FEDERAL COURT OF AUSTRALIA

Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146

Trade Practices – proper construction of s 44G(2)(a) and s 44H(4)(a) of the *Trade Practices Act 1974* discussed

Competition Policy Reform Act 1995 (Cth)
Trade Practice Act 1974 (Cth) Part IIIA

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 cited
Network Ten Pty Ltd v TCN Channel Nine Pty Ltd (2004) 218 CLR 273 cited
Re Duke Eastern Gas Pipeline Pty Ltd (2001) 162 FLR 1 disapproved in part
Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd (1976) 25 FLR 169 cited
Re Review of Declaration of Freight Handling Services at Sydney International Airport (2000) ATPR 41-754 disapproved in part

SYDNEY AIRPORT CORPORATION LIMITED v AUSTRALIAN COMPETITION TRIBUNAL, VIRGIN BLUE AIRLINES PTY LIMITED, QANTAS AIRWAYS LIMITED, NATIONAL COMPETITION COUNCIL AND PARLIAMENTARY SECRETARY TO THE COMMONWEALTH TREASURER
NSD 31 OF 2006

FRENCH, FINN AND ALLSOP JJ
18 OCTOBER 2006
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 31 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**SYDNEY AIRPORT CORPORATION LIMITED** **Appellant**
AND:	**AUSTRALIAN COMPETITION TRIBUNAL** **First Respondent**
	VIRGIN BLUE AIRLINES PTY LIMITED **Second Respondent**
	QANTAS AIRWAYS LIMITED **Third Respondent**
	NATIONAL COMPETITION COUNCIL **Fourth Respondent**
	PARLIAMENTARY SECRETARY TO THE COMMONWEALTH TREASURER **Fifth Respondent**

JUDGES:	**FRENCH, FINN AND ALLSOP JJ**
DATE OF ORDER:	**18 OCTOBER 2006**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the costs of the respondents.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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	PARLIAMENTARY SECRETARY TO THE COMMONWEALTH TREASURER **Fifth Respondent**
JUDGES:	**FRENCH, FINCH AND ALLSOP JJ**
DATE:	**18 OCTOBER 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT

Introduction

1 This is an application for judicial review of a decision of the Australian Competition Tribunal (the "Tribunal") under Part IIIA of the *Trade Practice Act 1974* (Cth) (the "Act") and in particular pursuant to s 44K(8)(b) of the Act to declare, in respect of an application brought by the second respondent ("Virgin"), a service in connection with the use of facilities at Sydney Airport for a period of five years from 9 December 2005 to 8 December 2010.

2 It is necessary to appreciate the background to the introduction of Part IIIA into the

Act by the *Competition Policy Reform Act 1995* (Cth) as the necessary context in which to read the text of the Act: *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273. That said, it is helpful in understanding that context to appreciate what is ultimately the short question of statutory interpretation tendered for consideration. Part IIIA embodies a statutory regime for regulated access to essential facilities. The engagement of this regime is governed by the procedures in the Act. After an application for the declaration that a facility is an essential facility the National Competition Council (the "NCC") makes a recommendation to the relevant Minister, who then decides whether to declare the facility. There is a right of review to the Tribunal. At each level of the process (the recommendation by the NCC, the decision by the Minister and the decision on review by the Tribunal), criteria specified in the Act must be met before a positive recommendation (by the NCC) or decision (by the Minister or Tribunal) can be made. It is the meaning and content of one of those criteria that was debated in this application: s 44G(2)(a) (for the NCC) and s 44H(4)(a) (for the Minister and the Tribunal).

