Queensland Wire* at first instance, Pincus J held that for a corporation to take advantage of its power in a market, there must be some misuse of that power in an unfair or predatory manner.[99] In his Honour's view, a proper construction of the section required those words to be read in a pejorative sense.[100] On final appeal to the High Court, however, it was unanimously held that 'take advantage' is a neutral concept, meaning nothing materially different to 'use', and so does not require proof of hostile intent.[101]

As to whether market power has been used, the test discernible from the High Court judgments in *Queensland Wire* is that a corporation's conduct will amount to a use, or taking advantage, of market power when that conduct is possible, in a commercial sense, only because of its market power.[102] In other words, a firm should be regarded as having taken advantage of market power when it has behaved differently from the manner in which it would be likely to behave if it were operating in a competitive market.[103] This approach may conveniently be described as the 'competitive market' test, to borrow from the judgment of Mason CJ and Wilson J in *Queensland Wire*.[104] In applying the test in that case, their Honours stated:

> It is only by virtue of its control of the market and the absence of other suppliers that BHP can afford, in a commercial sense, to withhold Y-bar from the appellant. If BHP lacked that market power – in other words, *if it were operating in a competitive market* – it is highly unlikely that it would stand by, without any effort to compete, and allow the appellant to secure its supply of Y-bar from a competitor.[105]

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99 [1987] ATPR 40-810, 48,819.

100 Ibid.

101 *Queensland Wire* (1989) 167 CLR 177, 191 (Mason CJ and Wilson J); 194 (Deane J); 202 (Dawson J); and 213 (Toohey J). This point was expressly confirmed by the High Court in *Melway* [2001] ATPR 41-805, 42,754 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

102 *Queensland Wire* (1989) 167 CLR 177, 192 (Mason CJ and Wilson J); 197-198 (Deane J); 202-203 (Dawson J); and 216 (Toohey J).

103 Ibid.

104 Steinwall does likewise: R Steinwall, 'Melway and Monopolisation – Some Observations on the High Court's Decision' (2001) 9 *Competition & Consumer Law Journal* 93, 97.

105 Ibid 192 (emphasis added). Similar views were expressed by Dawson J (202) and Toohey J (216).

In drawing the inference that BHP had taken advantage of its market power, the High Court took account of the following factors: BHP supplied Y-bar to AWI but not QWI; BHP made available for general sale at competitive prices all the other steel products from its rolling mills, so that BHP's conduct with respect to Y-bar was not in accordance with the general terms of its commercial behaviour; in every other steel product line in which BHP experienced some competition, it supplied that product.[106]

As the High Court's decision in *Queensland Wire* demonstrates, the practical application of the competitive market test generally involves an examination of the counterfactual. That is to say, whether a corporation has taken advantage of its market power is determined by asking whether the corporation would be likely to engage in the same conduct in a competitive market. The corollary is to ask whether the conduct depends on the possession of market power and is an exercise of that market power. Whichever way the question is phrased, the inquiry seeks to ascertain whether the conduct at issue is attributable to market power.[107] In *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd*,[108] French J explained very clearly the need for a causal nexus between a corporation's market power and its conduct:

> If a corporation with substantial market power were to engage an arsonist to burn down its competitor's factory and thus deter or prevent its competitor from engaging in competitive activity, it would not thereby contravene s 46. There must be a *causal connection* between the conduct alleged and the market power pleaded such that it can be said that the conduct is a use of that power.[109]

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106 Ibid 192 (Mason CJ and Wilson J); 197-198 (Deane J); 202-203 (Dawson J); and 216 (Toohey J).

107 Section 46(4)(a) provides that the reference to 'power' in s 46(1) is a reference to market power. Thus, the power taken advantage of by the respondent corporation must in fact be market power.

108 [1992] ATPR 41-196, where French J held that there was no evidence of a use of 'market power': ibid 40,644.

109 Ibid (emphasis added). French J's approach in *Natwest* was expressly applied by Wilcox J in *General Newspapers Pty Ltd v Australian and Overseas Telecommunications Corp Ltd* [1993] ATPR 41-215, 40,956 to conclude that, even without substantial market power, the respondent company would have acted in the same way. For similar reasoning, see, more recently, *Monroe*

This requirement has been reinforced by the High Court's recent decision in *Melway*. In a joint majority judgment, Gleeson CJ, Gummow, Hayne and Callinan JJ[110] pointed out that s 46 requires 'not merely the co-existence of market power, conduct, and proscribed purpose, but a *connection* such that the firm whose conduct is in question can be said to be taking advantage of its power.'[111] The lack of any causal link between Melway's dominant market position and its refusal to supply Auto Fashions provides the basis for the majority's conclusion that Melway had not taken advantage of its market power.[112]

In affirming the competitive market test from *Queensland Wire*, the High Court majority in *Melway* said:

> To ask how a firm would behave if it lacked a substantial degree of power in a market, for the purpose of making a judgment as to whether it is taking advantage of its market power, involves a process of economic analysis which … is consistent with the purpose of s 46.[113]

However, their Honours clarified the nature of the hypothetical market underlying this test[114] by observing that the absence of a substantial degree of market power does not mean the

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*Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2001] ATPR (Digest) 46-212; and *ACCC v Australian Safeway Stores Pty Ltd (No 2)* [2002] ATPR (Digest) 46-215.

110 Kirby J dissented.

111 [2001] ATPR 41-805, 42,757.

112 The majority did not disturb the finding of the trial judge, Merkel J, that the refusal to supply the respondent was for an exclusionary purpose, namely, to deter or prevent competition at the wholesale level, but warned of the danger of proceeding 'too quickly from a finding about proscribed purpose to a conclusion about taking advantage': ibid 42,755.

113 [2001] ATPR 41-805, 42,758. In dissent, Kirby J maintained that *Queensland Wire* stood for the proposition that to take advantage of market power for a proscribed purpose, a corporation must simply use that power (eg, by refusing supply) for a prohibited reason, and that it 'was unnecessary to pose hypothetical questions (sometimes difficult to resolve) as to whether such corporation could or would, acting rationally, have engaged in the forbidden conduct if it were subject to effective competition': ibid 42,769. With respect, Kirby J's view is directly contrary to the competitive market test espoused by the High Court in *Queensland Wire*.

114 Prompted perhaps by Pengilley's criticism of using a perfectly competitive market as the benchmark for comparison: W Pengilley, 'Misuse of Market Power: Present Difficulties – Future Problems' (1994) 2 *Trade Practices Law Journal* 27, 41; and Pengilley (above n 42) 60. Featherston and Edwards share the view that it should not be incumbent on firms with market power to behave as if they were constrained by forces that operate in a perfectly competitive

presence of 'an economist's theoretical model of perfect competition'.[115] All that is required is a sufficient level of competition 'to deny a substantial degree of power to any competitor in the market'.[116] In the majority's view, this qualification was necessary because:

> It is one thing to compare what it [the respondent] has done with what it might be thought it would do if it lacked market power. It is a different thing to compare what it has done with what it would do in circumstances that are completely divorced from the reality of the market.[117]

Their Honours explained that the lower courts had fallen into the latter trap in the *Melway* case by failing to consider the nature of the wholesale distribution arrangements, both of Melway and its competitors, that would exist in a competitive market.[118]

The majority viewed the refusal to supply Auto Fashions as a manifestation of Melway's distribution system, so that the 'real question'[119] in the case was whether, without its market power, Melway could have maintained that system.[120] Their Honours noted that Melway had adopted its segmented distribution system before it secured its position of market dominance, and there was no reason to believe it would not have been both willing and able to continue that system in a competitive market.[121] They reasoned that the creation and maintenance of the distribution system by Melway 'at a time when it did not have a substantial degree of market power, shows that its maintenance, when the appellant had market power, was not *necessarily* an exercise of that power.'[122] Thus, the majority concluded:

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market: R Featherston and G Edwards, 'Recent Developments in Misuse of Market Power" (2000) 8 *Trade Practice Law Journal* 79, 90.

115 [2001] ATPR 41-805, 42,758.

116 Ibid.

117 Ibid 42,759. Steinwall describes this as a 'qualification' to the competitive market test: Steinwall (above n 104) 98.

118 [2001] ATPR 41-805, 42,759. The point is that a competitive market may just as easily support exclusive distribution arrangements of the kind that Melway had in place as direct sales to retailers. See, further, Steinwall (ibid).

119 [2001] ATPR 41-805, 42,760.

120 Ibid. Note that here their Honours are asking the corollary question under the competitive market test.

121 Ibid, citing with approval Heerey J's dissenting judgment in *Melway* in the Full Federal Court.

122 Ibid 42,761 (emphasis in original).

> … it does not follow that because a firm in fact enjoys freedom from competitive constraint, and in fact refuses to supply a particular person, there is a *relevant connection* between the freedom and the refusal. Presence of competitive constraint might be compatible with a similar refusal, especially if it is done to secure business advantages which would exist in a competitive environment.[123]

These comments reinforce the author's view that the decision in *Melway* is simply another way of saying that that there must be a causal connection between a corporation's market power and its impugned conduct.[124]

On the question of how high the threshold of causation is under the competitive market test, the High Court majority in *Melway* said, albeit by way of obiter comments:

> … in a given case, it may be proper to conclude that a firm is taking advantage of market power where it does something that is *materially facilitated* by the existence of the power, even though it may not have been absolutely impossible without the power.[125]

That a corporation's market power has 'materially facilitated' its conduct implies a lower threshold of causation than does the present requirement that the conduct is only possible because the corporation possesses substantial market power.[126] In the author's view, lowering the threshold of causation in respect of the take advantage element will do little to increase certainty in the application of s 46. As Corones notes, 'materially' is a relative concept and its application to particular fact situations 'is bound to produce a divergence of views'.[127] Moreover, to the extent that it broadens the scope of s 46, the lower threshold may indirectly lead to the error of focusing on the sources of a corporation's market power, rather than its conduct. This misapplication of the competitive market test of taking advantage is discussed immediately below.

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123 Ibid (emphasis added).
124 See, also, Seah (above n 67) 243; and Steinwall (above n 104) 100.
125 [2001] ATPR 41-805, 42,758 (emphasis added).
126 Corones (above n 10) 420.
127 Ibid.

### (2) *Market power or other power?*

There is a series of Federal Court judgments in which conduct characterised as resulting from a corporation's exercise of extraneous sources of power (such as contractual, property, statutory or other legal rights) has been excluded from the ambit of s 46.[128] The proposition accepted in these judgments is that if a corporation with substantial market power exercises, for example, a contractual or statutory right, it necessarily takes advantage of power it has by virtue of the contract or statute, and not by virtue of its control of a market.[129]

It is submitted, however, that the adoption by the High Court in *Queensland Wire* of a broad economic concept of market power indicates that s 46 is intended to catch the taking advantage of all types of market power irrespective of their source.[130] Economists do not dispute that market power can arise from the existence of contracts with distributors, or from the existence of patents or other statutory monopolies.[131]

The High Court's reasoning in *Melway* confirms that it is erroneous to focus on the source of market power in determining whether there has been a taking advantage of market power.[132] It is therefore both surprising and disappointing that, in its recent decision in the *Rural Press* case,[133] the High Court briefly disposed of the ACCC's s 46 arguments on the

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128 For background discussion, see L Law and B Marshall, 'Misuse of Market Power: The Degree of "Causal Connection" Required under Australian and European Law' (1997) 3 *International Trade and Business Law Annual* 197.

129 In discussing these judgments, it is not suggested that the conclusion in respect of the take advantage element is wrong in every instance, merely that the underlying process of reasoning is flawed.

130 Law and Marshall (above n 128) 199; and P Clarke and S Corones, *Competition Law and Policy: Cases and Materials* (Oxford University Press Australia, Melbourne, 1999) 346.

131 Indeed, the Explanatory Memorandum to the *Trade Practices Act Revision Bill* states that 'market power can be derived from statutory limitations on competition (eg, through the creation of statutory monopolies) in the same way as any other constraints on competition can affect the operation of the market': (above n 16) [17.44].

132 M O'Bryan, 'Section 46: Legal and Economic Principles and Reasoning in Melway and Boral' (2001) 8 *Competition & Consumer Law Journal* 203, 211.

133 *Rural Press Ltd v ACCC; ACCC v Rural Press Ltd* [2003] ATPR 41-965.

basis that the respondent corporation had not taken advantage of market power, but of 'something distinct from market power, namely [its] material and organisational assets'.[134]

*Melway*[135] shows that the correct application of the competitive market test involves a comparative assessment of the corporation's behaviour in the presence or absence of competitive conditions – with a change in conduct suggesting that the test has been satisfied[136] – not a classification of its sources of market power. The two should not be confused.[137] This point was implicit in the High Court's decision in *Queensland Wire* as well, although only Dawson J directly touched on the issue in that case.[138] His Honour acknowledged that, while there is a need to distinguish between monopolistic practices and vigorous competition, it was not helpful 'to categorise conduct … by determining whether it is the exercise of some contractual or other right.'[139]

Earlier cases in which such categorisation occurred include *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd*,[140] *Warman International v Envirotech Australia Pty Ltd*[141] and *Williams v Papersave Pty Ltd*.[142] While the specific factual matrix varied, each case involved a corporation with a substantial degree of market power[143] engaging in conduct allegedly in breach of s 46. However, in each instance the contravention was not established, as the conduct was held by the Federal Court to result not from the exercise of the corporation's market power, but from the exercise of some other power or right.

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134 Ibid 47,591 (Gummow, Hayne and Heydon JJ). Gleeson CJ and Callinan J concurred; Kirby J dissented.

135 [2001] ATPR 41-805 (High Court).

