ACCESS TO 'ESSENTIAL FACILITIES' UNDER PART IIIA OF THE TRADE PRACTICES ACT: IMPLEMENTING THE LEGISLATIVE REGIME

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Introduction

In August 1993, the Report of the Independent Committee of Inquiry into Competition Policy in Australia (the 'Hilmer Report')[1] 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 characteristics, in the sense that they cannot be duplicated economically.[4] Classic examples include electricity transmission grids, telecommunications networks, gas and water pipelines, railroad terminals and tracks, airports, ports and wharves.[5] Access to such facilities is *essential* for effective competition in upstream or downstream markets,[6] but can 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 'essential facilities problem'.[7]

The Hilmer Report's consideration of the problem concluded with a list of recommendations for ensuring access to essential facilities.[8] In 1995, the Federal Parliament formalised its response to these recommendations by inserting a new Part IIIA, entitled 'Access to Services', into the *Trade Practices Act* 1974 (Cth).[9]

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1 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy*, AGPS (1993). The Committee was chaired by Professor Fred Hilmer.

2 There are four aspects to National Competition Policy: (1) establishment of an access regime; (2) extension of the existing competition provisions of the *Trade Practices Act* 1974 (Cth) to every business and profession; (3) removal of Crown immunity for government business activities; and (4) application of competitive neutrality principles to government monopolies.

3 Hilmer Report, above n 1, Ch 11.

4 Ibid at 239. To economists, the term 'natural monopoly' indicates that the size of the market is such that it is only efficient for one facility to operate in the market.

5 Ibid at 240.

6 For example, effective competition in electricity generation and telecommunication services requires access to transmission grids and local telephone exchange networks respectively: ibid at 239.

7 Owners of essential facilities may use their monopoly power to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency. Where they are vertically integrated into competitive upstream or downstream markets, owners of essential facilities have additional incentives to restrict competitors' access to the facilities or to offer terms and conditions of access which discriminate against them: ibid at 241.

8 Ibid at 266-268.

9 Introduced pursuant to the *Competition Policy Reform Act* 1995 (Cth), Part IIIA took effect on 6 November 1995.

The access arrangements set out in Part IIIA have now been in place for over three years. During 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 article reviews the operative provisions of Part IIIA and examines their implementation to date. The article begins by tracing the development of the 'essential facilities doctrine' (a judicial response to the essential facilities problem) in the United States. With that discussion as background, Australia's decision to enact a separate regime to govern access to essential facilities is then explained. This is followed by a detailed consideration of the legislative requirements of Part IIIA, together with an analysis of recent access proceedings. The article ends on a positive note, concluding that, with some streamlining of regulatory function, the access regime is set to fulfil its intended role in National Competition Policy.

The Essential Facilities Doctrine

The term 'essential facilities' is borrowed from the antitrust jurisprudence of the United States, where third party access to facilities which are essential to competition in a particular industry is governed by the 'essential facilities doctrine'.[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 terms.[13]

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*.'[14] Section 1 of that statute prohibits any contract, combination or conspiracy that restrains trade or commerce within the United States; 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 where the refusal of access on reasonable terms has resulted from concerted action among a group of competitors who collectively control an essential facility;[15] while s 2 is raised in cases where the

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

11 Various aspects of Part IIIA have already been subjected to academic commentary. See, for example: Kewalram RP, 'The Essential Facilities Doctrine and Section 46 of the Trade Practices Act: Fine-tuning the Hilmer Report on National Competition Policy' (1994) 2 *TPLJ* 188; Pengilley W, 'Hilmer and 'Essential Facilities'' (1994) 17 *UNSWLJ* 1; O'Bryan M, 'Access Pricing: Law Before Economics?' (1996) 4 *CCLJ* 85; Abadee A, 'The Essential Facilities Doctrine and the National Access Regime: A Residual Role for Section 46 of the Trade Practices Act?' (1997) 5 *TPLJ* 27; Smith R and Walker J, 'Part IIIA, Efficiency and Functional Markets' (1998) 5 *CCLJ* 183.

12 It is also known as the 'bottleneck doctrine'.

13 The treatment of essential facilities cases as a category of refusal to deal with cases under the general competitive conduct rules governing misuse of market power is common to a range of jurisdictions, including Canada, the European Community and New Zealand. However, for reasons explained in the next section of the article, the Hilmer Report recommended the establishment of a special legislative regime to govern access to essential facilities in Australia.

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

15 For example, *United States v Terminal Railroad Association* 224 US 383 (1911) [discussed below].

refusal was arrived at by a monopolist acting unilaterally.[16]

To provide a general understanding of the operation of the essential facilities doctrine in the United States, three case examples are considered below.[17]

- *United States v Terminal Railroad Association*[18] is the decision from which the doctrine originates. There, the 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. 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. In the circumstances of the case, the appropriate remedy was to order the admission of non-member competitors to the consortium.

- *Hecht v Pro-Football Inc*[19] is noteworthy for encapsulating the essential facilities doctrine in the following very 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.[20]

  In this case, 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.

- *MCI Communications Corp v American Telephone & Telegraph Co*[21] continues to be widely cited for its identification of the four elements necessary to establish liability under the essential facilities doctrine.[22] These elements are:
  (i) control of the essential facility by a monopolist;
  (ii) a competitor's inability practically or reasonably to duplicate the essential facility;
  (iii) the denial of the use of the facility to a competitor; and

16 For example, *MCI Communications Corp v American Telephone & Telegraph Co* 708 F 2d 1081 (1983) [discussed below].
17 Each of these cases has contributed significantly to the development of the doctrine in the United States.
18 224 US 383 (1912).
19 570 F 2d 982 (1977). The term 'essential facilities' was used for the first time in this case.
20 Ibid at 992.
21 708 F 2d 1081 (1983).
22 Ibid at 1132.

