

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT: THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

Brenda Marshall and Rachael Mulheron***

Introduction

The generic access regime contained in Part IIIA of the *Trade Practices Act 1974* (Cth)¹ sets out a regulatory schema governing third party access to the services supplied by eligible infrastructure facilities. Of the three avenues for attaining access to such services, the declaration process² has been used surprisingly little in the seven years of Part IIIA's operation.³ Access undertakings⁴ have been similarly under-utilised, with most reliance being placed on the certification of State and Territory industry-specific access regimes.⁵

Recently, however, during the course of its comprehensive and detailed examination of the national access regime,⁶ the Productivity Commission found that the declaration provisions of Part IIIA have been 'pervasive' in their influence, primarily because the threat of declaration has played a pivotal role in shaping State and Territory access regimes.⁷ Given the significant intrusion on the property rights of service providers that declaration entails, there is now

* BCom(Hons), LLB(Hons), LLM, University of Queensland. Lecturer, TC Beirne School of Law, University of Queensland.

** BCom, LLB(Hons), LLM, University of Queensland, DPhil (Oxon). Oriel College, University of Oxford.

1 All section references in this article are to the Trade Practices Act, unless otherwise specified.

2 For the provisions governing the declaration of a service, see Part IIIA, Division 2, Subdivisions A and B (ss 44F–44L).

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

4 For the provisions governing access undertakings, see Part IIIA, Division 6 (ss 44ZZA–44ZZC).

5 For the provisions governing the certification process, see Part IIIA, Division 2, Subdivision C (ss 44M–44Q).

6 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 earlier publications of the Commission in respect of the same inquiry: *The National Access Regime* (Issues Paper, October 2000) (hereafter, 'PC Issues Paper'); and *Review of the National Access Regime* (Position Paper, 29 March 2001).

7 PC Report (ibid) 28.

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

considerable awareness of the declaration process, and alternative routes to access under Part IIIA, within Australia's essential infrastructure sectors.⁸

In order to secure access to an infrastructure service by means of a declaration, the access seeker must prove that six criteria are satisfied.⁹ The last of these – that access (or increased access) to the service would not be contrary to the public interest¹⁰ – is the focus of this article.¹¹ It is strongly contended here that the public interest criterion serves no purpose, and that, contrary to the Productivity Commission's view,¹² it should be abolished from the matrix of declaration criteria. This contention rests on the following bases, each of which is fully advanced in Part III of the article. 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. Secondly, 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. Thirdly, because of the manner in which the criterion has been worded – it is expressed in the negative – its construction has been difficult. Fourthly, and most fundamentally, the broad nature of the criterion conflicts with the objective of economic efficiency underpinning Part IIIA.

However, before turning to these substantive arguments, the declaration process is outlined in Part II of the article below.

Declaring Access to Services

Declaration of services under Part IIIA involves a two-stage process. First, the National Competition Council (NCC), after reviewing the six declaration criteria stipulated in s 44G(2), must recommend to the designated Minister¹³ that access to a service should, or should not, be declared. In deciding whether to accept the NCC's recommendation or not,¹⁴ the Minister must examine 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

8 Ibid xv.

9 These criteria are identified in Part II of the article.

10 This is criterion (f), also referred to as the 'public interest test'.

11 Consideration of the 'public interest' is required in connection with the determination of access disputes under s 44X(1)(b), and the acceptance of access undertakings under s 44ZZA(3)(b). However, this article concentrates exclusively on the public interest criterion as it applies in the context of access declarations.

12 PC Report (above n 6) 193.

13 For infrastructure owned by a State or Territory, the relevant Minister is the State Premier or Chief Minister; for all other infrastructure, responsibility for declaring the service lies with the Commonwealth Treasurer: ss 44B and 44D.