136 Meltz (above n 67) 109.

137 O'Bryan (above n 132) 212.

138 However, Pincus J at first instance in *Queensland Wire* [1987] ATPR 40-810, 48,818-48,819 had also said, 'I cannot (with respect) accept that characterising the acts complained of as merely an exercise of legal rights, whether contractual or otherwise, can be an answer to a claim based on s 46.'

139 (1989) 167 CLR 177, 202.

140 [1975] ATPR 40-004.

141 [1986] ATPR 40-714.

142 [1987] ATPR 40-781.

In the *Ira Berk* case, for example, Joske J decided that the exercise by a corporation with substantial market power of a contractual right to terminate a contract amounted to the corporation taking advantage of the terms of the relevant contract and not taking advantage of its market power.[144] This reasoning was relied on by Wilcox J in *Warman*, where his Honour concluded that '[t]o exercise in good faith an extraneous legal right, though the effect may be to lessen, or even eliminate, competition, is to take advantage of that right, not of market power.'[145] And in *Williams v Papersave Pty Ltd*, it was accepted by Sheppard J that the respondent corporation, in securing a lease of premises that the applicant had hoped to acquire, had merely taken advantage of the information it had received that the lease was still available and not its economic power in the market (ie, its 'deeper pocket').[146]

In the aftermath of *Queensland Wire*, the Full Federal Court indicated, in *Australasian Performing Rights Association Ltd v Ceridale Pty Ltd*,[147] that it was no answer to an alleged contravention of s 46 for a market-dominant supplier to assert that it was merely exercising an 'extraneous legal right'.[148] Similarly, in *John S Hayes & Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd*,[149] Hill J opined that 'there is no necessary incompatibility between a party exercising a right available to it and that conduct constituting a breach of s 46.'[150]

Useful support is also found in the jurisprudence of the EU. In that jurisdiction, abuse of market power is recognised as an objective concept relating to the behaviour of a dominant

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143 Noting that, prior to 1986, s 46 required a corporation to be in a position 'substantially to control a market'.

144 [1975] ATPR 40-004, 17,115. Smithers and Hely JJ concurred in separate judgments.

145 [1986] ATPR 40-714, 47,827.

146 [1987] ATPR 40-781, 48,525. Confirmed by the Full Federal Court on appeal: *Williams v Papersave Pty Ltd* [1987] ATPR 40-818.

147 [1990] ATPR 41-042.

148 Ibid 52,129 (Wilcox, Spender and Pincus JJ).

149 [1994] ATPR 41-318.

150 Ibid 42,236. Although, subsequently, in *Helicruise Air Services Pty Ltd v Rotorway Australia Pty Ltd* [1996] ATPR 41-510, 42,399, Hill J described the question of whether the exercise of a contractual right could constitute a contravention of s 46 as an 'open one'.

corporation, whose very presence in the market weakens competition.[151] Accordingly, anti-competitive conduct by a dominant corporation is not readily excused under Art 82 of the *EC Treaty*[152] on the argument that the corporation was making use of a right or power separate from its market power.[153]

Take, for example, intellectual property rights. On the facts of the *Magill* case, the refusal by broadcasters to supply their copyright information as to weekly program lists to an independent publisher amounted to a contravention of Art 82. The reasoning of the European Court of First Instance, affirmed by the European Court of Justice on appeal,[154] was that the broadcasters, by reserving the exclusive right to publish their copyright information, were preventing the emergence of an alternative product and hence securing their monopoly in the derivative market for weekly television guides.[155] Significantly, the existence of the intellectual property rights was factored into the finding of market dominance and, in the circumstances, the exercise of those rights was contrary to Art 82.[156]

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151 See, eg, *Hoffman-La Roche & Co AG v European Commission* [1979] 3 CMLR 211, [91].

152 Referred to consistently in this dissertation as Art 82, the provision was previously numbered Art 86. See Chapter 3, part 3.3(A), for further explanation.

153 See, further, Law and Marshall (above n 128) 201-202.

154 *Radio Telefis Eireann and Independent Television Publications Ltd v European Commission* [1995] ECR I-743.

155 *Radio Telefis Eireann v European Commission* [1991] CEC 114, [72]-[73]; *British Broadcasting Corp v European Commission* [1991] CEC 147, [59]-[60]; *Independent Television Publications Ltd v European Commission* [1991] CEC 174, [57]-[58]. A similar conclusion was reached by the European Commission under Art 82 in *National Data Corporation Health Information Services v Intercontinental Marketing Services Health Inc* (*NDC v IMS*), Commission Decision D3/38.044 (3 July 2001), in respect of the refusal by IMS to supply certain copyright information to NDC. Both *Magill* and *NDC v IMS* resulted in an order for a compulsory licence. Cf *Tierce Ladbroke v European Commission* [1997] 5 CMLR 309, where the European Court of First Instance declined to apply Art 82 to compel a copyright licence to broadcasts of French horse races, claimed by Ladbroke to be essential to its Belgian betting activities, on the basis that such broadcasts had nothing to do with the placing of bets on horse races.

156 As van Melle has explained, 'The principle is simple enough. A monopolist that competes in a derivative market cannot refuse to deal with another firm in order to prevent or deter competition in that market. By refusing to deal in the component essential for competition in another market the monopolist uses the market power in respect of the essential component as leverage to gain power in the derivative market. *Queensland Wire* applies this principle to the supply of tangible property, US cases apply it to access to "essential facilities" … and *Magill* applies it to the licensing of intellectual property': A van Melle, 'Refusals to License Intellectual Property Rights: The Impact of RTE v EC Commission (Magill) on Australian and New Zealand Competition Law' (1997) 25 *Australian Business Law Review* 4, 16.

*Magill* was distinguished by Beaumont J in *Broderbund Software Inc v Computermate Products (Australia) Pty Ltd*[157] on the ground that it had not been established that ownership of copyright conferred market power on the Broderbund corporation.[158] However, it has been argued that, by implication, Beaumont J accepted the relevance of the reasoning in *Magill* to actions under s 46, leading to the conclusion that 'if copyright confers substantial market power in one market and the owner seeks to use that power as "leverage" to prevent new entry or deter or prevent a person from engaging in competitive conduct in relation to another downstream market, the owner will have misused the market power conferred by its copyright.'[159]

In *Dowling v Dalgety Australia Ltd*,[160] Lockhart J demonstrated divergent reasoning. In this case, the applicant was refused permission to auction at the Goondiwindi sale yards owned by three pastoral companies, Dalgety, Elders and Primac. Although finding that the threshold requirement of a substantial degree of market power was not established on the facts,[161] Lockhart J proceeded to consider the application of s 46. Ostensibly adhering to the test formulated by the High Court in *Queensland Wire*, his Honour asked whether any of the corporations had exercised a right it would be unlikely to exercise in a competitive market.[162] However, in reverting to the approach of categorising the source of the power enabling the conduct, Lockhart J took the view that, in declining to make available to a competitor a valuable asset, the respondents were exercising rights flowing from the ownership of property,

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157 [1992] ATPR 41-155.

158 Ibid 40,113-40,114.

159 S Corones, 'Parallel Importing Computer Software: Consumer Welfare Considerations' (1992) 3 *Australian Intellectual Property Journal* 188, 195. As explained in Chapters 2 and 3, 'leverage' occurs when a monopolist attempts to gain a competitive advantage in, or protect, a downstream market through its control of the primary market, rather than through superior downstream performance. The High Court's decision in *Queensland Wire* – where BHP, by refusing to supply QWI with Y-bar, used its power in the Australian steel market to deter or prevent QWI from engaging in competitive conduct in the rural fencing market – may be taken as confirming, in Australia, judicial opposition to market leverage.

160 [1992] ATPR 41-165.

161 Ibid 40,276.

which could not be construed as conduct in which they would not engage in a competitive market.[163]

Lockhart J's approach in *Dowling v Dalgety Australia Ltd* was cited with approval by Lee J in *NT Power Generation v Power & Water Authority*.[164] As discussed previously, a majority of the Full Federal Court, comprised of Lee and Branson JJ, determined that s 46 had no application in that case. This was the outcome of their Honours' finding that PAWA's refusal to make its infrastructure available for use by NT Power was not conduct by PAWA in the course of carrying on its business.[165] However, had s 46 been relevant, Lee and Branson JJ would have applied the provision very differently. Despite having the benefit of the High Court's decision in *Melway*, Lee J relied on Lockhart J's reasoning in *Dowling* to conclude that the take advantage element of s 46 would not have been satisfied in the instant case, since the section 'does not purport to interfere with the due rights of property per se'.[166] Conversely, Branson J's view, shared by Finkelstein J, was that PAWA clearly had taken advantage of its monopoly power to prevent NT Power from becoming a supplier of electricity.[167] Their Honours dismissed the suggestion that, in refusing access to its infrastructure, PAWA was merely exercising a regulatory function or its ownership rights.[168] Expressing particular incredulity at the latter claim, Finkelstein J said:

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162 Ibid 40,277.

163 Ibid 40,278. In criticising Lockhart J's reasoning in this case, Pengilley has said, 'If this is the trend of the law, it seems as if access to facilities owned by others will rarely be ordered in Australia … In respect of the denial of access by the owner of the facility, the owner's argument is always that he is merely exploiting what he owns': W Pengilley, 'Denying a Competitor Access to Facilities' (1992) 8 *Australian & New Zealand Trade Practices Law Bulletin* 11, 14. For similar criticism, see P Prince, 'Queensland Wire and Efficiency – What Can Australia Learn from US and New Zealand Refusal to Deal Cases?' (1998) 5 *Competition & Consumer Law Journal* 237, 251.

164 [2003] ATPR 41-909, 46,549.

165 Ibid 46,549 (Lee J); and 46,562 (Branson J); Finkelstein J dissenting (46,571).

166 Ibid 46,549.

167 Ibid 46,566 (Branson J); and 46,586 (Finkelstein J).

168 Ibid 46,566 (Branson J); and 46,582 (Finkelstein J).

> It would … be an extraordinary result if a monopolist could successfully defeat a s 46 claim with the proposition that the monopolist's ownership of the property in question entitles it to do as it pleases, even if its conduct is anti-competitive or predatory.[169]

Indeed, Finkelstein J's treatment in this case of the take advantage element of s 46 is particularly deft. His Honour's judgment contains a very useful application of the competitive market test in an essential facilities context. Invoking the counterfactual, Finkelstein J asked how PAWA would behave in a 'hypothetical competitive market' for the supply of electricity distribution and transmission facilities[170] if PAWA were asked to make its infrastructure available to a third party who wished to compete with PAWA in the downstream electricity supply market.[171] His Honour's answer was that a profit-maximising firm would not stand by and allow a competitor to supply the third party with distribution and transmission facilities, without at least bidding for that business.[172] In other words, PAWA would not simply refuse to grant access to its infrastructure.[173] His Honour explained:

> In a competitive market for the supply of distribution and transmission facilities PAWA could not prevent the third party from competing for PAWA's customers with the potential that it would lose business. This is because in our hypothetical competitive market there is an organisation that can provide distribution and transmission facilities to the third party. So it is impossible for PAWA to keep the third party away from its customers. How would a rational firm act in that situation? … [A] rational firm would act pragmatically and make its infrastructure available. It would do so to get what it could from the difficult situation in which it found itself. The only thing it could get by way of recompense for the loss of business that it would be likely to suffer in a competitive market is a, perhaps smaller, return from letting out its infrastructure.[174]

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169 Ibid 46,582.

170 In constructing the relevant hypothetical market (which, his Honour noted, following *Melway*, was not required to be a perfectly competitive market), Finkelstein J made the following reasonable assumptions: that PAWA had the capacity to allow its infrastructure to be used by third parties who intended to supply electricity to customers in the geographic area in which PAWA sold electricity; that PAWA had at least one competitor who was equally able to satisfy the demands of third parties; and that PAWA and its hypothetical competitor were willing to make their infrastructure available to third parties on reasonable terms and conditions. Ibid 46,584.

171 Ibid 46,585.

172 Ibid. This conclusion would hold if PAWA had been a non-integrated, rather than a vertically integrated, monopolist. In those circumstances, PAWA would lack any incentive to deny access to its facilities. Refer to the discussion in Chapter 2, part 2.2(B).

173 This would include a constructive refusal to supply as well.

174 [2003] ATPR 41-909, 46,585.

This explanation confirms the Hilmer Committee's view[175] that that it would be a straightforward matter to satisfy the take advantage element of s 46 in essential facilities cases.[176]

Nevertheless, the preoccupation of Lockhart J in *Dowling v Dalgety Australia Ltd* and Lee J in *NT Power*, not to mention the High Court in *Rural Press*, with categorising the source of the corporation's power, suggests an ongoing measure of judicial uncertainty in the application of the competitive market test, even post-*Melway*. In particular, whenever 'extraneous powers' are raised in relation to the question of whether a corporation has taken advantage of its market power, there is a risk that confused reasoning will increase.

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175 See n 95 above.