(iv) the feasibility of providing the facility.[23]

The case arose out of a complaint by MCI 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.[24]

Of course, as the essential facilities doctrine has evolved in the United States, so too have the limitations imposed on it. Access to an essential facility is not mandated, for example, where sharing will result in a reduction in the quality of the owner's product, where excess capacity is not available, or where the owner will be prevented from serving its own clients adequately.[25] In addition, the owner of the facility is not required to construct additional facilities in order to meet a demand for access.[26]

There is no question that United States' antitrust law has informed and advanced consideration of the essential facilities problem in Australia.[27] Significantly, however, the access regime embodied in Part IIIA of the *Trade Practices Act* does not duplicate in any precise fashion the features of the essential facilities doctrine as it applies in the United States. This was the outcome intended by the Hilmer Report, which found complaints about the lack of 'clarity, coherence or consistency' in the United States' doctrine most disquieting.[28] As discussed in the next section of the article, s 46 of the *Trade Practices Act* was similarly pronounced inadequate to deal with the essential facilities problem.[29]

Rationale for an Access Regime

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

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23 These four elements received specific endorsement in the Hilmer Report, above n 1 at 244.

24 708 F 2d 1081 (1983) at 1132.

25 *City of Anaheim v Southern California Edison Co* 955 F 2d 1373 (1992). The argument has also been put that a denial of access should never be unlawful per se, since 'legitimate business reasons' will always justify not sharing a facility: Areeda P, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 *Antitrust Law Journal* 841 at 841.

26 *Continental Trend Resources Inc v Oxy US Inc* [1991] 2 Trade Cases 69,510.

27 Analysis of United States' essential facilities cases appears in each of the following articles, for example: Kewalram, above n 11; Pengilley, above n 11; O'Bryan, above n 11; and Abadee, above n 11.

28 Hilmer Report, above n 1 at 244, citing Vautier KM, 'The 'Essential Facilities' Doctrine', *New Zealand Commerce Commission Occasional Paper No 4* (1990) at 65.

29 Hilmer Report, above n 1 at 243-244.

others when, and in the manner, they choose.[30] However, when a monopoly is involved, freedom to contract must be balanced against the possible misuse of market power.[31]

Thus, in Australian competition law, s 46 of the *Trade Practices Act* prohibits 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.[32] Contravention of this provision can effectively result in the imposition of a duty to deal.[33]

The Hilmer Report accepted the potential application of s 46 to essential facility situations.[34] Commenting on the elements of the section, the Report noted: (1) if a facility is truly essential, its owner will always have a substantial degree of market power within the meaning of s 46; (2) 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 market power, access to the facility would probably be available; and (3) the refusal to deal could conceivably occur for any of the proscribed purposes in s 46(a), (b) or (c).[35]

Nevertheless, continued reliance upon s 46 in essential facilities cases was deemed problematic.[36] The difficulties associated with proving a proscribed purpose under s 46[37] were considered the major impediment to the effective use of the section for resolving disputes over access to essential facilities.[38] In addition, doubts were expressed about the appropriateness of the courts as a forum for determining terms and conditions of access.[39]

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30 Ibid at 242.

31 Ibid.

32 Comprehensive discussion of the scope and operation of s 46 may be found in two recent articles: Shafron P, 'QWI v BHP: A Flash in the Section 46 Pan?' (1998) 72 *ALJ* 53; and Stewart IB, 'The Economics and Law of Section 46 of the Trade Practices Act' (1998) 26 *ABLR* 111.

33 This was the situation in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, where BHP's refusal to supply the product 'Y-bar' to QWI was held to infringe s 46. The parties then settled their dispute out of court in confidential negotiations.

34 Hilmer Report, above n 1 at 243. Analysis of refusal to deal cases under s 46 often includes discussion of the essential facilities doctrine: see, for example, Abadee, above n 11 at 33-34. However, very few of the cases commonly cited are in fact concerned with essential facilities; rather, they are concerned with the supply of a tangible or intangible good.

35 Hilmer Report, above n 1 at 243. O'Bryan, above n 11 at 88, has similarly, if more adamantly, said there is 'no doubt that s 46 is applicable to the essential facility problem'. Although it is reasonable to suggest that s 46 may accommodate access disputes as a particular type of refusal to deal, it is still the case that no Australian court has ever attempted to import the essential facilities doctrine into the provision. In fact, in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1988] ATPR 40-841 at 49,076-49,077, the Full Federal Court (Bowen CJ, Morling and Gummow JJ) expressly rejected the notion that s 46 embodied the essential facilities doctrine.

36 Hilmer Report, above n 1 at 243. Shafron, above n 32 at 60, has expressed the more forthright opinion that 's 46 provides little if any assistance in obtaining access' to an essential facility.

37 The obstacles to demonstrating a proscribed purpose under s 46 are explained in detail in Marshall B, 'Refusals to Supply under Section 46 of the Trade Practices Act: Misuse of Market Power or Legitimate Business Conduct?' (1996) 8 Bond LR 182.

38 Hilmer Report, above n 1 at 243. The Report recognised that s 46 could be amended 'in some way', but did not explore this option: ibid.

39 Ibid at 243-244. In New Zealand, the essential facilities problem continues to be dealt with under the misuse of market power provision in s 36 of the *Commerce Act* 1986 (NZ), which is substantially similar to s 46 of the

To overcome the perceived limitations of s 46, the Hilmer Report recommended the creation of a special legislative regime to ensure access to essential facilities.[40] This regime is described in the next section of the article.