The background and context to Part IIIA

3 The context commences with the Report of the National Competition Policy Review dated 1993 under the chairmanship of Professor Hilmer and with the assistance of Messrs Taperell and Rayner. In the Executive Overview of the Report the need for access to essential facilities was discussed as follows at (xxxi)-(xxxiii):

> *"Access to Essential Facilities*
> *Introducing competition in some markets requires that competitors be assured of access to certain facilities that cannot be duplicated economically – referred to as "essential facilities". Effective competition in electricity generation and rail services, for example, will require firms to have access to the electricity transmission grid and rail tracks.*
>
> *While the misuse of market power provision of the Act can sometimes apply in these situations, submissions to this Inquiry confirmed the Committee's own assessment that something more is required to meet the needs of an effective competition policy.*
>
> *The Committee recommends that a new legal regime be established under which firms could in certain circumstances be given a right of access to specified "essential facilities" on fair and reasonable terms. That regime would operate by specific declaration applying to designated facilities under a general law, provide safeguards to the owner of the facility and to users, and have the flexibility to deal with access issues across industry sectors and*

facilities. Key features of the proposed regime include:

- *the regime could only be applied to a facility without the owner's consent if declaration was recommended by the National Competition Council after a public inquiry;*
- *the access declaration would specify pricing principles for the individual facility; thereafter, actual access prices would be determined through negotiation between the parties and, if need be through binding arbitration;*
- *the access declaration would specify any other terms and conditions relating to access designed to protect the legitimate interests of the owner of the facility; and*
- *all access agreements would be required to be placed on a public register; if additional safeguards were considered necessary to protect the competitive process they could be specified as part of the declaration process.*

The National Competition Council would play a central role in advising on whether access rights should be created and, if so, on what terms and conditions. ***The regime would only be applied to the limited category of cases where access to the facility was essential to permit effective competition and the declaration 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 competitiveness.*** *An access right under the proposed regime could not be created without the recommendation of the Council, although the designated Minister would have the discretion to decline to declare access notwithstanding the recommendation of the Council."*
[emphasis added]

4 Immediately following this passage, in the same Executive Overview in dealing with monopoly pricing the Report stated the following at (xxxiii):

> *"The Committee considers the primary response of competition policy in these markets should be to increase competitive pressures, including by removing regulatory restrictions, restructuring public monopolies and, if need be, providing third party access rights. Where measures of this kind are not practical or sufficient, some form of price-based response may be appropriate."*

5 Chapter 11 of the Report dealt with access to facilities. The Report described what it called the "Essential Facilities Problem" as follows at 240-241:

> *"Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. While it is difficult to define precisely the term* ***'natural monopoly', electricity transmission grids, telecommunication networks, rail tracks, major pipelines, ports and airports***

> ***are often given as examples. Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus 'essential facilities' in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets.*** *For example, competition in electricity generation and in the provision of rail services requires access to transmission grids and rail tracks respectively.*
>
> *Where the owner of the 'essential facility' is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to use its monopoly position to charge higher prices and derive efficiency. In these circumstances, the question of "access pricing" is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process outlined in Chapter 12."*
> [footnotes omitted; emphasis added]

6 Later in chapter 11, the Report considered the question as to when a legislated right of access should be created. The Report recognised the public interest (and hence political, using that word in the broad sense) considerations in any such decision. It was therefore recognised to be a decision for the executive government. The role of relevant criteria in constraining this politically charged discretion and the role of and the NCC was stated as follows at 250:

> *"At the same time, 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 three explicit legislative criteria****, and by a requirement that the creation of such a right has been recommended by an independent and expert body – the proposed National Competition Council."*
> [footnote omitted; emphasis added]

7 Four criteria were then set out and discussed. The first criterion was expressed as follows at 251:

> *"Access to the facility in question is essential to permit effective competition in a downstream or upstream activity."*

The discussion of this criterion was limited to one sentence, as follows:

> *"Clearly, access to the facility should be essential, rather than merely convenient."*

8 The second criterion was expressed as follows at 251:

> *"The making of the declaration is in the public interest, having regard to:*
> *(a) the significance of the industry to the national economy; and*
> *(b) the expected impact of effective competition in that industry on national competitiveness."*

The Report then discussed these considerations and the public interest and commercial considerations that underlay them. This discussion recognised that in any given case difficult and complex economic, commercial and social considerations might arise, such as the national interest in the significance of an industry, the viability of long-term investment decisions, risks (both national and commercial) of intruding compulsory provisions into economic activity.