176 Yet, as identified in part 3.4 of Chapter 3, this has not been so in New Zealand. Although the use test articulated by the Privy Council in *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (hereafter, *Telecom v Clear*) appeared to be a restatement of the take advantage test advanced by the High Court in *Queensland Wire*, their Lordships' conclusion that Telecom had not used its dominant position in charging its opportunity cost (since that is what it would have done in a competitive market) has caused the defeat of most subsequent attempts to gain access to an essential facility on fair terms under s 36 of the *Commerce Act*. The recent amendments to s 36 are aimed at addressing this problem by ensuring that the Australian approach to the take advantage element of the provision is adopted: see the discussion in Chapter 3, part 3.4. It has been suggested, however, that these amendments achieve nothing more than a 'semantic alignment' with s 46 of the *Trade Practices Act*, given the apparent similarity between the formulations of the Privy Council's use test in *Telecom v Clear* and the High Court's take advantage test in *Queensland Wire*: T Gilbertson, 'New Zealand's Commerce Act Reforms: An Australian and International Perspective' (2002) 10 *Trade Practices Law Journal* 150, 154. In countering that view, it is submitted that the Australian approach to the take advantage element of the misuse of market power provision represents the interpretation *and* application of the competitive market test. There is no question in the author's mind that the Privy Council misapplied this test in *Telecom v Clear*. To see the flaw in their Lordships' reasoning, it is helpful to recall the saying, 'All squares are rhombuses, but not all rhombuses are squares.' Yes, all firms may price on the basis of opportunity cost, but, no, not every opportunity cost incorporates monopoly profit. With respect, for the Privy Council to maintain that Telecom was merely charging its opportunity cost presents an incomplete picture and distorts the reality of the situation in *Telecom v Clear*. Telecom was in fact charging a monopoly price, something it would not be able to do in a competitive market. Hence, it was taking advantage of its market power. Only this line of reasoning is consistent with the conclusion in *Queensland Wire* that BHP had taken advantage of its market power. Still, it does not follow that by taking advantage of market power, a corporation has *misused* such power. As discussed in parts 6.4(C) and 6.5 of this chapter, that will depend on the outcome of the analysis of the separate purpose element of the provision, and particularly, whether the corporation's conduct may be justified on the basis of some legitimate business reason.

A qualification to the preceding comment relates to 'regulatory power', now acknowledged appropriately as a different type of power to market power. In the *NT Power* case, PAWA's claim that it was exercising a regulatory function was dismissed on the basis that its conduct was 'not designed to achieve by regulation any specific public purpose of the legislature'.[177] This contrasts with the genuinely regulatory nature of the licensing power at issue in *Plume v Federal Airport Corp*[178] and *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*.[179]

In *Plume*, the applicant, an operator of a shuttle bus service, applied to the Federal Airports Corporation (FAC) for a licence to operate such a service between Alice Springs airport and the city centre. The FAC refused and the applicant alleged that the refusal contravened s 46. O'Loughlin J held that the exercise of the power to grant a licence could not be described as the exercise of an economic market power.[180] Rather, it was the use of a regulatory power designed for the benefit of the members of the public who used the facilities of the airport.[181]

Similarly, in *Stirling*, French J distinguished between the exercise of a statutory power in the public interest (not a use of market power) and the exercise of market power derived from a statutory monopoly (potentially a use of that power).[182] His Honour acknowledged that Bunbury Port Authority (BPA) had exclusive control over the Port of Bunbury pursuant to the *Port Authorities Act* 1999 (WA).[183] However, in granting a licence for the provision of towage

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177 [2003] ATPR 41-909, 46,582 (Finkelstein J). See, also, Branson J's judgment : ibid 46,566.
178 [1997] ATPR 41-589.
179 [2000] ATPR 41-752.
180 [1997] ATPR 41-589, 44,132.
181 Ibid.
182 [2000] ATPR 41-752, 40,734.
183 Ibid 40,699.

services in that port, French J held that BPA was discharging a regulatory function under an express power granted by Parliament and was not exercising market power.[184]

Leaving regulatory function to one side (on the ground that it is distinguishable from market power), the principle remains that if a corporation with market power claims merely to have exercised an extraneous right, this will not remove its conduct from the purview of s 46. Any misapprehension of this point, in the courts or elsewhere, would be remedied by a closer reading of the High Court's decision in *Melway*. As the majority explained in that case, market power means the freedom to act without competitive constraint.[185] Accordingly, in assessing whether a corporation has taken advantage of its market power, the competitive market test dictates that the only pertinent question to ask is whether the corporation would be likely to engage in the conduct in the presence of competitive constraint.[186] Categorising the particular sources of a corporation's market power is not the answer to that inquiry. What will be relevant, though, is whether the corporation can advance a legitimate business rationale in respect of its conduct. This matter, contended earlier in this chapter to be the linchpin of s 46 analysis, and as relevant to a denial of access to an essential facility as to any other refusal to supply,[187] is discussed in part 6.5 below.

### C *Anti-competitive purpose*

Although the High Court in *Queensland Wire* eliminated any notion that the concept of taking advantage requires conscious predatory activity, it is nevertheless necessary for the party

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184 Ibid 40,734. Confirmed by the Full Federal Court on appeal: *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-783.

185 [2001] ATPR 41-805, 42,761.

186 O'Bryan (above n 132) 209.

187 Refer to Kench's comments: see text accompanying n 70 above.

seeking to establish a contravention of s 46 to prove that one or more of the proscribed purposes in s 46(1) is present on the facts of the case.[188] As Mason CJ and Wilson J explained:

> ... it is significant that s 46(1) already contains an anti-competitive purpose element. It stipulates that an infringement may be found only where the market power is taken advantage of for a purpose proscribed in par (a), (b) or (c). It is these purpose provisions which define what uses of market power constitute misuses.[189]

An unavoidable element of intention is thereby incorporated into the section, in the sense that s 46(1) requires purposive action undertaken with the express aim of: (a) eliminating or substantially damaging a competitor; (b) preventing the entry of a person into a market; or (c) deterring or preventing a person from engaging in competitive conduct in a market.[190]

McMahon has complained that the proscribed purposes in s 46(1) are 'widely drawn and ill-defined',[191] and deal exclusively with injury to competitors which is the very nature of competitive conduct.[192] Certainly, the section is expressed in terms of protecting firms who wish to compete with the powerful corporation, rather than in terms of protecting competition itself or the interests of consumers.[193]

However, on the question of whether s 46 requires proof of an anti-competitive purpose or mere injury to a competitor, the High Court in *Queensland Wire* denied that the protection of individual competitors is an objective of s 46. Mason CJ and Wilson J said:

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[188] In fact, a proscribed purpose need only be one of the purposes motivating the respondent corporation, provided it is a 'substantial' purpose: s 4F of the *Trade Practices Act*.

[189] (1989) 167 CLR 177, 191.

[190] In relation to intention, see, also, ss 46(7), 4F and 84 of the *Trade Practices Act*.

[191] McMahon (above n 22) 18.

[192] Ibid. Cf Alexiadis' claim that conduct fulfilling the requirements of s 46(1)(a), (b) or (c) cannot be anything but predatory: P Alexiadis, 'Refusal to Deal and Misuse of Market Power under Australia's Competition Law' [1989] *European Competition Law Review* 436, 452.

[193] Clarke and Corones contend that the immediate effect of s 46 is 'to protect individual (and in practice, small) firms from the predatory conduct of large firms, rather than to protect competition as such': (above n 130) 110. See, also, P Clarke, 'Misuse of Market Power and the Trade Practices Commission' (1990) 18 *Australian Business Law Review* 355, 356; and Corones (above n 10) 410.

> ... the object of s 46 is to protect *the interests of consumers*, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away ... and these injuries are the inevitable consequence of the competition s 46 is designed to foster.[194]

In giving meaning to the phrase 'the interests of consumers', in the context of s 46, it may be argued that because the consumer is primarily concerned with obtaining goods and services at the lowest possible price, the welfare of consumers depends on a competitive market in which corporations compete against each other in order to produce goods and services as cheaply and efficiently as possible.[195] Section 46 is aimed therefore at preventing corporations with substantial market power from using this power to deter or prevent competition.[196]

In *Queensland Wire*, Deane J certainly spoke of s 46 in terms which suggest he was of the view that it is designed to protect and advance competition per se. His Honour stated that the objective of s 46 is 'the protection and advancement of a competitive environment and competitive conduct'.[197] Toohey J similarly noted that the objective of Part IV of the *Trade Practices Act* (in which s 46 appears) is 'to promote and preserve competition'.[198] This approach was confirmed in *Melway*, where the High Court majority was emphatic that s 46 'aims to promote competition, not the private interests of particular persons or corporations'.[199]

This author endorses the High Court's view of the policy objective of s 46. In the author's opinion, that view is supported by s 2 of the *Trade Practices Act*, amended in 1995 to

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194 (1989) 167 CLR 177, 191 (emphasis added).

195 See, further, I Stewart, 'The Economics and Law of Section 46 of the Trade Practices Act' (1998) 26 *Australian Business Law Review* 111, 112.

196 V Nagarajan, 'The Regulation of Competition by Section 46 of the Trade Practices Act' (1993) 1 *Competition & Consumer Law Journal* 127, 128.

197 (1989) 167 CLR 177, 194. Dawson J noted his general agreement with the judgment of Deane J: ibid 198.

198 Ibid 213.

199 [2001] ATPR 41-805, 42,752 (Gleeson CJ, Gummow, Hayne and Callinan JJ).

provide: 'The object of this Act is to enhance the welfare of Australians through the *promotion of competition* and fair trading and provision for consumer protection.'[200]

The Hilmer Committee acknowledged that a refusal to grant access to an essential facility 'could conceivably occur for any of the three proscribed purposes'[201] in s 46, but anticipated considerable difficulty for an applicant in demonstrating that the facility owner had an anti-competitive purpose when it refused access.[202] However, the challenge under s 46 is no greater than that inherent in establishing a party's purpose in any other context. Arguably less so, in fact. While the relevant purpose in s 46 proceedings is the subjective purpose of the respondent corporation,[203] this purpose is determined *objectively*.[204] Accordingly, primary consideration should be given to an analysis of the impugned conduct and the inferences which can be drawn from that conduct.[205] Robertson makes the point neatly:

> The ultimate issue for determination when a court is assessing purpose is: What is the economic actor *really* trying to do in commercial or economic terms? … In asking this question we are asking for an *explanation* of commercial conduct – to make the best sense we can of the conduct – not a psychological analysis of the minds of the economic agents.[206]

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200 Emphasis added. As explained in part 2.5(A) of Chapter 2, the author adopts a macroeconomic perspective in interpreting s 2, equating 'the welfare of Australians' to 'economic growth in Australia'. Competition is the means to this end, as economists widely agree that competition enhances efficiency, efficiency promotes productivity, and productivity drives the rate of economic growth: see, eg, T Makin, 'Prioritising Policies for Prosperity' (1999) 15 *Policy* 19, 20; and D Parham, 'A More Productive Australian Economy' (2000) 7 *Agenda* 3, 13.

201 *Hilmer Report* (above n 2) 243.

202 Ibid. The Hilmer Committee supported the purpose test in s 46; its concern was directed to the difficulties of proof the test presented to an access seeker: *Hilmer Report* (above n 2) 70 and 243. Taking issue with this, Hardy has argued that it is 'pointless to question whether the holder of an essential facility has a proscribed purpose under s 46' as, whatever the purpose, the access seeker does not gain access to the essential facility: Hardy (above n 10) 117. Pengilley has similarly described it as a 'barren' inquiry when access claims are being evaluated, contending that the appropriate basis for evaluation involves 'consideration of the circumstances in which ownership rights may be circumscribed in the interests of competition policy': W Pengilley, 'The Privy Council Speaks on Essential Facilities Access in New Zealand: What are the Australasian Lessons?' (1995) 3 *Competition & Consumer Law Journal* 26, 43.

203 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* [1991] ATPR 41-069, 52,222.

204 *General Newspapers Pty Ltd v Telstra Corp* [1993] ATPR 41-274, 41,697.

205 Pursuant to s 46(7) of the *Trade Practices Act*, the existence of a purpose proscribed by s 46(1) may be inferred from the conduct of the respondent corporation. The recently introduced s 36B of the *Commerce Act* permits an equivalent inference to be drawn in New Zealand cases.

206 D Robertson, 'The Primacy of "Purpose" in Competition Law – Part 1' (2001) 9 *Competition & Consumer Law Journal* 101, 121-122 (emphasis in original). Smith and Round maintain that

Both objective and subjective factors will be important to this inquiry. That is to say, the purpose element of s 46 requires an objective test,[207] to which subjective evidence may be relevant.[208] However, if conduct is not objectively anti-competitive, the fact that it was motivated by hostility to competitors is inconclusive. In other words, hostile intent does not constitute some overriding prerequisite to a contravention of s 46.

Most pertinent to countering allegations that its conduct was motivated by one of the proscribed purposes in s 46(1) will be evidence from the respondent corporation of a legitimate business reason that objectively justifies the conduct. This issue is examined in the next part of the chapter.

## 6.5 LEGITIMATE BUSINESS REASONS

### A *Significance*

In *Photo-Continental Pty Ltd v Sony (Aust) Pty Ltd*,[209] Kiefel J remarked that a finding of a breach of s 46 should be 'subject to other explanations offered or appearing from the circumstances'.[210] Her Honour's statement highlights the critical role of legitimate business

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the key to identifying a corporation's purpose is to analyse its actions 'in the context of its pattern of strategic behaviour' – that is, to give consideration 'to the complete *package* of behaviour engaged in by the firm … and to how this conduct fits in with the firm's *past* conduct': Smith and Round (above n 67) 194-195 (emphasis in original). See, also, R Smith and D Round, 'Section 46: A Strategic Analysis of Boral' (2002) 30 *Australian Business Law Review* 202, 213.

207 Prince has similarly stated that the determination of the purpose element of s 46 'should be based largely on an objective test': Prince (above n 163) 250.

208 Seah agrees that evidence 'of both an objective and subjective nature will ordinarily be considered where available': Seah (above n 67) 248.

209 [1995] ATPR 41-372.