14 It is not uncommon for contrary conclusions to be reached by the NCC and the designated Minister. See Table 1 in Part III of the article for details.

the service,¹⁵ after which the Minister is deemed to have decided not to declare the service.¹⁶ Review of the Minister's decision may be sought from the Australian Competition Tribunal (ACT).¹⁷

Importantly, the declaration of a service does not provide the access seeker with the right to access, but merely the right to negotiate an access arrangement. This comprises the second stage of the process. If negotiation cannot result in agreement between the access seeker and the service provider, then the Australian Competition and Consumer Commission (ACCC) must resolve the dispute by arbitration,¹⁸ taking into account matters such as the legitimate business interests of the provider and the economically efficient operation of the facility.¹⁹

Initiation of the first stage requires an application to the NCC that some particular service be declared.²⁰ Assuming that the 'service'²¹ to which access is being sought is provided by means of a 'facility',²² and that the application is made in good faith,²³ then, under ss 44G(2) and 44H(4) respectively, the NCC cannot recommend the declaration of the service, and the relevant Minister cannot declare the service, unless each of the following criteria is satisfied:

- (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

15 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.

16 Section 44H(9).

17 Section 44K(1) and (2). The application must be lodged within 21 days after publication of the Minister's decision: s 44K(3).

18 See Part IIIA, Division 3, Subdivision C (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.

19 Section 44X(1) sets out a non-exhaustive list of matters that the ACCC must take into account.

20 Pursuant to s 44F(1), the written application may be made by the designated Minister or any other person.

21 Defined in s 44B.

22 The term 'facility' is not defined in the legislation. However, guidance as to its meaning has been provided by the ACT, which in *Re Australian Union of Students* [1997] ATPR (ACT) 41-573, 43,957 adopted the Shorter Oxford Dictionary definition of 'equipment or physical means for doing something', and in *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,791 described a 'facility' as the 'minimum bundle of assets required to provide the relevant services subject to declaration'.

23 Section 44F(3).

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

- (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.

Despite the Productivity Commission's sanguine attitude to criterion (f),²⁴ obvious difficulties are associated with its implementation. These are detailed in the next section of the article.

Concerns About the Criterion

Serving No Purpose

A notable aspect of criterion (f) is that it has not proved decisive in any application for access determined over the seven years of Part IIIA's operation. In the following table, the NCC's conclusion on each of the declaration criteria in s 44G(2) is outlined, in respect of the eight recommendations the NCC has made. In none of these decisions 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 public interest enquiry favour a recommendation that access be declared; in the remainder, criterion (f) reflected the adverse outcomes of the earlier criteria.

24 PC Report (above n 6) 169–70.

TABLE 1 *Declaration criteria*

Decision	Criterion (a)	Criterion (b)	Criterion (c)	Criterion (d)	Criterion (e)	Criterion (f)
SIA freight handling application ²⁵	Yes	Yes	Yes	Yes	Yes	Yes
Hunter rail application ²⁶	Yes	Yes	Yes	Yes	Yes	Yes
Austudy payroll deduction application ²⁷	Yes	No	No	Yes	Yes	No
Kalgoorlie-Perth (i) rail and (ii) freight services application ²⁸	(i) Yes (ii) No	(i) Yes (ii) No	(i) Yes (ii) No	(i) Yes (ii) Yes	(i) Yes (ii) Not addressed	(i) Yes (ii) no need to extensively examine'
Sydney-Broken Hill rail application ²⁹	Yes	Yes	Yes	Yes	Yes	Yes
Carpentaria freight	Yes	Partly	No	Yes	Yes	Yes

25 *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.

26 *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.

27 Australian Union of Students (unreported, NCC, 19 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.

28 *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.

29 *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.

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

services application ³⁰						
Freight Australia rail application ³¹	No	Yes	Yes	Yes	Yes	'not necessary ... to consider'
Wirrida-Tarcoola rail application ³²	Yes	Yes	Yes	Yes	Yes	Yes

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'³³ is as true now as it was then.

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 criteria already address a number of positive elements in the public interest.³⁴ The public interest criterion is not meant to call into question the findings in the previous criteria, but enquires whether there are *any other matters* relevant to a declaration being contrary to the public interest.³⁵

This point was made in *Duke Eastern Gas Pipelines Pty Ltd*,³⁶ where the ACT had to consider s 1.9(d) of the National Gas Code,³⁷ which is the equivalent provision

30 *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.