Trade Practices Act. Commentators on New Zealand competition law have also questioned the ability of the courts to set terms and conditions of access. See, for example: Ahdar RJ, 'Battles in New Zealand's Deregulated Telecommunications Industry' (1995) 23 ABLR 77 at 116; and Pengilley W, 'The Privy Council Speaks on Essential Facilities Access in New Zealand: What are the Australasian Lessons?' (1995) 3 *CCLJ* 26 at 29.

40 Hilmer Report, above n 1 at 248-249.

Part IIIA of the Trade Practices Act

Although the Hilmer Report contemplated a regime for promoting access to essential facilities, Part IIIA of the *Trade Practices Act* is more specifically concerned with ensuring access to the *services* provided by such facilities. This refinement in the legislation recognises that a given facility may provide a range of services, only one of which might be essential to enable competition in an upstream or downstream market. It is the use of the facility for that particular purpose which is the focus of Part IIIA, not the overall use of the facility. A simple example helps to clarify the point:

> A port may be capable of handling passengers, general freight cargo and fresh produce. There may be other ports nearby capable of also handling passenger and general freight but none within reasonable distance capable of handling fresh produce. In this case, the service of transporting fresh produce might be judged to be an essential service for the particular port in question.[41]

Two alternative mechanisms for assisting third parties to obtain access to the services provided by nationally significant infrastructure facilities are established by Part IIIA.[42] The first involves having the particular service 'declared' to be open to access by third parties, with disputes about the terms and conditions of access then resolved through private negotiations or arbitration by the Australian Competition and Consumer Commission (ACCC). The second enables the owner of a facility to enter into an access undertaking with the ACCC setting out the terms and conditions under which third parties will be provided with access to the services of the facility. The two are mutually exclusive: an access undertaking cannot be accepted in respect of a service that has been declared;[43] and, conversely, a service cannot be declared once it is the subject of an access undertaking.[44] Further details on each mechanism are provided below.

The Declaration Process

The procedures to be followed under Part IIIA in having a service declared[45] and then deciding the terms and conditions of access to that service are summarised in the form of a flowchart in Figure 1. It is apparent from the flowchart that responsibility for the implementation of the access regime is shared by the National Competition Council (NCC), designated Minister (Federal Treasurer or Premier/Chief Minister), Australian Competition and Consumer Commission (ACCC) and Australian Competition Tribunal (ACT). The overview of the legislative requirements that appears below highlights the

41 Explanatory material accompanying the original draft legislation presented to the Council of Australian Governments (19 August 1994), para 1.16.

42 Access to telecommunications is governed by Part XIC ('Telecommunications Access Regime') of the *Trade Practices Act*. Part XIC replicates the provisions of Part IIIA to a significant extent, but the special nature and complexity of telecommunications were deemed to warrant a separate access regime: Explanatory Memorandum, *Trade Practices Amendment (Telecommunications) Bill* 1997 (Cth), 39. Similar considerations motivated the recent enactment of the *Gas Pipelines Access (Commonwealth) Act* 1998 (Cth), which fulfills the Commonwealth's obligations towards the establishment of a national access regime for natural gas pipelines.

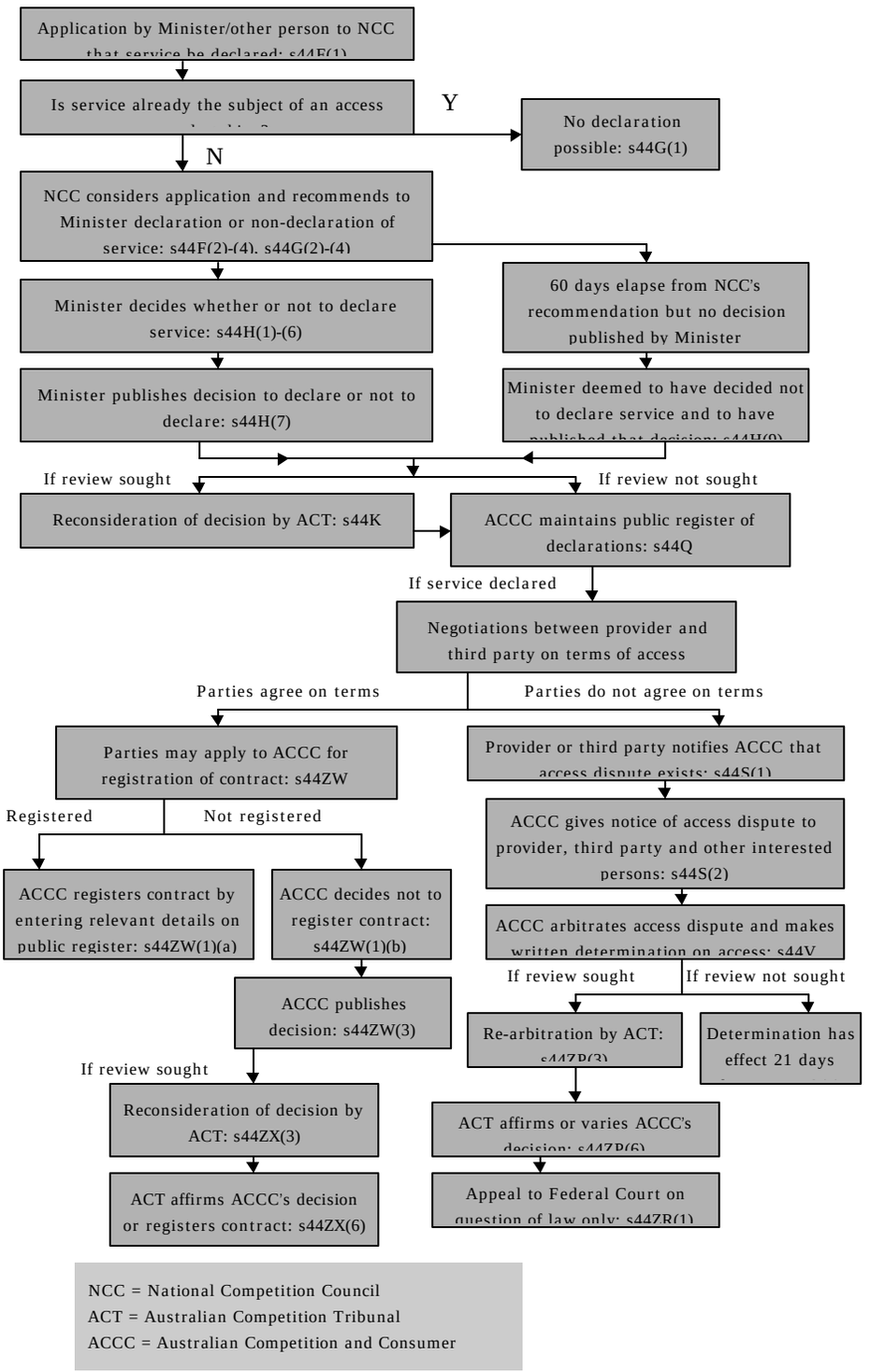
43 Section 44ZZB.