210 Ibid 40,123.

reasons in countering an allegation of misuse of market power, a perspective now widely supported in the academic literature on s 46.[211]

This view reflects the business justification defence available in the US and the EU.[212] In those jurisdictions, antitrust law acknowledges that an undertaking which is dominant with regard to the production and supply of certain products or services which are necessary to compete in another market may not, without a legitimate business justification, refuse to supply these products or services and thereby reserve the market for itself.[213]

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211 Eg, Welsman (above n 67) 312-313 ('if a legitimate reason substantially explains the conduct, then an entity is not misusing its substantial market power); Prince (above n 163) 243 ('the key factor … [is] whether the corporation's actions were for a legitimate business purpose'); Shafron (above n 28) 60 ('the focus is … on the reasons behind the refusal to supply'); C Hodgekiss, 'S 46 Trade Practices Act – Some Recent Developments', Paper presented at *Competition Law and Regulation Symposium*, University of New South Wales, Sydney, 24-25 August 2000, 1 ('the answer … revolves around the reasons for the refusal to supply'); Seah (above n 67) 256-257 ('the existence or otherwise of a legitimate commercial justification for the conduct under scrutiny, is highly probative'); W Pengilley, 'Misuse of Market Power: Australia Post, Melway and Boral (2002) 9 *Competition & Consumer Law Journal* 201, 225 ('the business purpose or reason for which conduct in engaged in is highly relevant'); and W Pengilley, 'The ACCC's Submission to the Dawson Inquiry Urges that We should Bring our Law into Line with that of other Countries' (2002) 10 *Competition & Consumer Law Journal* 110, 116 ('[t]he business purpose or reason for which conduct is engaged in must be regarded as of crucial importance'). These views are consistent with the author's 1996 publication in this area: see Marshall (above n 68), recently cited by Kirby J in *Melway* [2001] ATPR 41-805, 42,768 and Branson J in *NT Power Generation v Power & Water Authority* [2003] ATPR 41-909, 46,550.

212 Previously considered in Chapter 3, in the context of the essential facilities doctrine. See, particularly, the discussion of *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985) and *B&I Line Plc v Sealink Harbours Ltd* [1992] 5 CMLR 255 in parts 3.2(B) and 3.3(B) of that chapter, respectively.

213 Eg, in *Commercial Solvents Corp v European Commission* [1974] 1 CMLR 309, a leading European case on refusal to supply, the dominant manufacturer of nitroparaffin products (used in the production of tuberculosis drugs) decided that it would no longer supply nitroparaffin to other drug producers. A former customer complained that the refusal to supply amounted to a breach of Art 82 of the *EC Treaty*. In upholding the complaint, the European Court of Justice held that a dominant corporation in the market for the supply of a raw material cannot, without a legitimate business justification, refuse to supply the raw material when such refusal would lead to the elimination of competition in the downstream market for derivative products. A similar result was achieved in *United States v Aluminum Co of America* 148 F 2d 416 (1945). There, the refusal by a monopolist aluminum manufacturer to sell aluminum ingot to other producers of consumer goods prevented competition in the downstream market for pots and pans. In the absence of valid business reasons for its conduct, the manufacturer was held to have infringed s 2 of the *Sherman Act*.

As discussed in Chapter 3, this defence has been invoked successfully in that subset of US and European refusal to deal cases involving denials of access to essential facilities.[214] In such cases, legitimate business reasons for denying access to the facility have been held to include: that sharing will result in a reduction in the quality of the owner's product; that excess capacity is not available; that the owner will be prevented from serving its own clients adequately; that the proposed use is inconsistent with the safety or technical standards of the facility; that the applicant is not of good standing, or creditworthy, or financially independent; and that the applicant does not possess the technical skills and capacity required for the operation and security of the facility.[215] It is reasonable to expect that such reasons[216] would also be accepted by Australian courts in cases brought under s 46.[217]

Two points of possible confusion regarding legitimate business reasons should be clarified immediately. First, is there any difference between a 'legitimate' (or 'rational' or 'proper' or 'valid') business 'reason' or 'explanation' or 'justification' or 'criterion' or 'rationale'? The author submits that whichever combination of terms is preferred, the basic concept remains the same – and that is, in the context of refusal to supply, that there is some reasonable excuse for the refusal.

Second, are legitimate business reasons relevant to the purpose element or to the take advantage element of s 46? It is a matter of record that in the twelve year period between the

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214 For further discussion, see P Ahern, 'Refusals to Deal after Aspen' (1994) 63 *Antitrust Law Journal* 155, 173-182; Kench (above n 3) 142-144; D Glasl, 'Essential Facilities Doctrine in EC Anti-trust Law: A Contribution to the Current Debate' [1994] *European Competition Law Review* 306, 314; and Organisation for Economic Co-operation and Development, 'The Essential Facilities Concept', OCDE/GD(96)113, Roundtables on Competition Policy, Paris, 1996, 34.

215 Ibid.

216 For reasons explained below, these sort of reasons impact on the purpose, rather than the take advantage, element of s 46.

217 This would represent a small step in Australia, where the relevance of legitimate business reasons is already entrenched in refusal to supply cases. Cf New Zealand, which faces the Privy Council's dismissive view of legitimate business reasons expressed in *Telecom v Clear*: see relevant discussion in Chapter 3, part 3.4(B). However, those comments were merely obiter and are unlikely to withstand comparison with international antitrust jurisprudence in this area.

final decisions in *Queensland Wire* and *Melway*, s 46 judgments treated legitimate business reasons as going to purpose rather than anything else.[218] However, the clear implication of the High Court's ruling in *Melway* is that the notion of legitimate conduct applies to the take advantage element of s 46 just as much as it does to the purpose element of that provision.[219]

In the author's view, neither the take advantage element nor the purpose element has exclusive claim to the ameliorating effect of legitimate business reasons. Thus, depending on the circumstances, a corporation may seek to justify its conduct under either or both elements.[220] *ACCC v Universal Music Australia Pty Ltd*[221] exemplifies this approach. There, where the allegation against the respondent company was that it had threatened to withdraw supplies from retailers who stocked parallel imports of its products, Universal sought to show that its conduct was guided by the legitimate business justification of preventing free riding.[222] Hill J indicated his willingness to consider this 'business rationale' in relation to both the take advantage and the purpose element of s 46,[223] but did not proceed to do so on finding that there was no evidence to support the claimed rationale.[224]

However, the author further submits that since the take advantage and purpose elements of s 46 raise different inquiries, legitimate business reasons proffered in connection

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218 As Clough has similarly observed, in the post-*Queensland Wire* cases, 'the focus has been on addressing the legitimacy of the conduct under the purpose test': Clough (above n 66) 319. The same point is made in Meltz (above n 67) 108.

219 Meltz (ibid) 109.

220 Cf Corones' preference for a corporation's business rationale to be considered as part of the take advantage element of s 46: Corones (above n 10) 415. Cf also, Kirby J's remarks in dissent in *Melway* that it is in identifying the purpose of the respondent corporation, 'and not in characterising the acts as "tak[ing] advantage", that the debates about proscribed, or permissible, conduct by a dominant market player arise': [2001] ATPR 41-805, 42,768.

221 [2002] ATPR 41-855.

222 Universal's argument was that in the 'hit-driven' music industry, large amounts of money are spent by record companies on the promotion of titles, only a few of which will actually become hits. Persons importing titles from overseas are more likely to import hit recordings than non-hit recordings, thereby free riding on the investment of the record companies. Ibid 44,685.

223 Ibid.

224 Ibid. On appeal, Hill J's finding that Universal had contravened s 46 was set aside by the Full Federal Court on the basis that the company did not possess a substantial degree of power in the

with the take advantage element should be based on efficiency arguments, while a broader range of justifications (somewhat difficult to classify, but most conveniently described as quality control/consumer welfare and/or reputation/bottom-line considerations)[225] are potentially relevant to the purpose element. On this basis, the business justification put forward in the *Universal Music* case,[226] for example, should have been considered only in connection with the purpose element of s 46.

### B *Legitimate business purpose, not an anti-competitive purpose*

#### (1) *Justifying a refusal to deal*

As mentioned previously, it is in seeking to refute the finding of an anti-competitive purpose under s 46 that a corporation typically offers a legitimate business explanation for its conduct.[227] Thus, in *Queensland Wire*, Mason CJ and Wilson J held that their conclusion that 'the effective refusal to sell was for an impermissible *purpose* was supported by the fact that BHP did not offer a legitimate reason for the effective refusal to sell.'[228]

Certainly, a wide range of legitimate purposes may motivate a refusal to deal.[229] Past unsatisfactory dealings with a customer, a customer's poor credit record, a lack of confidence

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Australian wholesale recorded music market: *Universal Music Australia Pty Ltd v ACCC* [2003] ATPR 41-947, 47,368 (Wilcox, French and Gyles JJ).

225 Cf Ahern (above n 214) 173-182.

226 Free riding diminishes the return on investment made, and reduces the incentive for further investment, with negative implications for a firm's bottom-line.

227 The objective will be achieved if the legitimate business reason *substantially* explains the respondent corporation's ostensibly anti-competitive conduct. As mentioned previously, pursuant to s 4F of the *Trade Practices Act*, it is sufficient to constitute a breach of s 46 if a proscribed purpose in s 46(1) was one among other purposes, so long as the proscribed purpose was a 'substantial' one. It follows, therefore, that if a corporation can establish that it was motivated substantially by some legitimate purpose, there will be no contravention of s 46.

228 (1989) 167 CLR 177, 193 (emphasis added).

229 For further discussion, see S Corones, 'The Proposed Amendments to Section 46 of the Trade Practices Act: Some Problems of Interpretation and Application' (1985) 13 *Australian Business Law Review* 138, 149; MacDonald (above n 74) 133; M Williams, 'Section 46 of the Trade Practices Act: Misuse of Market Power – A Modern Day Catch 22?' (1992) 22

in a customer's business ethics, a customer's inability to maintain accurate records or propensity to engage in deceptive advertising or unfair practices, concerns about the quality of a customer's after-sales service or other matters affecting the commercial reputation of the supplier, are all factors which may impact upon the decision.[230]

In *Australasian Performing Rights Association Ltd v Ceridale Pty Ltd*,[231] it was accepted that APRA's real purpose in refusing to grant a licence to Ceridale was to prevent the unauthorised use of its material and to maintain the integrity of its licensing system.[232] In a similar vein, a supplier's genuine interest in maintaining and enhancing the prestige of its products was identified in *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd*[233] as a potentially legitimate business reason justifying a refusal to deal.[234]

In *John S Hayes & Associates Pty Ltd v Kimberley-Clark Australia Pty Ltd*,[235] it was held that the respondent's termination of the applicant's distributorship agreement was not conduct which involved the respondent 'taking advantage of its market power for a purpose of the kind referred to in s 46'.[236] Although no express reasons were given for the decision, presumably it was due to the applicant's persistent breaches of the terms of the agreement.[237] Unsatisfactory performance by the applicant was specifically recognised in *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd*,[238] *J Ah Toy Pty Ltd v Thiess Toyota Pty Ltd* [239] and

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*Queensland Law Society Journal* 377, 384; McMahon (above n 22) 11-12; Welsman (above n 67) 303; Abadee (above n 12) 35; and Meltz (above n 67) 104-108.

230 Ibid. All these factors fall into the quality control/consumer welfare and/or reputation/bottom-line categories identified previously.

231 [1990] ATPR 41-042.

232 Ibid 52,129.

233 [1987] ATPR 40-809, 48,800. Although, in this case, the respondent's contention that it was refusing supply because the applicant's conduct could bring the product into market disrepute was rejected on the facts.

234 See, also, *Berlaz Pty Ltd v Fine Leather Care Products Ltd* [1991] ATPR 41-118.

235 [1994] ATPR 41-318.

236 Ibid 42,236 (Hill J).

237 Hodgekiss has said of this case that it 'illustrates that so much depends upon whether the court is satisfied with the explanation as to the purposes of the respondent engaging in the particular conduct': Hodgekiss (above n 211) 27.

238 [1975] ATPR 40-004.

*Regents Pty Ltd v Subaru (Aust) Pty Ltd*[240] as providing sufficient justification for the respondent's termination of its dealership agreement with the applicant.[241] Similarly, in *Petty v Penfold Wines Pty Ltd*,[242] it was accepted that the respondent's refusal to supply was reasonably based on the applicant's poor payment history and was not motivated by the applicant's practice of excessive price discounting.[243]

More recently, in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority*,[244] BPA's proposal to grant an exclusive licence for towing services in the Port of Bunbury for five years was held by French J to be an exercise of regulatory power and not market power.[245] Nevertheless, had it been necessary to consider s 46 further, his Honour would have decided that BPA was not acting with one of the proscribed purposes in s 46(1), but was endeavouring to encourage a range of competitive responses from tenderers who would otherwise be reluctant to enter the market.[246]

Similar reasoning is evident in *ACCC v Australian Safeway Stores Pty Ltd*.[247] There, the ACCC alleged that Safeway had misused its market power in nine separate incidents by deleting the products of wholesale bakers who had supplied bread to independent retailers at prices that enabled those retailers to undercut Safeway's prices. In dismissing each of the s 46 claims at first instance, Goldberg J agreed with the respondent that the purpose of its 'bread policy' was to ensure that it remained competitive on the price of bread, rather than to punish

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239 [1980] ATPR 40-155.

240 [1996] ATPR 41-463.

241 Unsatisfactory performance was also the legitimate business reason relied on in *Venning v Suburban Taxi Services Pty Ltd* [1996] ATPR 41-468.

242 [1993] ATPR 41-263.