9 The third criterion was expressed as follows at 252:

> *"The legitimate interests of the owner of the facility must be protected through the imposition of an access fee and other terms and conditions that are fair and reasonable, including recognition of the owner's current and potential future requirements for the capacity of the facility."*

These issues were discussed at some length later in the chapter. Obviously, in any given case, unless agreement could be reached about terms of access, issues of difficulty and complexity would arise in relation to these issues.

10 The fourth criterion was expressed as follows at 252:

> *"The creation of such a right must have been recommended by an independent and expert body."*

The role of the NCC was then discussed.

11 The recommendations of the Report in this chapter on essential facilities included the following at 266:

> *"11.4 **A right of access** to a facility **only be created if:***
> *(a) the owner agrees; or*
> *(b) the designated Commonwealth Minister is satisfied that:*
> *(i) **access to the facility in question is essential to permit effective competition in a downstream or upstream activity;***

> *(ii) such a declaration is in the public interest, having regard to:*
>
> *(1) the significance of the industry to the national economy; and*
>
> *(2) the expected impact of effective competition in that industry on national competitiveness; and*
>
> *(iii) the legitimate interests of the owner of the facility will be protected by the imposition of an access fee and other terms and conditions that are fair and reasonable.*
>
> *Where the owner of a facility has not consented to a declaration, the Minister may only make such a declaration if recommended by the National Competition Council and only on terms and conditions recommended by that body or on such other terms and conditions as agreed by the owner of the facility."*
> [emphasis added]

12 The provision of access to essential facilities was also discussed in the Report in the next chapter on monopoly pricing. The following was said at 272:

> *"Given the risks associated with regulatory responses, the 'first best' solution is to address the underlying cause of monopoly pricing by increasing the contestability of the market. This might be achieved by removing or reducing regulatory barriers to entry; restructuring public monopolies; or providing rights of access to certain 'essential facilities'."*

13 In 1994, the Council of Australian Governments ("COAG") released a package of draft legislation for public comment. One major element of the legislation was an access regime. An outline to the legislation introduced it as follows:

> *"These provisions provide for the declaration of certain services provided by facilities which are of national significance, and for the means by which persons may seek access to declared services. The Council will have a recommendatory role in the declaration process, and the Commission will be the body which determines whether access should be given where this is disputed, and on what terms and condition. Provision is made for appeals and for the enforcement of access determinations. The access provisions will become Part IIIA of the* Principal Act, ..."

14 Later in this outline, there was an explanation of why the access engine was needed, which included the following:

> ***"The term 'access' means the ability of suppliers or buyers to purchase the use of essential facilities on fair and reasonable terms.*** *An essential facility is a transportation or other system which exhibits a high degree of natural monopoly; that is, a competitor could not duplicate it economically. A*

natural monopoly becomes an essential facility when it occupies a strategic position in an industry such that access to it is required for a business to compete effectively in a market upstream or downstream from the facility. Possible examples of such facilities are electricity transmission lines, gas pipelines, water pipelines, railways, airports, telecommunication channels and sea ports. Such facilities can be owned by private or public sector organisations."
[emphasis added]

15 In discussing the view expressed in the Report of Professor Hilmer and his colleagues that a legislated right of access would apply only to major infrastructure facilities, the outline stated:

"It is also appropriate that ***an access regime would only apply where access to the facility is essential to permit effective competition in a dependent market*** *(that is, one downstream or upstream from the facility) given that such linkages would provide the prime anticompetitive motive for denying or impeding access. The practical effect of these parameters is that the number of instances where such a right is expected to be created is likely to be small and mostly confined to facilities traditionally owned by governments. This is not to say, however, that access issues will not arise in the private sector particularly as more public sector facilities and enterprises are privatised by their owner governments."*
[emphasis added]

16 The draft legislation contained a provision setting out when the NCC could recommend the declaration of a service. This provision was the antecedent of s 44G of the Act. The provision was as follows:

"@A-6.(1) The Council, on an application under section @A-5, may recommend to the designated Minister that a particular service be declared.

(2) The Council cannot recommend the declaration of a service that is the subject of an access undertaking in operation under section @A-18.