31 *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.

32 *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. An application for review by the ACT has been lodged and is awaiting determination.

33 J Hole, A Bradley and P Corrie, 'Public Interest Tests and Access to Essential Facilities', Staff Working Paper, Industry Commission, March 1998, xii.

34 Eg: *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,409; *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,451; *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,316.

35 National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act 1974* (NCC, Melbourne, 2002) (hereafter, 'NCC Guide') 109. 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 6) 27.

36 [2001] ATPR (ACT) 41-821.

to the public interest criterion in s 44G(2)(f). Commenting on s 1.9(d), the ACT stated:

... criterion (d) does not constitute an additional positive requirement which can be used to call into question the result obtained by the application of pars (a), (b) and (c) of the criteria. Criterion (d) accepts the results derived from the application of pars (a), (b) and (c), but enquires whether there are *any other matters* which lead to the conclusion that coverage would be contrary to the public interest.³⁸

The ACT's statement has since been cited and applied by the NCC under the Part IIIA generic schema,³⁹ and confirms the expectation that, in construing the s 44G(2) criteria under Part IIIA, 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.⁴⁰ Accordingly, in applying criterion (f), the NCC is concerned to determine whether any argument would displace that presumption.⁴¹

However, the idea that the presumption could be displaced where all of criteria (a)–(e) are satisfied defies economic sense. The authors struggle 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 submit the outcomes in Table 1 in support of their view.

Early comments by the NCC on the declaration process under Part IIIA reflect this 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

37 More fully, the National Third Party Access Code for Natural Gas Pipeline Systems. This is a regulatory framework governing third party access to natural gas pipeline systems. Section 1.13 of the Code provides that the relevant Minister must decide that the pipeline is 'covered' if satisfied of all the matters set out in s 1.9(a)–(d) of the Code.

38 *Duke Eastern Gas Pipelines Pty Ltd* [2001] ATPR (ACT) 41-821, 43,072 (emphasis added).

39 See *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) 33, and *Application for Declaration of the Wirrida–Tarcoola Rail Track Services* (unreported, NCC, July 2002) 43.

40 Hole et al (above n 33) xii; NCC Guide (above n 35) 109.

41 NCC Guide (above n 35) 109.

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

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.⁴²

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.⁴³ However, contrary to that view, the authors consider 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 scenario to that described by the NCC),⁴⁴ it would not be difficult to establish criterion (f).

The outcomes shown in Table 1 demonstrate the irrelevance of a public interest test in ss 44G(2) and 44H(4), given the other criteria upon which declaration depends. Curiously, however, the Productivity Commission remains supportive of the retention of criterion (f).⁴⁵ 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.

Public Interest Contentions Mostly Unsuccessful

An examination of the matters that have been raised under criterion (f) reveals just how wide a variety of arguments the NCC has considered in connection with declaration applications to date. By far the majority of arguments have proven unsuccessful for the service provider. In the case examples below, service providers consistently failed to establish that it would be contrary to the public interest to declare the relevant service.

In *NSW Minerals Council Ltd*,⁴⁶ 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

42 National Competition Council, *The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act* (NCC, Melbourne, 1996) 23.

43 I Tonking, 'Access to Facilities – Reviewing Part IIIA' (2000) 492 *Australian Trade Practices News* 3.

44 See above n 42. The reasoning is logically consistent.

45 PC Report (above n 6) 193.

46 [1997] ATPR (NCC) 70-005.

arbitration of terms and conditions of access.⁴⁷ In refuting this argument, the NCC reasoned that, since it has the ability under s 44J to revoke an access declaration after an effective regime is introduced, 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.⁴⁸ 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.⁴⁹

In the *Carpentaria* application,⁵⁰ 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.⁵¹ The NCC dismissed the argument, citing no evidence of 'different policies'.⁵² 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'.⁵³

In the *AuIron* application,⁵⁴ 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.⁵⁵ 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 studies, calling for tenders)

47 Ibid 70,409–70,411. The NSW Government had submitted the existing NSW rail access regime to the NCC for certification as 'effective' under ss 44M and 44N, and was prepared to modify the NSW rail regime to meet any concerns raised by the NCC in that process: 70,410.