243 Ibid 41,553. Confirmed by the Full Federal Court on appeal: *Petty v Penfold Wines Pty Ltd* [1994] ATPR 41-320. See, also, *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* [1992] ATPR 41-196, where the respondent's legitimate business justification for refusing supply was to secure payment of a debt.

244 [2000] ATPR 41-752.

245 Ibid 40,734.

246 Ibid. Confirmed by the Full Federal Court on appeal: *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-783.

247 [2003] ATPR 41-935.

bakers and prevent or deter competition.[248] In reaching this conclusion, his Honour relied heavily on evidence that Safeway usually sought, before any deletion of products, a 'case deal' from the wholesale baker concerned allowing it to sell bread at prices that competed with those of the independent retailers.[249] On appeal, a majority of the Full Federal Court affirmed Goldberg J's decision in respect of the five incidents in which Safeway had sought a case deal from the relevant wholesaler.[250] However, in the other four incidents, where a case deal had not been requested, the majority found that Safeway had contravened s 46.[251]

Some commentators claim that it cannot be said that the mere existence of an explanation consistent with a legitimate commercial purpose establishes that the conduct was actually engaged in for that purpose.[252] The response to this is simply to issue a reminder that the purpose element of s 46 requires an *objective* test.[253] If business reasons are advanced by the respondent corporation to explain the motivation for its conduct, the court must determine, objectively, whether such reasons are valid, or legitimate, in the circumstances of the case.[254] However, even if the reasons are accepted as valid,[255] it will always be impossible to know whether the corporation has succeeded in masking a hidden or secret anti-competitive purpose. On the other hand, an objective test means that proffered business reasons will not be upheld merely because the corporation's conduct was motivated, subjectively, by such reasons.

### (2) *Monopoly pricing*

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248 *ACCC v Australian Safeway Stores Pty Ltd (No 2)* [2002] ATPR (Digest) 46-215, 53,363.

249 Ibid 53,346-53,347. Goldberg J's judgment is discussed at length in J Carmichael, 'Tip Top Result Goes Stale: ACCC v Australian Safeway Stores Pty Ltd (No 2)' (2002) 7 *Deakin Law Review* 387.

250 [2003] ATPR 41-935, 47,034 (Heerey and Sackville JJ).

251 Ibid 47,034-47,035. In dissent, Emmett J maintained that Safeway lacked a substantial degree of power in the relevant market, rendering any breach of s 46 impossible: ibid 47,064.

252 See, eg, Seah (above n 67) 257; and Gilbertson (above n 176) 156, where it is contended that 'anti-competitive purpose can easily be concealed by a strategically created trail of documents designed to show legitimate business reasons for conduct actually engaged in for an anti-competitive purpose.'

253 Refer to Robertson's comments on establishing 'purpose': see text accompanying n 206 above.

254 Whether, in the particular circumstances, the conduct is a 'normal' response, or consistent with industry practice, would be a relevant consideration: Corones (above n 10) 417.

Returning to the facts of *Queensland Wire*, McMahon has raised the interesting argument, especially relevant in the essential facility context, that BHP merely set a monopolistic price for its Y-bar and that this amounts to a legitimate business reason for its conduct, since the charging of a monopoly price is a defensible use of monopoly power.[256] In extending the argument in a subsequent article on related s 46 themes, Hay and McMahon assert that so long as a monopolist is free to charge the monopoly price for its product, it has no reason not to sell to independent downstream producers even though this may cause the monopolist itself to lose sales in the downstream market.[257]

However, this assertion provides the very basis for justifying the High Court's conclusion in *Queensland Wire* that there was a constructive refusal to supply. A letter from BHP, quoted in the joint judgment of Mason CJ and Wilson J,[258] establishes that BHP's purpose in offering to supply at the prices in question was to achieve the same result as an outright refusal to supply at any price. BHP described its conduct as 'either to refuse supply of steel Y-bar or to offer to supply steel Y-bar at an uncompetitive price',[259] treating these alternatives as equivalent. In the absence of any explanation from BHP, the High Court was entitled to treat the prices at which BHP was prepared to supply as tantamount to an outright refusal to supply.

This was not a situation in which BHP was prepared to supply, even at a monopoly price. Rather, BHP did not want to supply at all.[260] According to Hay and McMahon's own arguments, there is no economic justification for this behaviour.

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255 Such as those explained in the text accompanying nn 215 and 230 above.
256 McMahon (above n 22) 18.
257 G Hay and K McMahon, 'Duty to Deal under Section 46: Panacea or Pandora's Box?' (1994) 17 *University of New South Wales Law Journal* 54, 58.
258 (1989) 167 CLR 177, 184-185.
259 Ibid.
260 As McMahon expressly acknowledged, 'A purpose of eliminating competition must be discerned from the excessively high price. It is this purpose, similar to leverage, which

No issue is taken with McMahon's original point regarding the defensibility of monopoly pricing under s 46.[261] Indeed, in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd*,[262] the Full Federal Court plainly stated:

> … s 46 does not strike at 'monopolists' or those in a 'monopolistic position'. Nor does it look to the attainment of a commercially 'reasonable' result. It asks whether a corporation has a substantial degree of power in a market and then proscribes the taking advantage of that power for certain purposes. Therefore, there is no contravention of that provision by a corporation with a substantial degree of power in a market which … uses [that power] to attain a particular price, provided that in doing so the corporation has not taken advantage of its power for a proscribed purpose.[263]

It follows that a corporation with a substantial degree of market power may charge what might be described as monopoly prices (ie, prices above the level that would be charged in a competitive market), unless it puts itself in breach of s 46 by taking advantage of that power for a proscribed purpose.[264]

Does this analysis alter when an essential facility is involved? In other words, if access is sought to an essential facility, does s 46 require the facility owner to cease charging monopoly prices? As O'Bryan has explained, the answer to this question depends on the answer to a further question: presuming that an 'excessive'[265] price manifests at least one of

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distinguishes this situation from merely the collection of monopoly profits or the efficiencies to be gained by vertical integration': McMahon (above n 22) 21.

261 Cf G Hay, 'Reflections on Clear' (1996) 3 *Competition & Consumer Law Journal* 231, 235, where it is argued that if monopoly profits 'are immune from scrutiny … consumers will not have been well served'.

262 [1991] ATPR 41-109.

263 Ibid 52,666 (Lockhart, Gummow and von Doussa JJ). Bednall has similarly remarked that 's 46 does not prohibit monopolies, it does not take away the fruits of success that accrue to the "winning" competitor': T Bednall, 'Catch 46: Recent Developments in the Law of Exercise of Market Power', Paper presented at *Trade Practices Workshop*, Business Law Section of the Law Council of Australia, Melbourne, 7-9 August 1998, 7.

264 Welsman (above n 67) 288; and O'Bryan (above n 10) 90. This accords with the position in the US. See, eg, *Blue Cross and Blue Shield Ltd of Wisconsin v Marshfield Clinic* [1995] 2 Trade Cases 71,120, 75,376, where the Court of Appeals (Seventh Circuit) explained that a 'monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of "monopolising" in violation of the *Sherman Act* and can charge any price that it wants.'

265 See n 73 above.

the proscribed anti-competitive purposes in s 46(1),[266] at what price does the facility owner *cease* to have such a purpose?[267] At that price, the facility owner may still be taking advantage of its market power; but is no longer contravening s 46. The answer to the latter question has to be the price at which the competitor in the dependent market is able to compete effectively.[268] That price may or may not be a monopoly price, thereby providing the answer to the former question.[269] Ahdar helps to put the matter in perspective with this comment:

> The real question is not the issue of monopoly rents at all but whether the charge … (which contains an unqualified monopoly rent component) is sufficiently high to substantially restrict or deter competition.[270]

### C *Legitimate business conduct, not taking advantage of market power*

Current willingness to consider legitimate business reasons in connection with the take advantage element of s 46, in addition to the purpose element, owes much to Heerey J's dissenting judgment in *Melway* in the Full Federal Court.[271] There, his Honour said:

> … the existence of a *legitimate business reason* which would explain the impugned conduct irrespective of the degree of market power necessarily points against a conclusion that such conduct in fact involved taking advantage of that power.[272]

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266 Smith has criticised the 'inability of s 46 to deal directly with monopoly pricing that is not for a proscribed purpose': Smith (above n 85) 23. However, O'Bryan's analysis overcomes this perceived limitation by assuming that at some (extremely high) price, a purpose of eliminating competition will be discerned. This is consistent with McMahon's reasoning, cited previously: see n 260 above.

267 O'Bryan (above n 10) 91.

268 Ibid.

269 With respect, this is the reasoning the Privy Council should have employed in *Telecom v Clear* regarding Telecom's monopoly pricing: refer to discussion in n 176 above.

270 R Ahdar, 'Battles in New Zealand's Deregulated Telecommunications Industry' (1995) 23 *Australian Business Law Review* 77, 104.

271 [1999] ATPR 41-693.

272 Ibid 42,863 (emphasis added). Heerey J also quoted from the judgment of the Court of Appeals (Sixth Circuit) in *Byars v Bluff City News* 609 F 2d 843 (1979), 862 as follows, 'A finding of antitrust liability in a case of a refusal to deal should not be made without examining reasons which justify the refusal to deal': ibid.

In the course of his judgment, Heerey J closely examined Melway's business rationale for adopting its segmented distribution system, concluding that the system constituted 'a reasonable commercial regulation … in order to maximise sales of its directories'.[273]

In the High Court, the majority justices did not expressly embrace a business rationale approach. Nevertheless, it is apparent that their Honours were concerned to understand 'what options were available to Melway in terms of a distribution strategy and … the rationale for adopting the chosen strategy.'[274] The majority observed that there was no legal obligation on Melway to have any wholesale distribution system at all; if Melway had chosen to do so, it could have supplied retailers directly itself, or it could have supplied the retail market through a single wholesale distributor.[275] Their Honours also accepted that the appointment of exclusive distributors in respect of particular segments of the market for Melbourne street directories enabled Melway to maximise sales of its street directories.[276]

Given this rational business explanation for Melway's wholesale distribution system, it was logical for the High Court majority to infer that the company would have adopted the same system in a competitive market as well.[277] In other words, since Melway's adoption of the distribution system did not depend on its dominant position, it could not be said that the company had taken advantage of its market power. The clear implication of the High Court's reasoning in *Melway* is that in assessing whether a corporation's conduct amounts to a taking

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273 [1999] ATPR 41-693, 42,863. Commenting on the Full Federal Court's decision in *Melway*, Robertson said that, in contrast to Heerey J, the majority judges (Sundberg and Finkelstein JJ) failed to appreciate 'the economic and commercial reasons for efficient distribution networks': Robertson (above n 206) 126. For further criticism of *Melway* in the lower courts, see W Pengilley, 'Can an Entity with Substantial Market Power Change its Distributor?' (1999) 14 *Australian & New Zealand Trade Practices Law Bulletin* 139.

274 Corones (above n 10) 414. Cf Corones' earlier argument that these issues were 'glossed over' by the majority in *Melway*: S Corones, 'Non-price Vertical Restraints after Melway' (2001) 75 *Australian Law Journal* 437, 449.

275 [2001] ATPR 41-805, 42,752.

276 Ibid 42,753.

277 Ibid 42,761. As O'Bryan points out, once the High Court accepted that Melway's distribution system maximised its sales, it was 'relatively straightforward to reach the conclusion that the

advantage of its market power, it is helpful to consider whether a legitimate business rationale objectively justifies the conduct.[278]

As with the purpose element of s 46, the relevant test here is again an objective one, but pertaining this time to *efficiency* considerations.[279] Thus, even if the corporation genuinely believes in its reason, the court must assess whether, objectively, that reason represents a valid efficiency (ie, cost-minimising/profit-maximising)[280] argument, on the basis of economic theory and/or 'best' business practice.[281] If the efficiency explanation is found to be valid,[282] then it is reasonable for the court to infer that the corporation would have engaged in the same conduct without market power, and, therefore, that the corporation has not taken advantage of its market power.[283] Obviously, the converse applies as well.

The decision in *General Newspapers Pty Ltd v Telstra Corp*[284] provides an early example of this line of reasoning. The appellant in that case operated a printing business and approached the respondent to express interest in printing the respondent's telephone directories.

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corporation would be likely to engage in the same conduct in a competitive market': O'Bryan (above n 132) 229.

278 Corones (above n 10) 417.

279 In his dissenting judgment in *Melway* in the Full Federal Court, Heerey J reasoned that 'the concept of taking advantage of market power has to be seen in terms of *efficiency*. If the conduct complained of would have been engaged in irrespective of degree of market power … to conduct the corporation's business more *efficiently*, there will be no taking advantage of market power': [1999] ATPR 41-693, 42,862 (emphasis added). His Honour credits F Hanks and P Williams, 'Implications of the Decision of the High Court in Queensland Wire' (1990) 17 *Melbourne University Law Review* 437, 445 with the genesis of this view. The paramountcy of efficiency arguments in assessing the take advantage element of s 46 was also recognised, pre-*Melway*, in O'Bryan (above n 67) 84.

280 This is productive efficiency, as explained in part 2.5(B) of Chapter 2.

281 Corones (above n 10) 419. According to Corones, the question to ask is, 'Would a rational actor acting under competitive conditions engage in the same conduct?': ibid.

282 Eg, Edwards applies a transaction cost economics framework to the High Court's decision in *Melway* [2001] ATPR 41-805 and concludes that 'efficiency arguments … support Melway's desire to maintain its exclusive distribution system': G Edwards, 'Melway – A TCE Perspective' (2002) 10 *Trade Practices Law Journal* 77, 84. Edwards explains that in order 'to encourage distributors to specialise and devote optimal effort to distributing the manufacturer's product, it may be of benefit for the manufacturer to provide distributors with some protection from erosion of their geographic or customer segments by the activities of other distributors': ibid 83. For similar analysis of the *Melway* case, see D Clough, 'Law and Economics of Vertical Restraints in Australia' (2001) 25 *Melbourne University Law Review* 20.