(3) The Council cannot recommend the declaration of a service unless it is satisfied of all the following matters:

- *(a)* ***that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;***
- *(b) that no other facility exists that can economically provide the service;*
- *(c) that it would be uneconomical for anyone to develop another facility to provide the service;*
- *(d) that the facility is of national significance, having regard to:*
  - *(i) the size of the facility; and*

(ii) the importance of the facility to constitutional trade or commerce;

(e) that access to the service can be provided without undue risk to human health or safety;

(f) that access to the service is not already the subject of a single, effective access regime;

(g) that access (or increased access) to the service would be in the public interest.

(4) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Council must apply the relevant principles set out in that agreement."
[emphasis added]

17 The notes on this provision in the outline contained the following:

"There a number of matters on which the Council must be satisfied before it can recommend the declaration of a service. These are:

- ***that access to the service would promote competition in a market (other than a market for the service);***
- *that no other facility exists that can economically provide the service;*
- *that it would be uneconomic for anyone to develop another facility to provide the service;*
- *that the facility is of national significance having regard to its size and the importance of the facility to interstate or overseas trade and commerce;*
- *that access to the service can be provided without undue risk to health or safety;*
- *that access to the service is not already subject to a single, effective access regime; and*
- *that access to the service would be in the public interest.*

The Council must be satisfied on each of the above before it can recommend the declaration of a service. A negative assessment on any of the above matters would mean that the service in question could not be recommended for declaration.

In determining whether access would promote competition, the Council may consider Australian and international markets. For example, access may facilitate the entry of Australian businesses into overseas markets."
[emphasis added]

18 Also in this package was a draft inter-governmental agreement between all Australian Governments dealing with and entitled "Competition Principles". In clause 6 of that draft agreement, the Government parties dealt with "Access to Services Provided by Means of Essential Facilities". Clause 6(1) provided for the following obligations upon the

Commonwealth:

> *"Subject to sub-clause (2), the Commonwealth will put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities (other than facilities which are products, production processes or intellectual property) where:*
> *(a) it would not be economically feasible to duplicate the facility;*
> *(b)* ***access to the service is necessary in order to permit effective competition in a downstream or upstream market;***
> *(c) the facility is of national significance having regard to the size of the facility or its importance to substantial interstate or overseas trade (or both); and*
> *(d) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist."*
> [emphasis added]

19 Clauses 6(2)-(4) dealt with circumstances where there were access regimes of a State or Territory.

20 In 1995, the *Competition Policy Reform Bill* was introduced into Parliament. Relevantly, clauses 44G and 44H were in the same terms as ss 44G and 44H of the Act to which we will come. The Explanatory Memorandum (in the form it took after amendments by the Senate to the Bill as introduced, in terms which are unnecessary to deal with) stated:

> *"165 This regime establishes two mechanisms for the provision of third party access, namely:*
> *(a) a process for declaration of services which provides a basis for negotiation of access. This is backed up by compulsory arbitration where the parties cannot agree on an aspect of access; and*
> *(b) a procedure whereby service providers can offer undertakings which set out the terms on which a provider will grant access to third parties.*
>
> ...
>
> *181 The Council cannot recommend that the service be declared if the service is the subject of an operative access undertaking. Also, there are a number of matters* all *of which the Council must be satisfied on before it can recommend that the service be declared. These are:*
> *(a) that access to the service would promote competition in a market (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 its size,*

the importance of the facility to constitutional trade and commerce, or its importance 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; and

(f) that access to the service would not be contrary to the public interest.

182 In determining whether access would promote competition, the Council may consider Australian and international markets. For example, access may facilitate the entry of Australian businesses into overseas markets.

...

187 The designated Minister cannot declare a service if the service is the subject of an operative access undertaking. Further, the designated Minister cannot declare a service unless satisfied of all the following matters:

(a) that access to the service would promote competition in a market (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 its size, the importance of the facility to constitutional trade and commerce, or its importance 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; and

(f) that access to the service would not be contrary to the public interest.

188 Once the designated Minister is satisfied of all these matters, he or she has a discretion whether or not to declare the service. As is the case for the Council, the Minister must consider whether it would be economical for anyone to develop another facility to provide part of the service."