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

45 For the provisions governing the declaration of a service, see Part IIIA, Division 2 - 'Declared services' (ss 44F-44Q).

significant role played by the regulatory authorities under Part IIIA.

Figure 1: From Declaration to Terms of Access



NCC = National Competition Council
ACT = Australian Competition Tribunal
ACCC = Australian Competition and Consumer

NCC's Declaration Recommendation

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[46] or any other person.[47] In the case of a non-Ministerial applicant, however, 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 before expending its resources on the relevant inquiries.

A further threshold issue that the NCC must consider is whether the service in respect of which the declaration recommendation is sought meets the statutory definition of 'service' in s 44B.[48] 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.

The key requirement of the above definition is that the service must be provided by means of a 'facility'. Should the NCC require assistance with the interpretation of this term, which is not defined within Part IIIA, the Australian Competition Tribunal has recently suggested that 'the dictionary definitions may be of some help'.[49] Heeding its own advice, the ACT 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'.'[50]

Assuming that the relevant 'service' is provided by means of a 'facility', then s 44G(2) comes into play. This stipulates that the NCC cannot recommend the declaration of the service unless each of the following criteria is satisfied:

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

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46 Pursuant to ss 44D and 44B, the 'designated Minister' will either be the Federal Treasurer (whose portfolio includes the administration of National Competition Policy); or, in cases where a State/Territory body is the provider of the service, the Premier/Chief Minister of that State/Territory.

47 The Hilmer Report, above n 1 at 252, had envisaged that proceedings would be initiated by 'government' (Commonwealth, State or Territory). 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: Pengilley, above n 11 at 38 and 49.

48 Section 44B is the definitions section of Part IIIA.

49 *Re Australian Union of Students* [1997] ATPR 41-573 at 43,957.

50 Ibid.

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.[51]

Two general observations about s 44G(2) may be made. First, the six criteria are likely to be satisfied in relation to major infrastructure facilities,[52] 'but not products, production processes or most other commercial facilities'.[53] Secondly, the criteria do not demand proof of any anti-competitive or exclusionary purpose, avoiding the evidentiary difficulties associated with proving a proscribed purpose under s 46.[54] More specific comments on each criterion are provided below.

Promoting competition in other markets

Pursuant to s 44G(2)(a), a service cannot be declared unless access to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service.

Access disputes typically arise where the owner of an essential facility is vertically integrated with an incentive to inhibit competitors' access to the facility. However, the Hilmer Report regarded situations where a facility owner does not compete in an upstream or downstream market, but charges monopoly profits at the expense of

51 The Hilmer Report, above n 1 at 251, recommended a legislative right of access to a facility where two criteria were satisfied: access to the facility was essential to permit effective competition in an upstream or downstream activity; and access was in the public interest, having regard to the significance of the industry to the national economy, and the expected impact of effective competition in that industry on national competition. Both of these criteria are reflected in s 44G(2).

52 For example: airports, railroad terminals and tracks, seaports, telecommunications networks, gas and water pipelines, and electricity transmission and distribution wires.

53 Hilmer Report, above n 1 at 251. The criteria can be interpreted as an attempt to allay the type of concern expressed by the Full Federal Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1988] ATPR 40-841 at 49,076-49,077, where Bowen CJ, Morling and Gummow JJ admitted 'difficulty, at least in cases where a monopoly of electric power, transport, [or] communications ... is not involved, in seeing the limits of the concept [of an essential facility].'

54 Refer to the discussion in the third section of this article, entitled 'Rationale for an Access Regime'.

economic efficiency, to be an equivalent problem.[55] Accordingly, there is no requirement under s 44G(2)(a) to characterise the service provider as a vertically integrated monopolist; on the contrary, the broad terms of criterion (a) simply require that access to the service must promote competition in another market.

Consider, for example, *Australian Cargo Terminal Operations Pty Ltd*.[56] The matter concerned an application by ACTO for declaration of the services at Sydney and Melbourne International Airports provided by means of freight aprons and hard stands, and areas for storing loading equipment and transferring freight. The NCC recommended declaration and the designated Minister (the Federal Treasurer) decided to declare the services. In connection with s 44G(2)(a), both the NCC and the Minister were satisfied that access to the services provided by an international airport to enable the operation of airline services would promote competition in the markets for ramp services and cargo terminal operations.