283 Refer to O'Bryan's comments in n 277 above.

After telling the appellant it had been placed on a tender list, but never calling for tenders, the respondent awarded contracts for the printing of its White and Yellow Pages to its two existing printers. These contracts included clauses requiring that the relevant printing equipment not be used for other work, except in limited circumstances and with the respondent's approval. In dismissing the appellant's allegation that the terms of the contracts disclosed a misuse by the respondent of its market power, the Full Federal Court held that the 'dedication clauses' were justified by reference to a legitimate commercial explanation.[285] Specifically, Davies and Einfeld JJ accepted the respondent's evidence that 'dedicated' printing equipment was necessary for the efficient printing of the telephone directories given time, scale and configuration considerations.[286]

In *ACCC v Boral Ltd*,[287] Heerey J, as the trial judge, followed the approach he had advocated in *Melway* in the Full Federal Court. This time the allegation was that Boral Besser Masonry Ltd (BBM) had misused its market power by engaging in predatory pricing.[288] Once again, Heerey J closely examined the corporation's business reasons for its conduct as part of the take advantage element of s 46. His Honour said:

> If the impugned conduct has a business rationale, that is a factor pointing against any finding that the conduct constitutes a taking advantage of market power. If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power.[289]

Heerey J concluded that the threshold requirement for the application of s 46 was not satisfied in this case, as BBM did not have a substantial degree of market power in Melbourne's

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284 [1993] ATPR 41-274.

285 Ibid 41,701.

286 Ibid 41,700.

287 [1999] ATPR 41-715.

288 The ACCC instituted proceedings against BBM and its holding company, Boral Ltd. However, the trial judgment focuses on BBM, and the subsequent appeals were pressed only in relation to that company.

289 [1999] ATPR 41-715, 43,231.

concrete masonry products market.[290] However, even if BBM had possessed market power, his Honour would have found that the respondent had not taken advantage of that power because, in the circumstances of the case, its conduct in pricing below variable cost represented a 'rational' business decision.[291]

The Full Federal Court disagreed with Heerey J on both issues,[292] but on further appeal, the High Court effectively reinstated the decision of the trial judge. Six of the seven members of the High Court upheld Heerey J's conclusion that BBM lacked market power,[293] thereby disposing of the possibility of any s 46 contravention on the company's part. Nevertheless, hypothesising that BBM had possessed market power, these justices also expressed agreement with Heerey J as to the importance of a legitimate business rationale in deciding whether the company had taken advantage of such power. Gleeson CJ and Callinan J observed that the reasoning of Heerey J on the question of taking advantage of market power was correct,[294] quoting his Honour's opinion at first instance that BBM's conduct was based on 'sound business reasons';[295] Gaudron, Gummow and Hayne JJ cited with approval the passage quoted above from Heerey J's judgment at trial;[296] and McHugh J accepted that the 'commercial reasons'[297] for BBM's conduct would have been a relevant factor in determining whether the company had taken advantage of market power.[298] By these obiter comments, the

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290 Ibid.

291 Ibid 43,234. Even though, in his Honour's view, BBM did have the proscribed purpose of driving at least one competitor out of the market: ibid 43,236. Corones has criticised Heerey J for not attempting to 'weigh or rationalise the interplay between [the] legitimate business reason and the proscribed purpose': Corones (above n 10) 412. However, as mentioned previously, and reiterated now in Heerey J's defence, the elements of s 46 require sequential analysis. Thus, having found that the take advantage element was not satisfied, there strictly was no need for his Honour to consider the purpose element at all.

292 See *ACCC v Boral Ltd* [2001] ATPR 41-803.

293 See n 94 above.

294 *Boral Besser Masonry Ltd v ACCC* [2003] ATPR 41-915, 46,687.

295 Ibid 46,678.

296 Ibid 46,691.

297 Ibid 46,717.

298 Ibid.

High Court has confirmed the relevance of legitimate business reasons in mitigating against a finding that a corporation's conduct constitutes a taking advantage of its market power.[299]

## 6.6 CONCLUSION

The concept 'misuse of market power' represents the combined effect, legally and economically, of the elements of s 46.[300] Under the statute, the corporation must first possess market power; second, because of this market power, it must act in a way in which it would not be likely to act under competitive conditions; and, third, its conduct must be directed towards achieving one of the proscribed anti-competitive purposes. Impinging on the second and third elements is the additional factor, distilled from s 46 jurisprudence, that the corporation's conduct is not excused by legitimate business reasons. In all cases where a contravention of s 46 is alleged, including those involving a denial of access to an essential facility, each of the elements of the provision must be satisfied.

Not surprisingly, the prediction that 'it is unlikely that there will be a flood of successful s 46 actions'[301] in the wake of *Queensland Wire* has been borne out in the years since that High Court decision. In refusal to supply cases, this repeatedly has been due to firms advancing various legitimate business reasons in justification of their conduct.[302] In essential facilities cases, the business reason that a facility owner puts forward is also likely to be determinative of the issue. As Corones anticipated, 'the courts ... will look carefully at the

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299 While simultaneously accepting that such reasons extend beyond the domain of refusal to supply cases.

300 McMahon (above n 22) 28.

301 MacDonald (above n 74) 133.

302 Indeed, Lee warned of the difficulty of establishing a contravention of s 46 in cases 'where the hallmarks of sporadic and discriminatory conduct are absent, where there are no damaging admissions and where relevant witnesses are prepared to testify as to some legitimate commercial reason for their conduct': S Lee, 'Queensland Wire Industries: A Breath of Fresh Air' (1990) 18 *Federal Law Review* 212, 227.

reasons given for refusing supplies and where they are not satisfied that they involve some legitimate business reason, the refusal will be condemned.'[303]

Although legitimate business reasons have been offered mainly in connection with the purpose element of s 46, they are regarded, post-*Melway*, as being equally relevant to the take advantage element of the provision. Of course, there is no obligation on the respondent corporation to advance a legitimate business justification in respect of either element.[304] However, in refusal to supply cases, where the answer to the question whether the respondent's conduct constitutes a breach of s 46 so evidently turns on whether the refusal is justified, it is most advisable for the respondent to do so.[305] To briefly summarise:

- In respect of the purpose element (assuming market power and a taking advantage of that power): if the conduct of the respondent corporation has a legitimate business justification (drawn from the quality control/consumer welfare and/or reputation/bottom-line categories),[306] it is reasonable to conclude that the conduct was not motivated by one of the anti-competitive purposes in s 46(1) and, therefore, that there is no breach of s 46.

- In respect of the take advantage element (assuming market power, but irrespective of the existence of a proscribed purpose): if the respondent's conduct has a legitimate business rationale (which must be efficiency-based), it is reasonable to infer that the conduct does not constitute a taking advantage of market power and, therefore, that there is no contravention of s 46.

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303 Corones (above n 64) 29.

304 Corones (above n 10) 419.

305 As failure to give such evidence will entitle the court to assume that the evidence would not have helped the respondent corporation: *TPC v Nicholas Enterprises Pty Ltd* [1979] ATPR 40-126. Refer, eg, to the comments of Mason CJ and Wilson J in *Queensland Wire*: see text accompanying n 228 above.

306 As mentioned previously, legitimate business reasons in essential facilities cases are most likely to fall into these categories.

In light of the discussion in this chapter regarding the elements of s 46 and the relevance of legitimate business reasons, there can be little doubt that a breach of s 46 'will *always* be difficult to prove'[307] – except perhaps in the most obvious of cases.[308] This point was well-understood by the Hilmer Committee and informed its recommendation that a dedicated access regime be introduced to deal with essential facilities cases. Section 46 remains potentially relevant to those residual cases falling outside the ambit of the regime enacted by Part IIIA of the *Trade Practices Act*. However, in the majority of cases where access is sought by a third party to the services of essential infrastructure, primary focus is now placed on the provisions of Part IIIA. The interpretation and application of these provisions was the subject of detailed analysis in the two preceding chapters.

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[307] Alexiadis (above n 192) 467 (emphasis in original). Moreover, where the respondent corporation is a statutory authority, as in *NT Power Generation v Power & Water Authority* [2003] ATPR 41-909, it may not be possible to bring the corporation's conduct within the ambit of the *Trade Practices Act* at all.

[308] Or where the respondent corporation admits its misuse of market power: see, eg, *TPC v CSR Ltd* [1991] ATPR 41-076.

# CHAPTER 7

## CONCLUSION

### 7.1 RETENTION OF THE NATIONAL ACCESS REGIME

The evaluation in this dissertation of the rationale for, and implementation of, the national access regime set out in Part IIIA of the *Trade Practices Act* 1974 (Cth)[1] has involved not only a careful examination of the report of the Independent Committee of Inquiry into National Competition Policy,[2] cl 6 of the Competition Principles Agreement, the provisions of Part IIIA itself, the NCC's guide to the access regime,[3] the Productivity Commission's review of the regime[4] and the Commonwealth Government's response to that review,[5] but also a comprehensive analysis of the case law arising under Part IIIA and the existing academic commentary, both legal and economic, pertaining to the regime.

Recognising the influence on government policy of the review activities undertaken by the Productivity Commission,[6] particular attention has been paid to the recent pronouncements of the Commission in respect of Part IIIA. The Commission's final report contains a raft of

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1 Or, in other words, the investigation of these research questions: (i) should the national access regime be retained; and (ii) if so, can the operation of the regime be improved? Refer to part 1.3(A) of Chapter 1.

2 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (AGPS, Canberra, 1993) (hereafter, '*Hilmer Report*').

3 National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act* (NCC, Melbourne, Parts A and B released December 2002, Part C released February 2003).

4 Productivity Commission, *Review of the National Access Regime* (AusInfo, Canberra, report dated 28 September 2001, released 17 September 2002) (hereafter, '*PC Report*'). See, also, the preliminary views of the Commission in respect of the same inquiry: *Review of the National Access Regime* (Position Paper, 29 March 2001) (hereafter, '*PC Position Paper*').

5 Commonwealth Treasury, 'Government Response to Productivity Commission Report on the Review of the National Access Regime', Canberra, 20 February 2004 (hereafter, '*Final Response*').

sensible, but relatively minor, recommendations aimed at improving the operation of the national access regime[7] (and, as expected, the majority of these have been accepted by the Commonwealth Government).[8] Disappointingly, however, the Productivity Commission has not sought to effect the more substantial refashioning of the regime's architecture argued for in this dissertation. Nevertheless, the Commission's review of Part IIIA deserves acknowledgement as an important milestone in the evolution of the national access regime.

It is now more than a decade since the Hilmer Committee contended that the natural monopoly characteristics of essential infrastructure facilities in Australia meant that an explicit mechanism for facilitating efficient third party access to the services provided by such facilities was desirable[9] – a position confirmed by the Productivity Commission in its final report.[10] Although this dissertation was not predicated on the assumption that a national access regime was necessary, Chapter 2 concluded that there is a case for access regulation and particular merit in having an access regime.[11] (As explained in that chapter, the expression 'access *problem*' is not a misnomer.) Given the in-principle case for access regulation and the limited experience of the access regime to date, the author subscribes to the view that it would be inappropriate to abandon the regime at this stage.[12]

Like the Productivity Commission,[13] and the Hilmer Committee before it,[14] the author does not accept that access regulation should be left to general anti-competitive provisions elsewhere in the *Trade Practices Act*. Chapters 3 and 6 have shown that the participation of courts in access matters is problematical, at best, and that the difficulty of establishing a

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6 F Zumbo, 'Reviewing the Productivity Commission's Activities in the National Competition Policy Area' (2001) 9 *Trade Practices Law Journal* 33, 38.

7 *PC Report* (above n 4) 426-427 sets out a summary of the Commission's final recommendations. See, also, Table 7.1 in this chapter.

8 See *Final Response* (above n 5).

9 *Hilmer Report* (above n 2) 239.

10 *PC Report* (above n 4) 93-94.

11 This answers the dissertation's first research question (see n 1 above).

12 *PC Report* (above n 4) Finding 4.1.

13 Ibid 111-112.

contravention of s 46 of the *Trade Practices Act* limits the usefulness of general competition law as a means of facilitating access to essential facilities.

The author also concurs with the general preference expressed by both the Productivity Commission[15] and the Hilmer Committee[16] for a generic access regime.[17] At the same time, it is impossible to deny that industry-specific arrangements are an important part of the current landscape and, in some circumstances, are likely to deliver more efficient outcomes than case-by-case declarations under Part IIIA.[18] Accordingly, the author agrees that there is no reason to change the current 'dual approach' of a national access regime operating in tandem with industry-specific regimes.[19] Instead, the objective must be to strengthen the role that Part IIIA plays in establishing a framework to guide and discipline industry regimes, so as to minimise unwarranted variations in these regimes.

In sum, the preferable strategy is to retain the Part IIIA access regime, while continuing to monitor its effects.[20] Ultimately, the worth of the regime, as for all regulation, will 'be judged by its outcomes'.[21] That said, it is apparent, even at this early stage in its history, that Part IIIA has some significant deficiencies. Particular concerns include the absence of clear objectives for the access regime, the regime's potential to deter investment in essential infrastructure, and the cumbersome institutional arrangements and administrative processes applying under the legislation. In light of these concerns, the author has proposed certain measures intended to improve the workability of the national access regime. These measures are detailed in the next part of the chapter.