21 In April 1995, an inter-governmental agreement was executed by all Australian Governments which included as cl 6(1) provision in the same terms as cl 6 in the draft inter-governmental referred to at [18] above.

The text and structure of Part IIIA

22 Part IIIA of the Act was then inserted by Act No 88 of 1995, the *Competition Policy*

Reform Act.

23 The word "service" is defined in s 44B as follows:

> *"**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."*

24 The phrase "third party" is defined in s 44B as follows:

> *"**third party**, in relation to a service, means a person who wants access to the service or wants a change to some aspect of the person's existing access to the service."*

25 Part IIIA, conformably with the recommendations of the Report of Professor Hilmer and his colleagues and of the COAG discussion paper, provides for a two-stage process. The first part of the process is dealt with in Division 2 of Part IIIA and deals with the declaration of services. The Minister or any other person may apply to the NCC requesting a recommendation that a service be declared: s 44F. Section 44F(4) provides a wide framework of consideration by the NCC as follows:

> *"In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared."*

26 Section 44G provides both limitations and a necessary framework for the NCC's recommendations as follows:

> *"(1) The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under section 44ZZA.*
> *(2) The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:*
> *(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;*

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

(3) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Council:

(a) must, subject to subsection (5), apply the relevant principles set out in that agreement; and

(b) must, subject to section 44DA, not consider any other matters.

(4) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the Council must follow that decision, unless the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement.

(5) In deciding whether a regime is an effective access regime, the Council must disregard:

(a) Part 3A of Schedule 1 to the Gas Pipelines Access (South Australia) Act 1997 of South Australia, as that Schedule applies as a law of South Australia; and

(b) if an Act of:

(i) the Commonwealth; or

(ii) another State; or

(iii) the Australian Capital Territory; or

(iv) the Northern Territory;

applies Schedule 1 to the Gas Pipelines Access (South Australia) Act 1997 of South Australia as a law of the Commonwealth, as a law of that other State or as a law of that Territory—Part 3A of that Schedule as so applying.

6) The Council cannot recommend declaration of a service provided by means of a pipeline (within the meaning of Schedule 1 to the Gas Pipelines Access (South Australia) Act 1997 of South Australia) if:

(a) a binding no-coverage determination is in force under Part 3A of that Schedule, as that Schedule applies as a law of South Australia, in respect of the pipeline; or

(b) a price regulation exemption is in force under Part 3A of that Schedule, as that Schedule applies as a law of South Australia, in respect of the pipeline.

(7) If an Act of:
(a) the Commonwealth; or
(b) another State; or
(c) the Australian Capital Territory; or
(d) the Northern Territory;
applies Schedule 1 to the Gas Pipelines Access (South Australia) Act 1997 of South Australia as a law of the Commonwealth, as a law of that other State or as a law of that Territory, the Council cannot recommend declaration of a service provided by means of a pipeline (within the meaning of that Schedule as so applying) if:
(e) a binding no-coverage determination is in force under Part 3A of that Schedule, as so applying, in respect of the pipeline; or
(f) a price regulation exemption is in force under Part 3A of that Schedule, as so applying, in respect of the pipeline."

27 Once the NCC gives the Minister its recommendation, he or she must either declare or decide not to declare the service: s 44H(1). Section 44H(2) is a provision in similar terms to s 44F(4), as follows:

> *"In deciding whether to declare the service or not, the designated Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the designated Minister may make a decision whether to declare the service or not."*

28 Subsections 44H(3) to (6), are *mutatis mutandis*, the same as s 44(G)(1) to (4) and are as follows:

> *"(3) The designated Minister cannot declare a service that is the subject of an access undertaking in operation under section 44ZZA.*
> *(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:*
> *(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;*
> *(b) that it would be uneconomical for anyone to develop another facility to provide the service;*
> *(c) that the facility is of national significance, having regard to:*
> *(i) the size of the facility; or*
> *(ii) the importance of the facility to constitutional trade or commerce; or*
> *(iii) the importance of the facility to the national economy;*
> *(d) that access to the service can be provided without undue risk to human health or safety;*
> *(e) that access to the service is not already the subject of an effective access regime;*

(f) that access (or increased access) to the service would not be contrary to the public interest.