48 Ibid 70,411. Similar arguments failed in *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) 43.

49 *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.

50 *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003.

51 Ibid 70,320–70,321.

52 Ibid 70,321.

53 Ibid.

54 *Application for Declaration of the Wirrida–Tarcoola Rail Track Services* (unreported, NCC, July 2002).

55 Ibid 44.

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

to facilitate the transportation of its product by the required starting date, and that the service provider's argument thus had no basis.⁵⁶

Three separate matters were raised by the facility owner, Sydney Airport Corporation Ltd (SACL), in the *Sydney International Airport (SIA)* case⁵⁷ in an attempt to demonstrate that declaration of certain 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 Sydney International Airport (the facility which was the focus of the declaration), in terms of balancing the competing demands for scarce space there, and that the ACCC should not be allowed to perform this role.⁵⁸ The ACT disposed of this submission by saying that it was 'not allowing the Commission to do anything'.⁵⁹ 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.⁶⁰

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.⁶¹ 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 Sydney International Airport and therefore

56 Ibid 45.

57 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754.

58 Ibid 40,795.

59 Ibid.

60 Ibid 40,795–40,796.

61 Ibid 40,795.

access could be provided without undue risk to human health or safety.⁶² Rejection of the third contention followed logically from this conclusion.⁶³

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.⁶⁴ The lodgement 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.⁶⁵ 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.⁶⁶ 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.⁶⁷ 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.'⁶⁸

A disappointing aspect of the *SIA* case 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), it nevertheless had a 'residual discretion' to decline to make a declaration.⁶⁹ 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 cover such a range of considerations that the Tribunal

62 Ibid.

63 Ibid.

64 *Australian Cargo Terminal Operations Pty Ltd* [1997] ATPR (NCC) 70-000, 70,146.

65 Ibid.

66 Ibid.

67 Ibid 70,148.

68 Ibid 70,150.

69 *Review of Declaration of Freight Handling Services at Sydney International Airport* [2000] ATPR (ACT) 41-754, 40,796.

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

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).⁷⁰

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,⁷¹ under the rubric of 'matters for discretion' failed to meet with any success either.⁷²

While there is 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* case. However, what purpose can an 'extremely limited'⁷³ 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 subsequently in section D, these arguments risk undermining the pro-efficiency objective of the access regime. With respect, the authors submit that the ACT's claim to possession of a 'residual discretion' to refuse declaration should be retracted or overruled at the earliest opportunity.

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 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.'⁷⁴ The statement is

70 Ibid.

71 It was argued, for example, 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.

72 *Ibid* 40,796–40,798.

73 See above n 70.

74 See Premier's Media Release, reported in *Carpentaria Transport Pty Ltd* [1997] ATPR (NCC) 70-003, 70,325.

incorrect because Carpentaria did not need to demonstrate that an access declaration would give rise to any public interest benefit.

This problem is exacerbated 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;⁷⁵
- that the environmental and safety benefits arising from the replacement of some road freight services by rail transport would be in the public interest;⁷⁶ and
- that access would enhance the economic activity and social viability of regional population centres in the public interest.⁷⁷

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 the criterion. 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. This, as the Productivity Commission noted, is at odds with the usual presumption that the party seeking change should demonstrate a benefit from that change.⁷⁸ In only one case to date has a service provider discharged this onus, and successfully refuted criterion (f). In the *Austudy Payroll* application,⁷⁹ the ACT took the view 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.⁸⁰ For this reason, the ACT found that access to the Austudy payroll deduction service would be contrary to the public interest.⁸¹

⁷⁵ *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005, 70,413.

⁷⁶ *Specialized Container Transport Applications for Declaration of Services Provided by Westrail* [1998] ATPR (NCC) 70-006, 70,452.

⁷⁷ *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) 43.

⁷⁸ PC Issues Paper (above n 6) 28.