## 7.2 REFORM OF THE REGIME

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[14] *Hilmer Report* (above n 2) 243-244.
[15] *PC Report* (above n 4) 118.
[16] *Hilmer Report* (above n 2) 248-249.
[17] Refer to part 2.4(D) of Chapter 2.
[18] *PC Report* (above n 4) 118.
[19] Ibid Finding 5.2.

As explained in Chapter 1,[22] the Part IIIA access regime ideally should promote:

- decisions that are well-targeted to the access problem and which minimise unintended side-effects;
- certainty for current and prospective facility owners, access seekers and other interested parties;
- consistency among policy-makers, and those responsible for its implementation and enforcement;
- administrative efficiency; and
- regulatory accountability and transparency.

Based on the analysis in Chapters 2, 4 and 5, it is evident that the existing Part IIIA does not meet these criteria as successfully as it could. The improvements to Part IIIA proposed in those chapters are summarised in part A below, and the key reforms reviewed in part B.[23]

## A *Proposed amendments to Part IIIA*

Table 7.1 outlines the recommendations of this dissertation for reform of Part IIIA, in the context of a matrix which facilitates comparison with the proposals, both preliminary and final, advanced by the Productivity Commission, and the views of the Commonwealth Government.

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20 *PC Position Paper* (above n 4) 71.

21 A Fels, 'Regulating Access to Essential Facilities' (2001) 8 *Agenda* 195, 206.

22 Refer to Table 1.1 in Chapter 1, focusing on the five criteria applicable to the operation of Part IIIA. See, also, *PC Report* (above n 4) 124.

23 This material answers the dissertation's second research question (see n 1 above).

**TABLE 7.1: Summary of proposed amendments to Part IIIA**

| *PC Position Paper proposals (*Tier 1 and **Tier 2)* | *PC Report recommendations (R) and findings (F)* | *Government's final response to PC Report recommendations* | *Conclusions of this dissertation* |
|---|---|---|---|
| 5.1* Inclusion of an objects clause in Part IIIA relating to the promotion of efficient use of, and investment in, essential infrastructure facilities and recognising the regime's role in providing a framework for industry regimes. | R6.1 Inclusion of an objects clause in Part IIIA relating to the promotion of efficient use of, and investment in, essential infrastructure and recognising the regime's role in discouraging unwarranted divergence in industry regimes.<br><br>R6.2 A requirement for decision-makers to have regard to the objects clause in all determinations and coverage decisions made under the regime. | R6.1 accepted, but with minor modifications to the wording of the proposed objects clause.<br><br>R6.2 accepted. | R6.1 supported, but the proposed objects clause must be amended to reflect a greater concern with the promotion of dynamic, rather than productive or allocative, efficiency – to ensure that proper regard is had to investment issues as a threshold matter under Part IIIA.<br><br>R6.2 supported, as it will ensure consistency in the application of the regime. |
| 5.2* Explicit recognition that Part IIIA applies to services provided by both vertically integrated and non-integrated entities. | F6.2 Part IIIA should continue to cover eligible services provided by both vertically integrated and non-integrated facilities. | | F6.2 properly reflects the ACT's decision in the *SIA* review that the provisions of Part IIIA are not limited in their application to vertically integrated monopolists. |
| 5.3* Inclusion in Part IIIA of pricing principles to apply to arbitrations for declared services, and assessments of proposed undertakings and the effectiveness of existing access regimes. | R6.3 Inclusion in Part IIIA of pricing principles to apply to arbitrations for declared services, assessments of proposed undertakings and evaluations of whether existing access regimes are effective. | R6.3 accepted. | R6.3 supported. Legislative pricing principles will guide pricing negotiations/decisions, and contribute to consistent and transparent regulatory outcomes over time. |
| | R6.4 Retention of the current exclusions from Part IIIA, but with monitoring of developments in relation to the 'production process' exclusion. | R6.4 accepted. | R6.4 supported. The current exclusions from the definition of 'service' ensure that the access regime is not too broad in its application. |
| 6.1* Modification of the declaration criteria to ensure that the provision of access must deliver a substantial increase in competition and to remove the possibility that services provided under conditions of duopoly or oligopoly could be declared. | R7.1 Modification of the first declaration criterion to require that provision of access would deliver a 'substantial' increase in competition. | R7.1 accepted, but term 'material' to replace 'substantial'. | R7.1 supported, but additional amendments to the declaration criteria are also needed – ie, criterion (c) should be recast to focus on the significance of services, rather than facilities; the public interest test in criterion (f) should be abolished; and a new criterion, addressing the issue of protected contractual rights, should be introduced. |
| 6.2** Overhaul of the declaration criteria, focusing more directly on efficiency rather than simply promoting competition, and requiring that declaration would be likely to improve efficiency significantly. | R7.2 A requirement for the next scheduled review of Part IIIA to review declaration decisions to assess whether further strengthening or recasting of the declaration criteria is needed. | R7.2 accepted. | Without denying R7.2's premise that changes may be necessary in the future, further 'strengthening or recasting' of the declaration criteria is needed at this time – see the amendments proposed immediately above. |

**TABLE 7.1 (cont)**

| *PC Position Paper proposals (*Tier 1 and **Tier 2)* | *PC Report recommendations (R) and findings (F)* | *Government's final response to PC Report recommendations* | *Conclusions of this dissertation* |
|---|---|---|---|
| 6.3* A requirement for the provider of a declared service to give an access seeker sufficient information to permit meaningful negotiations. | R8.1 A requirement for an exchange of specified information between the provider of a service declared under Part IIIA and an access seeker to facilitate negotiation of specific terms and conditions. | R8.1 not accepted. The ACCC should publish non-binding guidelines indicating to service providers and access seekers the type of information that is likely to best facilitate negotiations after declaration of a service. | Government's response endorsed. Non-binding guidelines are preferable, as mandatory disclosure requirements may simply lead to disputation about the 'sufficiency' of the information each party provides. |
| 6.4** Provision to commence arbitration 30 days after declaration of a service, unless both parties to the dispute notify the ACCC that a resolution is imminent. | | | To avoid protracted post-declaration negotiations, position paper proposal 6.4 should be implemented. |
| | | | Privately negotiated access agreements should be subject to regulator approval before becoming legally binding. |
| | | | Part IIIA should explicitly encourage mediation of access disputes. |
| 6.5* Explicit mention in the Part IIIA arbitration criteria that determinations should promote the efficient use of, and investment in, essential infrastructure facilities. | | | Position paper proposal 6.5 is effectively encompassed by R6.2 (see above). |
| 6.6* A requirement for the ACCC to generally limit its involvement in arbitrations to matters in dispute between the parties. | R8.2 A requirement for the ACCC, when arbitrating a dispute for a service declared under Part IIIA, to justify consideration of matters not in dispute between the parties. | R8.2 accepted. | R8.2 supported. Reconsideration by the arbitrator of matters that have already been resolved is unnecessary and time consuming. |
| 6.7* A requirement for the ACCC to justify the introduction of non-efficiency considerations when arbitrating disputes for declared services, or assessing proposed undertakings. | R8.3 A requirement for the ACCC, when arbitrating a dispute for a declared service, or assessing a proposed undertaking, to justify the introduction of non-efficiency considerations. | R8.3 accepted. | R8.3 does not go far enough. Retention of ss 44X(1)(b) and 44ZZA(3)(b) is only justified if the public interest criteria therein are interpreted in terms of economic efficiency. |
| 6.8* Removal of the scope for the ACCC to require facility extensions when arbitrating a dispute for a declared service. | R8.4 Clarification that the ACCC, when arbitrating a dispute for a declared service, can require a service provider to permit interconnection to its facility. | R8.4 accepted. | R8.4 supported, as it will cure an obvious oversight in the legislation. |
| | R8.5 Introduction of provision for the ACCC to conduct multilateral arbitrations for declared services. | R8.5 accepted. | R8.5 supported, as it will alleviate concerns about the efficacy of bilateral arbitrations. |
| 7.1* A requirement for the Commonwealth Government to submit its industry access regimes for certification. | R9.1 Commonwealth Government to have the option of submitting its regimes for certification, and NCC to comment on the consistency of any proposed Commonwealth industry regimes with Part IIIA. | R9.1 not accepted. | Government's response challenged. To discourage unwarranted divergence from the Part IIIA framework, all government access regimes should be tested against that framework. |

**TABLE 7.1 (cont)**

| *PC Position Paper proposals (*Tier 1 and **Tier 2)* | *PC Report recommendations (R) and findings (F)* | *Government's final response to PC Report recommendations* | *Conclusions of this dissertation* |
|---|---|---|---|
| 7.2* Explicit provision that privatised services subject to statutory access regimes are to be assessed against the same effectiveness criteria as government-provided services. | | | The certification mechanism is open only to government access regimes. Private infrastructure owners have the option of submitting an access undertaking. |
| 7.3** Incorporation of the principles for assessing the effectiveness of existing access regimes within Part IIIA (rather than in cl 6 of the CPA). | F9.1 Principles for assessing the effectiveness of industry access regimes should continue to be located with the CPA. | | F9.1 supported. Retaining the cl 6 principles within an intergovernmental agreement such as the CPA affords the States/Territories appropriate status as parties to the access compact with the Commonwealth. |
| 7.4** Modifications to streamline the current tests for effectiveness and to render them consistent with the modified Part IIIA architecture. | R9.2 Negotiation between the Commonwealth and States/Territories with a view to aligning the cl 6 principles for assessing the effectiveness of industry regimes with comparable principles and criteria in Part IIIA. | R9.2 accepted. | R9.2 supported, as it will promote regulatory consistency. |
| | R9.3 Negotiation between the Commonwealth and States/Territories and the NCC to determine how best to provide for interim and conditional certifications. | R9.3 accepted. | R9.3 supported, as it will assist access seekers to gain access as early as possible. |
| 7.5* Introduction of scope for service providers to lodge post-declaration undertakings. | R10.1 Introduction of scope for service providers to lodge post-declaration undertakings. | R10.1 accepted. | R10.1 supported, as it will avoid the need to determine the terms and conditions of access to declared services exclusively through negotiation-arbitration. |
| 7.6* Alignment of the criteria for assessing proposed undertakings with those applying to arbitrations for declared services and certification of existing access regimes. | R10.2 Alignment of the criteria for assessing proposed undertakings with those applying to arbitrations for declared services and the cl 6 principles for certification. | R10.2 not considered 'necessary or appropriate'. | Government's response endorsed. Sufficient alignment will be achieved via R6.2 and R6.3 (see above). |
| | R10.3 Amendment to the National Gas Code such that an undertaking application under Part IIIA for a pipeline potentially covered by the Code would trigger an assessment of whether the Code should apply. | R10.3 accepted. | R10.3 supported in principle, but amendments to the National Gas Code are a matter for the Productivity Commission's independent review of that Code (due for completion in July 2004). |
| | R10.4 Amendment to Part IIIA to make it explicit that the ACCC cannot accept an undertaking for a service covered by a certified regime. | R10.4 accepted. | R10.4 supported. The current situation undermines the objective of certification. |
| | R11.1 Provision for investors to seek binding rulings on whether services provided by proposed infrastructure facilities would meet the Part IIIA declaration criteria. | Practicality of R11.1 to be considered in the context of industry regimes. | R11.1 not supported, on the grounds that the practical implementation of the proposal would be highly problematical. |

**TABLE 7.1 (cont)**

| *PC Position Paper proposals (*Tier 1 and **Tier 2)* | *PC Report recommendations (R) and findings (F)* | *Government's final response to PC Report recommendations* | *Conclusions of this dissertation* |
|---|---|---|---|
| | R11.2 Provision to provide immunity from Part IIIA for projects where construction and the price of access has been determined by an appropriately constituted competitive tender. | R11.2 accepted. | R11.2 not supported, on the grounds that the proposal is redundant. |
| | R11.3 A requirement for the Commonwealth Government to initiate, through the Council of Australian Governments, a process to refine mechanisms (such as access holidays) to facilitate efficient investment within Part IIIA and industry access regimes. | Practicality of R11.3 to be considered in the context of industry regimes. | R11.3 not supported, on the grounds that the proposal is unnecessary. |
| 8.1* Details of the pricing principles to be incorporated in Part IIIA. | R12.1 Details of the pricing principles to be incorporated in Part IIIA. | R12.1 accepted, but specification of pricing principles refined. | Government's response endorsed. |
| 8.2** Consideration be given to making explicit provision for the use of productivity-based approaches for setting price caps in the tests for effectiveness of existing access regimes. | R12.2 Initiation of a process to develop the instruments and measurement techniques necessary to make greater use of productivity-based approaches to setting access prices. | Practicality of R12.2 to be considered in the context of industry regimes. | Government's response endorsed. |
| | R13.1 A requirement for the ACCC, when arbitrating terms and conditions for a declared service, to explain its reasons for the asset methodology employed. | R13.1 accepted. | R13.1 supported, as it will enhance regulatory transparency. |
| 9.1* Ending the role for Ministers in declaring and certifying services. | F14.1 Ministers should continue to be responsible for making decisions on applications to have services declared or existing access regimes certified as effective. | | F14.1 not supported. Ministerial decision-making under Part IIIA should be abolished. |
| 9.2** Making a single body responsible for administering Part IIIA – most probably the ACCC. | F14.2 The current division of responsibility in Part IIIA between the NCC and the ACCC is appropriate. | | F14.2 not supported. Part IIIA should move to a single-regulator model, and the regulator should be the NCC. |
| 9.3* If proposal 9.1 is not accepted, maintenance of the current 60 day time limit on ministerial decisions for declarations and extension of this limit to certifications. | R15.2 Extension of the 60 day limit for Ministerial decisions on declaration applications to decisions on certification applications. | R15.2 not accepted. | Government's response challenged. R15.2 will ensure timely decision-making and deserves support. |
| | R15.3 Introduction of non-binding target time limits for other aspects of Part IIIA decision-making. | R15.3 accepted. | R15.3 supported, as it will enhance the timeliness of Part IIIA processes. |
| 9.4* Provision for full merit review of decisions on undertaking applications. | R15.1 Provision for full merit review of ACCC decisions on undertaking applications. | R15.1 accepted. | R15.1 supported. It will overcome an anomaly in the current arrangements. |