(5) In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the designated Minister:

(a) must, subject to subsection (6A), apply the relevant principles set out in that agreement; and

(b) must, subject to section 44DA, not consider any other matters.

(6) If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the designated Minister must follow that decision, unless the designated Minister believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement."

29 If the Minister declares a service the provider may apply to the Tribunal for review; and if the Minister decides not to declare the service the applicant for the declaration may apply to the Tribunal for review: s 44K(1) and (2). The review is a reconsideration of the matter in which the Tribunal has the same powers as the Minister: s 44K(4) and (5). Thus the Tribunal must approach the matter in accordance with s 44H.

30 The second part of the process deals with access arrangements and is consequential upon a declaration being made. If a declaration is made, the terms of access may be negotiated privately between the parties and the agreed results of such negotiation may be registered with the Commission: see ss 44Z to 44ZY in Division 4 of Part IIIA. If, however, the terms of access are not able to be negotiated privately, the fact of declaration of the service enables the seeker of access or the provider of the service to notify the Commission that an access dispute exists: s 44S. The Commission then assumes the role of an arbitrator to the dispute: ss 44S, 44U and 44V. The potential width of the terms of reference of the arbitration can be seen from s 44V dealing with the contents of the arbitration determination. It is to be noted that the determination does not have to provide for access: s 44V(3). Thus, the declaration of the service under the first part of the process does not necessarily ensure access to the service, or indeed, on any particular terms.

31 Section 44W provides for the limitations on the determination that can be made by the Commission. In particular, s 44W(1) provides as follows:

"The Commission must not make a determination that would have any of the

following effects:

(a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;

(b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;

(c) depriving any person of a protected contractual right;

(d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;

(e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility."

32 Section 44X provides for matters which the Commission must and may take into account in making a determination as follows:

"(1) The Commission must take the following matters into account in making a determination:
(a) the legitimate business interests of the provider, and the provider's investment in the facility;
(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
(c) the interests of all persons who have rights to use the service;
(d) the direct costs of providing access to the service;
(e) the value to the provider of extensions whose cost is borne by someone else;
(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
(g) the economically efficient operation of the facility.

(2) The Commission may take into account any other matters that it thinks are relevant. "

33 A party to the arbitration determination may apply to the Tribunal for a review of the determination, which review is a "re-arbitration" of the access dispute in which the Tribunal has the same powers as the Commission: s 44ZP.

34 Division 5 of Part IIIA provides for written undertakings to be given by the provider of a service to the Commission in connection with provision of access to a service. In particular, for the purposes of ss 44G(1) and 44H(3), see s 44ZZA.

Comments on the context, text and structure of Part IIIA

35 Before examining the arguments of the parties about the meaning of s 44H(4)(a) and how the Tribunal approached it, the following general remarks are appropriate. First, the context and history of Part IIIA lead easily to the conclusion that difficult and complex questions of an economic, commercial and social character will be involved at both stages of the process. For example, in the first stage, such considerations as what is of national significance, whether it is economic to develop another facility and whether access would be contrary to the public interest could, no doubt, in any given case, be difficult and complex, and involve matters of judgment. Likewise, in the second stage, disputed questions of access, the legitimate business interests of the provider and its investment, the public interest, the interests of others, the costs and operational and technical issues involved could well be complex and difficult.

36 Secondly, notwithstanding what might well be anticipated to be the complexities and difficulties of the kind given above by way of example, the background material does not reveal any complexity in the concepts behind what the access regime is directed to: essential facilities that cannot be duplicated economically (to use the words of the Hilmer Report) and services being provided by means of significant infrastructure facilities in circumstances set out in cl 6(1)(a)-(d) of the Competition Principles Agreement of 11 April 1995 (see [18] above for the identical terms of the draft agreement).