⁷⁹ *Re Australian Union of Students* [1997] ATPR (ACT) 41-573.

⁸⁰ *Ibid* 43,960.

⁸¹ *Ibid* 43,961.

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

III-Defined Scope and Objectives

There is no attempt to define the term ‘public interest’ in ss 44G(2)(f) and 44H(4)(f), mainly because, according to the NCC, relevant public interest considerations will ‘vary from one application to another’.⁸² 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).⁸³ Indeed, a Senate Select Committee recently recommended ‘that the NCC publish a detailed explanation of the public interest test and how it can be applied, and produces a listing of case histories where the public interest test has been applied.’⁸⁴

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*⁸⁵ may help to inform the interpretation of the ‘public interest’ criterion. In the early *QCMA* decision,⁸⁶ 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.’⁸⁷ In refining this description in *Re 7-Eleven Stores*,⁸⁸ the TPT explained that, in modern economics, ‘progress’ had been subsumed under the notion of efficiency, a multi-dimensional concept encompassing productive efficiency, allocative efficiency and dynamic efficiency.⁸⁹

Although cast in alarmingly broad terms, 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,

82 NCC Guide (above n 35) 109.

83 PC Issues Paper (above n 6) 28.

84 Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy, *Riding the Waves of Change* (AGPS, Canberra, 2000) 43.

85 See ss 90 and 93, respectively.

86 *Re Queensland Co-operative Milling Association Ltd* [1976] ATPR (TPT) 40-012.

87 *Ibid* 17,242.

88 [1994] ATPR (TPT) 41-357.

89 *Ibid* 42,677. Putting it simply, productive efficiency requires that enterprises should produce their relevant outputs at least at cost; allocative efficiency refers to the allocation of resources in such a way as to produce the goods and services which consumers value most highly; and dynamic efficiency results from investments in innovative production methods and new facilities over time.

increased employment, and provision of better information to consumers)⁹⁰ have not strayed far from matters of economic policy.⁹¹

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.⁹² Indeed, in its submission to the Productivity Commission, the NCC suggested that the public interest test provides the primary vehicle within the declaration criteria for assessing the net impact of declaration on efficiency.⁹³ Moreover, acknowledging the tripartite nature of economic efficiency described above,⁹⁴ the NCC has made clear its intention to avoid applying the access regime 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.⁹⁵ This accords with the Productivity Commission's recommendation that the promotion of efficient use of, and efficient investment in, essential infrastructure facilities be recognised as a primary objective of Part IIIA.⁹⁶

Yet the NCC does not view the terms 'public interest' and 'economic efficiency' as synonymous,⁹⁷ presumably anticipating the diverse arguments about the merits or problems of an access declaration that have already been mounted under criterion (f).⁹⁸ Indeed, the NCC has specifically cited the so-called 'public interest' matters listed in clause 1(3) of the Competition Principles Agreement as potentially

90 See further, Trade Practices Commission, Objectives, Priorities and Work Program for 1988–1989 (TPC, Canberra, 1988) 8.

91 See also, C Johnston, 'Consumer Welfare and Competition Policy' (1996) 3 *Competition and Consumer Law Journal* 245, 246.

92 NCC Guide (above n 35) 111. This point was also made in the NCC's submission to the Productivity Commission's inquiry into the national access regime: (sub 43, January 2001) 79.

93 NCC Submission (ibid) 84–85.

94 See above n 89.

95 NCC Guide (above n 35) 111; point also made in NCC Submission (above n 92) 85. However, Hood and Corones have warned that this is not a decision which is open to the NCC, because once declared, pricing is subject to negotiation by the parties and, if they fail to agree, is determined by the ACCC. See A Hood and S Corones, 'Third Party Access to Australian Infrastructure', Paper presented at the Access Symposium (Business Law Section of the Law Council of Australia, Melbourne Business School, 28 July 2000) 82–83. The warning is repeated in the Law Council's submission to the Productivity Commission's inquiry into the national access regime: (sub 37, January 2001) 15.