**TABLE 7.1 (cont)**

| *PC Position Paper proposals (*Tier 1 and **Tier 2)* | *PC Report recommendations (R) and findings (F)* | *Government's final response to PC Report recommendations* | *Conclusions of this dissertation* |
|---|---|---|---|
| 9.5** Amendment to Part IIIA appeal arrangements to remove provision for merit review of accepted declaration applications. | F15.1 The current rights of appeal attaching to Part IIIA declaration decisions should be retained. | | F15.1 supported. Certification and arbitration decisions are subject to merit review. Decisions on proposed undertakings will be as well (see R15.1 above). For consistency, merit review of declaration decisions should be retained. |
| 9.6* Legislative requirement for public comment on declaration and certification applications. | R15.4 Legislative provision for public input on declaration, certification and undertaking applications. | R15.4 accepted. | R15.4 supported, as public input will permit more informed decision-making. |
| 9.7* A requirement for the designated regulator/s to publish reasons for its/their decisions on declaration, certification and undertaking applications. | R15.5(i) A requirement for Ministers, the NCC and the ACCC to publish reasons for their decisions or recommendations on declaration, certification and undertaking applications. | R15.5(i) accepted. | R15.5(i) supported, as it will ensure procedural transparency and regulatory accountability. |
| 9.8* If proposal 9.1 is not accepted, a requirement for Ministers to publish reasons for their decisions. Non-decisions by Ministers to be deemed as acceptance of the recommendation from the regulator. | R15.5(ii) Non-decisions by Ministers on declaration and certification applications to be deemed as acceptance of the recommendations from the NCC. | R15.5(ii) not accepted. | Government's response challenged. R15.5(ii) is based on the very sensible premise that a Minister's deemed decision should reflect the NCC's detailed assessment of the issues. |
| 9.9* A requirement for the ACCC to publish post-arbitration reports. | R15.6 A requirement for the ACCC to publish post-arbitration reports. | R15.6 accepted. | R15.6 supported, as it will ensure regulatory transparency. |
| | R15.7 Introduction of an explicit provision to expedite extensions of certifications and undertakings. | R15.7 accepted, but with minor modifications to the proposal. | Government's response endorsed. |
| 10.1* Exemption for certain regulated terms and conditions of access established under Part IIIA from Parts IV and VII of the *Trade Practices Act*. | F15.3 The materiality of any problems arising from the current overlap between Parts IIIA and IV of the *Trade Practices Act* is not clear. | | F15.3 not supported. Terms and conditions of access arrangements regulated under Part IIIA of the *Trade Practices Act* should be exempt from exposure to Parts IV and VII of that Act. |
| | R16.1 A requirement for the NCC to report annually on the operation and effects of the revised Part IIIA arrangements. | R16.1 accepted. | R16.1 supported, as it will facilitate ongoing monitoring of the national access regime. |
| | R16.2 Provision for an independent review of the revised Part IIIA arrangements five years after the first group of changes is introduced. | R16.2 accepted. | R16.2 supported, as periodic review of the regime is warranted. |

* Tier 1 comprised those preliminary proposals which the Productivity Commission considered would clearly be beneficial.
** In the Commission's view, Tier 2 proposals had the potential to deliver further gains, but would involve more substantial changes to the regime's architecture.

## B *Key reforms*

### (1) *Inclusion of an objects clause*

A recurrent theme of the Productivity Commission's inquiry into Part IIIA was the encouragement of efficient investment in infrastructure.[24] Citing a submission by the Law Council of Australia, the Commission's position paper notes that '[t]hird party access regulation is a very intrusive form of regulation. It may have a serious impact on the dynamic efficiency of an industry, because it lessens the incentive to innovate and invest, and permits free riding on existing infrastructure.'[25]

Investment issues are brought to the fore in the Productivity Commission's recommendation for the inclusion in Part IIIA of an objects clause referring to the need to promote the efficient use of, and investment in, essential infrastructure, and recognising the generic regime's role in providing a framework for industry-specific regimes.[26] While there is merit in this proposal, the author has argued, in Chapter 2 of the dissertation, that the objects clause must be amended to reflect a greater concern under Part IIIA with the promotion of dynamic efficiency, rather than the promotion of static (productive and allocative) efficiency. Only this will ensure that proper regard is had to investment issues as a threshold matter under Part IIIA.

The amended objects clause can be expected to promote consistency in the application of the regime, and greater certainty for facility owners and access seekers, as its provisions will

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24 L Thomson and S Writer, 'A Workable System of Access Regulation: The Productivity Commission's Review of the National Access Regime' (2003) 11 *Trade Practices Law Journal* 92, 96.

25 *PC Position Paper* (above n 4) xvii, citing the Law Council of Australia's submission to the inquiry: (sub 37, January 2001) 2.

26 *PC Report* (above n 4) Recommendation 6.1.

influence all determinations under Part IIIA.[27] The clause also confirms Part IIIA's status as the policy 'blueprint' for industry-specific access regimes.

**(2) *Enactment of pricing principles***

Chapter 5 of the dissertation firmly endorsed the Productivity Commission's recommendation that pricing principles be expressly embodied within the access regime,[28] rather than be left to the discretion of decision-makers when setting terms and conditions of access, with only indirect indicators of legislative intent, as is presently the case. In the author's view, the proposed pricing principles will improve certainty for facility owners and access seekers, and promote convergence of pricing approaches across the various access routes and regimes (in the latter case, by guiding the different regulators that operate outside the ambit of Part IIIA). Moreover, the proposed principles are particularly concerned to ensure that pricing determinations under Part IIIA provide a sufficient return to service providers to justify continued investment in the relevant infrastructure, and provide them with incentives to improve the efficiency of their operations. In these ways, the pricing principles will directly support the proposed objects of the national access regime.

**(3) *Amendment of the declaration criteria***

The sole amendment to the six declaration criteria in Part IIIA suggested by the Productivity Commission was the strengthening of criterion (a), to provide that access would promote a 'substantial' increase in competition in another market, rather than simply promoting competition in that other market.[29] As the present arrangements permit declaration even if

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27 Ibid Recommendation 6.2.
28 Ibid Recommendation 6.3.
29 Ibid Recommendation 7.1.

there would be only a small increase in competition – and, by implication, limited efficiency gains – that amendment was supported in Chapter 4.

However, Chapter 4 also found that certain of the other declaration criteria require the legislature's attention as well.[30] Specifically, the additional proposals advanced in that chapter involve recasting criterion (c) to focus on the significance of services, rather than facilities; abolishing the public interest test in criterion (f); and introducing a new criterion, addressing the issue of protected contractual rights. These measures will ensure that the declaration criteria in Part IIIA are better targeted to the purposes they seek to serve.[31]

### (4) *Modification of the negotiation-arbitration framework*

Useful recommendations made by the Productivity Commission to enhance the prospects of negotiated outcomes and effective arbitrations where access to a service was declared include:

- allowing multilateral arbitrations for declared services;[32]
- permitting service providers to lodge access undertakings after services have been declared; and[33]
- requiring the arbitrator of disputes over declared services to limit its involvement to matters in dispute between the parties.[34]

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30 Not criterion (d) and (e), which are uncontentious, nor criterion (b), which has attained a robust interpretation.

31 Chapter 4 determined that criterion (f) serves no useful purpose – hence the proposal that it be abolished.

32 *PC Report* (above n 4) Recommendation 8.5.

33 Ibid Recommendation 10.1. This will provide an alternative to time-consuming (bilateral) negotiations between a service provider and a series of access seekers.

34 Ibid Recommendation 8.2.

In addition, the following proposals were put forward by the author in Chapter 4 to further improve the consistency and efficiency of the negotiate-arbitrate process under Part IIIA:

- publication of non-binding guidelines indicating to service providers and access seekers the type of information likely to facilitate negotiations after declaration of a service;[35]
- privately-negotiated access agreements to be subject to regulator approval before becoming legally binding;
- commencement of arbitration 30 days after the declaration of a service, unless the parties to the dispute indicate that a resolution is likely;[36] and
- exemption of regulated terms and conditions of access from exposure to Parts IV and VII of the *Trade Practices Act*.[37]

### (5) *Achievement of greater consistency among access regimes*

As the Productivity Commission anticipated, efforts to procure a more consistent set of access regimes in Australia will depend heavily on implementation of the following proposals:

- First, requiring the Commonwealth Government to submit its industry access regimes for certification.[38] At present, these regimes operate outside of the Part IIIA framework, leading to the possibility of inconsistent approaches and requirements.

- Second, aligning the cl 6 principles for assessing the effectiveness of existing access regimes with comparable principles and criteria in Part IIIA.[39] This would help to

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35 Cf the Productivity Commission's proposal for mandatory disclosure requirements: ibid Recommendation 8.1.

36 Drawing on *PC Position Paper* (above n 4) Proposal 6.4.

37 Ibid Proposal 10.1.

38 *PC Report* (above n 4) Recommendation 9.1.

39 Ibid Recommendation 9.2.

reduce the possibility of inconsistent interpretations under the various Part IIIA access routes.

Both proposals were supported without reservation – and the Commonwealth Government's opposition to the first proposal[40] roundly criticised – in Chapter 4.

### (6) *Improvement in administrative efficiency and transparency*

In order to streamline the time-consuming procedures under Part IIIA and enhance regulatory transparency, the Productivity Commission recommended target time limits for various steps in the Part IIIA processes,[41] as well as a requirement (which will legislatively implement the status quo to date) that all Part IIIA decision-makers publish reasons for their recommendations and determinations.[42] These sound measures were endorsed in Chapter 4.

Such refinements to Part IIIA are obviously worthwhile, but they are no substitute for systemic change. In this regard, the Productivity Commission's findings in favour of the retention of the designated Minister as the final decision-maker in applications for declaration of services and certifications of effective access regimes,[43] and the continued separation of responsibility between the NCC (in determining whether access should be allowed at all) and the ACCC (in setting the terms and conditions on which access should be granted)[44] are especially disappointing.

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40 *Final Response* (above n 5) 10.

41 *PC Report* (above n 4) Recommendation 15.3. Several previously mentioned proposals will aid timeliness as well, such as: including pricing principles in Part IIIA, which will help to confine the scope of negotiations; publishing guidelines on the type of information that will facilitate negotiations; providing for arbitration to commence 30 days after the declaration of a service, unless a negotiated resolution is imminent; preventing the arbitrator of access disputes from revisiting matters that have been agreed between the parties; and permitting the lodgment of post-declaration undertakings.

42 Ibid Recommendation 15.5.

43 Ibid Finding 14.1.

44 Ibid Finding 14.2.

Diametrically opposite conclusions on these matters were reached in Chapter 4. There, it was recognised that fundamental reform of Part IIIA is tied to two vital proposals:

- First, ending the role of Ministers in Part IIIA decision-making. As highlighted in Chapter 4, the Part IIIA cases confirm that Ministerial input has simply added to the time taken to reach decisions on declaration and certification applications, without being necessary for due process or the achievement of appropriate outcomes.

- Second, making a single regulator responsible for the administration of Part IIIA – preferably the NCC. Avoiding dual regulatory participation in the access regime can be expected to enhance the efficacy of the regime, overcome a potential source of inconsistency in interpretation, and consolidate limited public sector expertise in the complex field of access regulation.

## 7.3 CLOSING REMARKS

Eight years after the introduction of Part IIIA, Australia's experience with the national access regime remains far from extensive.[45] There is still much 'bedding-down' required. The next five years of the regime's operation will serve to consolidate the interpretation and application of the provisions of Part IIIA – amended, ideally, in accordance with the recommendations made in this dissertation.

The Commonwealth Government is poised to act on the Productivity Commission's review of Part IIIA,[46] but should pause to reconsider the adequacy of the Commission's final recommendations. As a package, the reforms advanced in this dissertation will go further than the more limited measures proposed by the Productivity Commission towards achieving the

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45 *PC Position Paper* (above n 4) 70.

outcomes of improved workability and continuing investment in infrastructure facilities so vital to the success of this regulatory scheme.

To track future developments, ongoing monitoring and periodic review of the access regime must be entrenched. Thus, there is no dispute that the NCC should be charged with reporting annually on the operation of Part IIIA,[47] and that a further independent review of the regime should be undertaken five years hence.[48]

In the interim, an important area for further research will be to assess the impact that legislative reform of Part IIIA, together with incremental advances occurring case-by-case, have on the operation of the national access regime.

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46 The Commonwealth Government has announced the imminent introduction of a bill to implement its response to the Productivity Commission's inquiry into Part IIIA. Refer to part 1.2(F) of Chapter 1.

47 *PC Report* (above n 4) Recommendation 16.1.

48 A further independent review of the national access regime has been recommended for five years after the first group of changes to Part IIIA resulting from the Productivity Commission's inquiry are put in place: ibid Recommendation 16.2. Both Recommendation 16.1 and Recommendation 16.2 have been endorsed by the Commonwealth Government: see *Final Response* (above n 5) 22-23.

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