37 Thirdly, in none of the various materials was there any discussion of any complexity of notion or anticipated complexity of assessment involved in respect of the consideration contained in cl 6(1)(b) of the Competition Principles Agreement: that access to the service is necessary in order to permit effective competition in a downstream or upstream market. Rather, the essential notion to be derived from the Hilmer Report, the outline of legislation issued by COAG, the Explanatory Memorandum and the Competition Principles Agreement is that it is necessary for the fact of access (in its ordinary meaning) to be relevant to effective competition in another market (upstream or downstream).

38 Fourthly, examining the subject matter of the decision of the Minister (and Tribunal) under s 44H the requirements of s 44H(4) do not present themselves as apparently exhaustive of the relevant considerations involved in the decision. Indeed, the second sentence of

s 44H(2) makes clear that the relevant consideration in the first sentence of the same subsection (which also appears in cognate terms as a consideration in s 44H(4)(b)) is not a limitation. Of course, the factors in s 44H(4) are limitations in the sense that they are matters in respect of all of which the Minister (or Tribunal) must be satisfied before he, she (or it) can declare a service. But s 44H(4) is a statutory statement of necessary matters, it is not expressed to be a list of the only considerations that may be relevant to be considered.

39 This last point is relevant when one comes to consider the meaning and content of s 44H(4)(a). The construction and interpretation of s 44H, and in particular s 44H(4), should not be approached on the basis that it is necessary to find a place for all possible competing arguments about the merits in any given decision about the making of a declaration within the list of necessary pre-conditions of satisfaction in s 44H(4). After the considerations in s 44H(2) and (4) are dealt with, the decision to be made whether or not to declare a service may be affected by a wide range of considerations of a commercial, economic or other character not squarely raised by, nor falling within, the necessary pre-conditions in s 44H(4). Of course, any such additional considerations must not be irrelevant in the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-42, in particular having regard to the purposes, text and structure of the Act.

The factual context here

40 The factual background that follows is taken from the reasons of the Tribunal and was not in dispute.

41 In 1997 and 1998, most major Australian airports, with the exception of Sydney airport, were privatised by the grant of 50 year leases to private operators. In 1998, the Commonwealth leased Sydney airport to the applicant ("SACL") for 50 years with an option to extend for a further 49 years. At this time, SACL was owned by the Commonwealth. In June 2002, control of Sydney airport was given to a private consortium (Southern Cross Airports Consortium), which also acquired all the shares in SACL.

42 Sydney airport is the largest and busiest airport in Australia, accounting for 50% of all international arrivals into Australia; 30% of all Australia's domestic passengers pass through Sydney airport. It is one of the two terminals on the Sydney-Melbourne route, which route

accounts for 20% of all passenger movements in Australia and which is one of the ten busiest air routes in the world.

43 SACL provides services at Sydney airport including three runways, various taxiways and aprons for aircraft using about 40 gates for domestic operation and other gates for international operation. The facilities in question in respect of the declaration were so-called "airside" facilities, as distinct from "landside" facilities. It is unnecessary to descend to any terminological or definitional debate about these words. The Tribunal found that the "service" for the purpose of its review was comprised of the activities between passengers or cargo embarking, disembarking, loading or unloading and the aircraft becoming airborne or landing – that is, all movement between runways and passenger arrival and departure gates and maintenance, equipping and re-equipping of the aircraft. Challenges in connection with this finding by the Tribunal were abandoned before the hearing in this Court. Thus, the relevant service can be described by the phrase used by the Tribunal: "Airside Service".

44 There were a number of subject matters of a commercial nature which concerned Virgin, Qantas and SACL. In respect of some, Qantas and Virgin had a common interest contrary to that of SACL. In respect of others, Qantas and Virgin had different and opposing interests. The most stark and pressing interest of the latter kind was the question of the method of charging for aeronautical services.