Duplicating the facility

Section 44G(2)(b) specifies that it must be uneconomical for anyone to develop another facility to provide the service. This criterion recalls the Hilmer Report's endorsement of *MCI Communications Corp v American Telephone & Telegraph Co*,[57] where 'a competitor's inability practically or reasonably to duplicate the essential facility'[58] was identified as a crucial element of the essential facilities doctrine.[59]

Although the Hilmer Report placed particular emphasis on the *MCI* case, which concerned a natural monopoly, it is not expected that s 44G(2)(b) will limit the application of the access regime to natural monopoly facilities. The ACCC has said, for example, that criterion (b) can be interpreted 'as extending beyond the natural monopoly case to natural duopolies or oligopolies, that is, where there are already two (or more) facilities but it would be uneconomic to develop another one.'[60]

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.

Carpentaria Transport Pty Ltd[61] illustrates the effect of s 44F(4). In this matter, Carpentaria Transport 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.

55 Hilmer Report, above n 1 at 240-241.
56 [1997] ATPR (NCC) 70-000.
57 708 F 2d 1081 (1983).
58 Ibid at 1132.
59 Hilmer Report, above n 1 at 244.
60 Australian Competition and Consumer Commission, *Access Regime - A Guide to Part IIIA of the Trade Practices Act*, AGPS (1995) at 5.
61 [1997] ATPR (NCC) 70-003.

These facilities were grouped as track, above-track (including locomotives and rolling stock), and terminals (including loading and lifting equipment).[62]

In the result, the NCC did not recommend declaration and the designated Minister (the Queensland Premier) decided not to declare the service. Both the NCC and the Minister justified their conclusion on the basis that it would be economical for someone to develop another facility that provided *part* of the service - that is, it would be economically feasible for someone to develop or provide the above track facilities and terminals that contributed to the provision of the rail freight service.

National significance

Section 44G(2)(c), which requires the facility to be of 'national significance',[63] has been described by the NCC as a 'test of materiality'.[64] Insight into the practical implementation of this criterion is provided by *Re Australian Union of Students*.[65] There, the AUS applied to have the 'Austudy Payroll Deduction Service'[66] declared by the NCC.[67] The application classified the 'facility' used to provide the 'service' as the computer network of the then Department of Education, Employment, Training and Youth Affairs (DEETYA).

The NCC recommended against declaration of the service and the designated Minister (the Federal Treasurer) decided not to declare the service. An application for review of the Minister's decision was then made to the ACT. The ACT affirmed the Minister's decision (and the NCC's recommendation) not to declare the service.

Although it believed there was 'real doubt' about the matter, the ACT was prepared to assume, for the purposes of Part IIIA, that DEETYA's computer network was a 'facility' and that the Austudy Payroll Deduction Service was a 'service'.[68] In the result, it was not necessary to decide these questions because the DEETYA computer network did not satisfy s 44G(2)(c) as it was not of national significance having regard to its size, or its importance to the national economy or constitutional trade and commerce.

The ACT accepted that a computer network may be said to be sizeable from the point of view of the quantity of information stored in its databases. On this measure, however, the DEETYA database, with approximately 485,000 student records stored in its database, was merely one of several hundred national data bases, many of which were of comparable or even greater size.[69] Moreover, even if access resulted in every

62 Ibid at 70,269.

63 In the NCC's view, nationally significant infrastructure can be 'situated entirely within the borders of a single State or Territory': National Competition Council, *The National Access Regime - A Draft Guide to Part IIIA of the Trade Practices Act*, AGPS (1996) at 26.

64 Ibid.

65 [1997] ATPR 41-573.

66 'Austudy' refers to a Federal Government scheme that provides financial assistance to secondary and tertiary education students on low incomes.

67 The AUS wished to gain access to the student records stored on the Austudy database for the purposes of its recruitment activities.

68 [1997] ATPR 41-573 at 43,959.

69 Ibid at 43,960.

Austudy recipient in Australia becoming a member of a student union, this would still only result in $1.5 million in union payments annually, a very small sum when viewed in relation to the Australian economy as a whole.[70]

Health and safety

Section 44G(2)(d) stipulates that it must be possible to provide access to the service without undue risk to human health and safety.

This criterion received close attention in the previously mentioned matter of *Australian Cargo Terminal Operations Pty Ltd*.[71] In the end, however, neither the NCC nor the Minister was prepared to accept that ACTO's proposed methods of operation posed a safety concern. 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.[72]

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. Of particular relevance to this criterion are existing State/Territory access regimes.

If the Federal Treasurer has previously decided that a State/Territory regime is an effective access regime,[73] the NCC must follow that decision unless it believes that a substantial modification of the regime has occurred during the intervening period.[74] Otherwise, the NCC must determine the effectiveness of a State/Territory regime for itself.[75]

Two State-based regimes that have been accepted by the Federal Treasurer as 'effective' include the Victorian Access Regime for Commercial Shipping Channels[76] and the New South Wales Access Regime for Natural Gas Distribution Network.[77]

Public interest

Section 44G(2)(f) provides that access (or increased access) to the service must not be contrary to the 'public interest'.[78]

There is no attempt to define the term 'public interest' in Part IIIA, mainly because

70 Ibid at 43,959.

71 [1997] ATPR (NCC) 70-000 [discussed infra in connection with s 44G(2)(a)].

72 Ibid at 70,141.

73 Sections 44M and 44N dictate the procedure to be followed when the Federal Treasurer decides whether or not a State/Territory based regime is an 'effective' access regime.

74 Section 44G(4).

75 Section 44G(3).

76 *The Victorian Government* [1997] ATPR (NCC) 70-001.

77 *The New South Wales Government* [1997] ATPR (NCC) 70-002.