96 PC Report (above n 6) recommendation 6.1

97 NCC Guide (above n 35) 113.

98 See previous discussion in section C above.

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

relevant.⁹⁹ 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 resources.¹⁰⁰ A veritable 'smorgasbord', yet some commentators assert that clause 1(3) is weighted too heavily in favour of competition and efficiency!¹⁰¹

In its Final Report, the Productivity Commission did not take up the suggestion of explicit guidance in respect of criterion (f). All that it noted was that if the package of criteria were to be revamped in the future, the test ought to be retained, 'to assess whether there are non-efficiency considerations that should have a bearing on the declaration decision.'¹⁰²

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.¹⁰³ 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.¹⁰⁴ 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 is that this 'allows a range of ill-defined values to muddy the scope and objectives of competition law.'¹⁰⁵

99 NCC Guide (above n 35) 114. 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.'

100 However, clause 1(3) does not define the term 'public interest' for the purposes of ss 44G(2)(f) and 44H(4)(f).

101 F Argy, 'National Competition Policy: Some Issues' (2002) 9 Agenda 33, 41-42.

102 PC Report (above n 6) 193.

103 To do otherwise confuses the realisation of potential gains with the distribution of those gains. Authorities which administer trade practices laws 'should not have to pursue two goals simultaneously': P Williams, 'Why Regulate for Competition?', Paper presented at the conference Regulating for Competition (New Zealand Centre for Independent Studies, Auckland, 1988) 12.

104 See further, Argy (above n 101) 43. Active policies would include, for example, adjustment assistance, equal opportunity measures, and active labour market programs (such as wage subsidies and training).

105 J Duns, 'Competition Law and Public Benefits' (1994) 16 Adelaide Law Review 245, 267. Admittedly, Duns' focus was the 'public benefit' test in Part VII of the Trade

Transposing Duns' analysis to the declaration criteria in Part IIIA, the authors concur that the public interest criterion, which itself has 'no identifiable objectives',¹⁰⁶ is 'the feature most at odds, at least potentially, with a view of competition law which sees the promotion of efficiency as its only proper goal.'¹⁰⁷

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.¹⁰⁸

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 preceding criteria have not been satisfied.¹⁰⁹ Such an approach is supported by the *Duke* decision,¹¹⁰ 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.

Conclusion

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, this article has put forward a convincing case that the criterion serves no useful purpose in the matrix of declaration criteria under Part IIIA. Certainly, no declaration decisions to date have turned on the public interest criterion. In fact, these 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

Practices Act, but the parallels with the 'public interest' criterion in Part IIIA are undeniable.

106 Ibid 259.

107 Ibid 266. 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) 3, for a similar condemnation of the public benefit test in the Commerce Act 1986 (NZ).

108 G Gentle, 'Economic Welfare, the Public Interest and the Trade Practices Tribunal' (1975) 51 *Economic Record* 174, 174.

109 See the relevant references in Table 1.

110 See above n 39.

DECLARATIONS UNDER PART IIIA OF THE TRADE PRACTICES ACT:
THE CASE FOR ABOLISHING THE PUBLIC INTEREST CRITERION

been interpreted correctly.¹¹¹ Most damaging, of course, is the capacity of a wide-ranging public interest test to undermine the pro-efficiency objective of Part IIIA.

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,¹¹² entrenchment of a public interest test within the matrix of declaration criteria is undoubtedly politically expedient.¹¹³ Realistically, some delay in acting on this article's recommendation must be expected. However, if, by the time of the next independent review of the access regime,¹¹⁴ there are no cases in which declaration criteria (a)–(e) were all satisfied, but a declaration was not recommended because to do so would be contrary to the public interest, then the case for abolishing criterion (f) will be complete.

111 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.

112 See generally, D Parham, 'A More Productive Australian Economy' (2000) 7 Agenda 3.

113 Community concern about the socio-economic effects of National Competition Policy is on-going. See, for example, L Rowe, 'Economic Reformers are Losing their Nerve', *The Australian* (26 October 2001) 13.

114 A further review of the national access regime has been recommended for five years hence: PC Report (above n 6) recommendation 16.2.