78 Commenting on the fact that criterion (f) is expressed in the negative, the NCC has said that if the effect of declaring a service were judged to be neutral in public interest terms, declaration would be recommended if criteria (a)-(e) were satisfied: NCC, above n 63 at 28.

'conceptions of the public interest are likely to change over time as community attitudes change.'[79] Although the NCC has emphasised 'economic efficiency' as a key public interest consideration, a range of arguments about the merits or problems of an access declaration can be anticipated under s 44G(2)(f).[80]

For example, in *Re Australian Union of Students*,[81] the ACT concluded that the Austudy Payroll Deduction Service failed to satisfy s 44G(2)(f), as well as s 44G(2)(c). With respect to criterion (f), the ACT took the view that the AUS 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.[82] For this reason, the ACT found that access to the Austudy Payroll Deduction Service would be contrary to the public interest.[83]

When assessing the six criteria in s 44G(2), the NCC is not required under Part IIIA to take into account submissions from interested persons.[84] However, the NCC has stated that it will direct-mail people who appear likely to have an interest in the application, advertise the matter in relevant newspapers, and seek public submissions.[85]

While no time limit is prescribed in the legislation for its deliberations, the NCC has indicated that it expects to complete its inquiries and deliver its declaration recommendation to the designated Minister within eight weeks of receiving the application, with sixteen weeks nominated as the intended upper limit in particularly complex matters.[86]

The NCC reports to the designated Minister and is under no statutory obligation to disseminate its findings more widely.[87] In practice, however, the NCC's declaration recommendations are publicly available.[88] This is commendable as publication of the NCC's recommendations is important for at least two reasons: first, to act as a public safeguard on Ministerial discretion; and secondly, to assist individual parties in evaluating the merits of their case before seeking a review of the designated Minister's decision from the ACT.

Minister's Decision

79 Ibid.
80 Ibid.
81 [1997] ATPR 41-573.
82 Ibid at 43,960.
83 Ibid at 43,961.
84 The Hilmer Report, above n 1 at 252, had expected 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.'
85 NCC, above n 63 at 14.
86 Ibid at 15.
87 The Hilmer Report, above n 1 at 252-253, had expressed the view that the NCC's recommendations should be made public and that the regime should provide 'a transparent and predictable regulatory environment within which competitive trading arrangements could evolve.'
88 For example, the NCC's recommendations are reported as 'Access Decisions' in the *Australian Trade Practices Reporter*, CCH Australia Ltd, Vol 3.

The Hilmer Report took the view that that the designated Minister should be given a discretion to decline to declare a service, notwithstanding an affirmative NCC recommendation;[89] but should only be permitted to make a declaration if that was recommended by the NCC.[90] As the Report explained:

> ... the existence of a broad discretionary regime may create pressures on the Minister to declare an essential facility to advance private interests. Accordingly the Committee proposes that the Minister's discretion be limited by ... explicit legislative criteria, and by a requirement that the creation of such a right has been recommended by an independent and expert body [the NCC].[91]

However, the legislation does not provide that Ministerial declaration of a service must be based on a positive recommendation from the NCC. Once the Minister has received a declaration recommendation, s 44H(1) merely states that he/she must declare the service or decide not to declare it.

Declaration of a service depends on the Minister being satisfied of all the matters specified in s 44H(4)(a)-(f), which mirror the six matters considered by the NCC under s 44G(2)(a)-(f).[92] Effectively, the Minister is required to re-evaluate exactly the same criteria examined by the NCC. Of course, the end result may be that the Minister reaches a different conclusion;[93] but in cases where the Minister agrees entirely with the NCC's recommendation, it seems inefficient practice not to allow the Minister simply to adopt that recommendation.[94]

The Minister has 60 days to publish his/her declaration or decision not to declare the service.[95] After this period, the Minister is deemed to have decided not to declare the service and to have published his/her decision against declaration.[96]

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.[97] The review by the ACT is a reconsideration of the matter; and for

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89 Hilmer Report, above n 1 at 253.

90 Ibid at 261.

91 Ibid at 250.

92 The obligation to consider whether it would be economical for anyone to develop another facility that could provide *part* of the service, imposed on the NCC under s 44F(4), is also demanded of the Minister under s 44H(2).

93 For example, in *Specialized Container Transport Applications for declaration of services provided by Westrail* [1998] ATPR (NCC) 70-006, the NCC recommended declaration of the Kalgoorlie-Perth rail service provided by Westrail. However, the Premier of Western Australia did not declare the rail service, on the basis that an effective access regime was already in place under the *Government Railways Act* 1904 (WA).

94 This would have simplified matters in *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, where the Federal Treasurer, having duly re-considered the declaration criteria, effectively followed the NCC's recommendation that certain airport services be declared.

95 Section 44H(7) and (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.

96 Section 44H(9). For example, in *Specialized Container Transport* [1997] ATPR (NCC) 70-004, the NCC recommended declaration of the Sydney-Broken Hill rail service provided by the Rail Access Corporation of New South Wales; but, after 60 days had elapsed, the New South Wales' Premier was deemed to have decided not to declare the service. Similarly, in *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, the NCC recommended declaration of the Hunter Railway Line, another rail service provided by the Rail Access Corporation of New South Wales; but, again, after 60 days, the New South Wales' Premier was deemed to have decided not to declare the service.

97 Section 44K(1) and (2). The application must be lodged within 21 days after publication of the Minister's

the purposes of the review the ACT has the same powers as the Minister.[98] If the Minister declared the service, the ACT may affirm, vary or set aside the declaration;[99] 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.[100]

Arbitration by the ACCC

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. If a service is declared, the service provider and access seeker must attempt to negotiate an access arrangement.[101] Any agreement reached is simply a commercial contract between the parties and does not have to be registered, although it can be if the ACCC accepts an application by all parties to the contract for its registration.[102]

If negotiations break down, then either the access seeker and/or the service provider may notify the ACCC that an 'access dispute' exists.[103] The ACCC must then resolve the dispute by arbitration,[104] taking into account matters such as the legitimate business interests of the provider and the public interest as set out in s 44X(1).[105]

The arbitral process concludes when the ACCC makes a written determination on access by the third party to the service.[106] Pursuant to s 44V, the determination may deal with 'any matter relating to access by the third party',[107] including requiring the third party to pay for access to the service, and specifying the terms and conditions of the third party's access.[108] However, the determination must not cause any of the effects listed in s 44W,[109] such as interfering with the future use of the facility by the existing user.[110] Also, the determination does not have to require that the provider

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decision: s 44K(3).

98 Section 44K(4) and (5).

99 Section 44K(7).

100 Section 44K(8). For example, it will be recalled that in *Re Australian Union of Students* [1997] ATPR 41-573 [discussed below], the Tribunal affirmed the Minister's decision not to declare the relevant service.

101 This reflects the Hilmer Report's recommendation, above n 1 at 253, that, wherever possible, the parties to an access dispute should be allowed to come to their own access arrangements.

102 Section 44ZW(1). In making its 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: s 44ZW(3) and (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.

103 Section 44S(1).

104 See Part IIIA, Division 3, Subdivision C - 'Arbitration of access disputes' (ss 44U-44Y). 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: s 44U.

105 The relative weight to be assigned to the matters in s 44X(1) is not apparent from the legislation. Moreover, the ACCC is entitled to take into account any other matters it thinks relevant: s 44X(2).

106 Alternatively, s 44Y permits the ACCC to terminate an arbitration (without making a determination) for various reasons, including, for example, 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).

107 Section 44V(2).

108 Section 44V(2)(b) and (c). For further discussion of the principles likely to guide the ACCC's deliberations when setting terms and conditions (including price) of access, see Marshall B and Mulheron R, 'Charging for Admission: A Lawyer's Guide to Access Pricing under Part IIIA of the Trade Practices Act' (1998) 6 TPLJ 132.

109 Section 44W(1)(a)-(e).

110 Section 44W(1)(a). The term 'existing user' is defined, in s 44W(5), to include the service provider. These

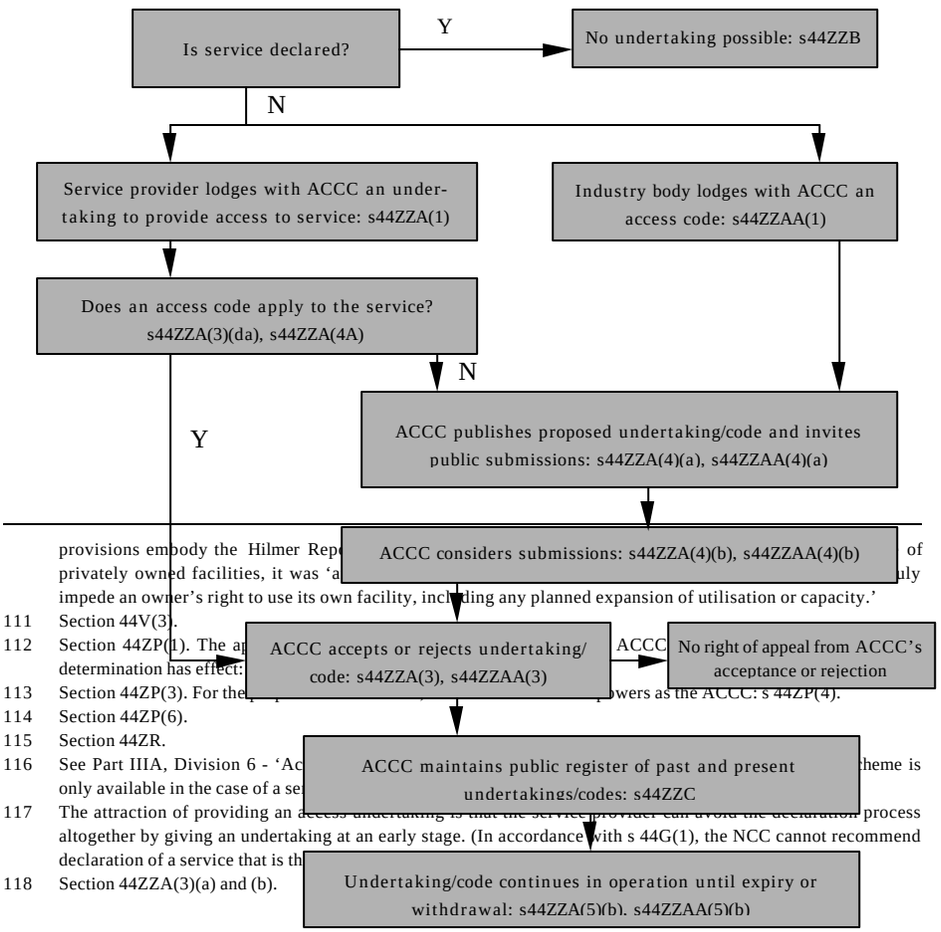
grant access to the third party, notwithstanding that access was declared by the Minister.[111]

The parties to the arbitration may apply in writing to the ACT for a review of the ACCC's determination.[112] The ACT's review amounts to a re-arbitration of the matter;[113] at the conclusion of which the ACT may either affirm or vary the ACCC's determination.[114] An appeal from the ACT's decision lies to the Federal Court on a question of law only.[115]

Access Undertakings

As an alternative to the declaration process, Part IIIA provides for a scheme of access undertakings.[116] Under this scheme, depicted diagrammatically in Figure 2, a service provider can volunteer to give the ACCC an access undertaking setting out the terms on which it will offer access to third parties.[117] The matters to which the ACCC should have regard in deciding whether or not to accept an access undertaking, such as the legitimate business interests of the provider and the public interest,[118] are listed in s 44ZZA(3).

Figure 2: Access Codes and Access Undertakings



provisions embody the Hilmer Rep of privately owned facilities, it was 'a uly impede an owner's right to use its own facility, including any planned expansion of utilisation or capacity.'

111 Section 44V(3).

112 Section 44ZP(1). The ap determination has effect:

113 Section 44ZP(3). For the owers as the ACCC: s 44ZP(4).

114 Section 44ZP(6).

115 Section 44ZR.

116 See Part IIIA, Division 6 - 'Ac heme is only available in the case of a se

117 The attraction of providing an access undertaking is that the service provider can avoid the declaration process altogether by giving an undertaking at an early stage. (In accordance with s 44G(1), the NCC cannot recommend declaration of a service that is th

118 Section 44ZZA(3)(a) and (b).

In a recent development, the provisions governing access undertakings have been simplified and streamlined in two respects.[119] First, the requirement in s 44ZZA(1) for an access undertaking to include 'details' about the terms and conditions of access has been removed.[120] This does not mean that such an 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. Practically speaking, it is now 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.[121]

Secondly, a new s 44ZZAA permits an industry body to give the ACCC a written code setting out rules for access to a service. The matters to which the ACCC should have regard in deciding whether to accept the access code are set out in s 44ZZAA(3); the list is similar to that in s 44ZZA(3) in respect of access undertakings.[122] Section 44ZZAA(4) imposes an additional requirement of public consultation before a code may be accepted by the ACCC.

The motivation behind the introduction of access codes lay in the realisation that efficiencies would arise from permitting a code of conduct setting out rules about access to an industry's infrastructure to be determined by industry participants and accepted by the ACCC, and then allowing individual service providers to offer undertakings based upon the code.[123] To give just one example, with an access code, the need for public consultation in respect of each undertaking is obviated.[124]

Conclusion

Given the stringent criteria in s 44G and s 44H, of which the NCC and Minister must be satisfied respectively, and the narrow definition of 'service' in s 44B, it is clear that the access regime established by Part IIIA applies only to a narrow, albeit extremely important, range of 'nationally significant' infrastructure.[125] These types of infrastructure, characterised by entrenched monopoly, are commonly referred to as 'essential facilities' because access to the services they provide is *essential* for competition in dependent markets.

Within the domain of its application, Part IIIA provides uniform and well-defined procedures for facilitating the resolution of access disputes. As explained in the Hilmer Report, delineating these steps in a separate access regime has definite advantages

119 Pursuant to the *Trade Practices Amendment (Industry Access Codes) Act* 1997 (Cth).

120 This proved to be undesirable and impractical in certain network industries, such as the electricity industry: Explanatory Memorandum, *Trade Practices Amendment (Industry Access Codes) Bill* 1997 (Cth), p 1.

121 Section 44ZZA(1) now simply states that a 'written undertaking' may be given to the ACCC in connection with the provision of access to a service. Notes to the section indicate the kinds of matters that might be dealt with in the undertaking (for example: terms and conditions of access to the service; and an obligation on the provider not to hinder access to the service).

122 All access codes, and access undertakings, accepted by the ACCC must be kept on a public register: s 44ZZC.

123 Again, the major proponent of this amendment appears to have been the electricity industry, where rules of conduct are well developed: *Commonwealth Senate Hansard* (13 February 1997) at 658 per Senator Cook.

124 Section 44ZZA(4A).

125 Arguably, the limited scope of Part IIIA leaves a 'residual role' for s 46 of the *Trade Practices Act* in the resolution of certain access disputes: see, further, Abadee, above n 11 at 43-45.

over reliance on the general competitive conduct rules governing misuse of market power, such as s 46 of the *Trade Practices Act* (whether or not those rules incorporate a United States' style 'essential facilities doctrine').[126] Yet, despite the general merits of the approach, the administrative arrangements in Part IIIA appear somewhat more cumbersome than was originally intended.

The Hilmer Report evinced a strong intention to keep access disputes away from the courts.[127] 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 characteristic of litigation to establish a purported contravention of s 46 of the *Trade Practices Act*.[128]

However, under Part IIIA, a third party seeking access to particular services faces the daunting prospect of their application passing through three authorities (NCC, designated Minister and ACCC). This increases to four if a review of the decision of the Minister or ACCC is sought from the ACT. Inherent in such a structure is considerable scope for unwarranted duplication and delay.

Some streamlining of procedures under Part IIIA would assist the efficient operation of the access regime. As advocated by the Hilmer Report, this could sensibly be achieved by permitting more substantive decision-making by the NCC at the 'front-end' of proceedings.[129]
For example, the Hilmer Report 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 was approved) the pricing principles, and other terms and conditions of access, that should apply.[130] It was also envisaged that the terms of access recommended by the NCC would be made public and be binding on the Minister.[131] 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 interests of the facility owner.[132] 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.[133]

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). 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

126 Hilmer Report, above n 1 at 242-245.
127 Ibid at 243-244.
128 Ibid.
129 Ibid at 250-256.
130 Ibid at 255.
131 Ibid at 255-256.
132 Ibid at 266-267.
133 Ibid at 256.

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.[134]

Elimination of regulatory excess will enhance the successful implementation of the access regime, which appears set to fulfil its role in National Competition Policy by effectively dealing with the 'essential facilities problem'.

134 Section 44V(3).