45 There were a number of charges related to the Airside Service. They were set out by the Tribunal at [167] as follows:

- *The Domestic Passenger Services Charge ("Domestic PSC") payable by domestic airlines in respect of each arriving and departing passenger;*
- *a portion of the Terminal 2 Passenger Facilitation Charge ("PFC");*
- *the regional aircraft runway charge payable by regional airlines;*
- *the freight and general aviation runway charge payable by operators of freight and general aviation aircraft;*
- *an apron charge for general aviation aircraft;*
- *security charges.*

46 Before 1 July 2003, SACL levied aeronautical charges based on maximum take-off weight of the aircraft. In 2000, various airlines sued SACL in this Court over increases in its

aeronautical charges. The details of the case are irrelevant for present purposes. However, as part of negotiations to settle the case, SACL and Qantas discussed a possible change to the basis for SACL's charging from a maximum take-off weight basis to one calculated by reference to passengers carried. SACL, in effect, agreed to change the basis of its charging. After various dealings with the ACCC and much discussion with the airlines (and strenuous opposition from Virgin), on 1 July 2003, SACL began levying aeronautical charges on a basis of the number of passengers, not the maximum take-off weight of the aircraft.

47 By reason of the businesses carried on by Qantas and Virgin and the equipment, routes and frequencies of their respective businesses, a change from charging based on maximum take-off weight to charging based on passenger numbers significantly advantaged Qantas over Virgin. The charge was no longer substantially a fixed charge by reference to plane capacity, but substantially variable based on numbers of passengers carried.

48 On 1 October 2002, Virgin applied to the NCC for a recommendation under s 44F(2) that a service be declared for "Airside Service" defined as follows:

> *"a service for the use of runways, taxiways, parking aprons and other associated facilities (Airside Facilities) necessary to allow aircraft carrying domestic passengers to:*
>
> *(i) take off and land using the runways at Sydney Airport; and*
>
> *(ii) move between the runways and the passenger terminals at Sydney Airport,"*

49 In November 2003, the NCC recommended that the Airside Service not be declared.

50 On 29 January 2004, the Parliamentary Secretary to the Treasurer decided not to declare the Airside Service.

51 On 18 February 2004, Virgin applied under s 44K(2) to the Tribunal for a review of the Parliamentary Secretary's decision. After an 11 day hearing in October 2004, with later filed submissions, the Tribunal determined, on 12 December 2005, as follows:

> *"1. It sets aside the decision of the Parliamentary Secretary to the Commonwealth Treasurer of 29 January 2004 not to declare the services required for the use of runways, taxiways, parking aprons and other associated facilities (Airside Facilities) necessary to allow aircraft*

carrying domestic passengers to:

(i) take off and land using the runways at Sydney Airport; and

(ii) move between the runways and the passenger terminals at Sydney Airport.

2. *It declares the service for the use of runways, taxiways, parking aprons and other associated facilities (Airside Facilities) necessary to allow aircraft carrying domestic passengers to:*

(i) take off and land using the runways at Sydney Airport; and

(ii) move between the runways and the passenger terminals at Sydney Airport, (Airside Service).

3. *It determines that the declaration in paragraph 2 of the determination shall be effective on and from 9 December 2005 and shall expire on 8 December 2010."*

The approach of the Tribunal

52 Central to the application is the Tribunal's approach to s 44H(4)(a).

53 The parties agreed that the "market for the service" referred to in s 44H(4)(a) was the market for aeronautical services in Sydney.

54 There was a difference between the parties before the Tribunal as to the description of the other market for s 44H(4), being the so-called "dependent market". The Tribunal found that the relevant dependent market related to the carriage of domestic air passengers into and out of Sydney. No complaint was made about this in the hearing in this Court.

55 The Tribunal then turned to the meaning and scope of the expressions "access" and "increased access" in s 44H(4). After setting out the respective contentions of the parties (which were reflected in their submissions before the Court), the Tribunal set out its views as to the meaning of these words at [137] – [144] of its reasons, as follows:

> *"As noted above, the TPA does not define access or increased access. Looking to the common meaning of the term 'access', the Concise Oxford Dictionary (8th ed., 1990) defines access as, inter alia, 'the right or opportunity to reach or use or visit'. The New Oxford Dictionary of English (2001) defines access, inter alia, as 'the means or opportunity to approach or enter a place'. The Macquarie Dictionary (3rd ed., 1998) defines access as meaning, inter alia, 'way, means or opportunity of approach'. It was generally agreed between the parties that the ordinary meaning of the terms*

meant that where 'access' is used in criterion (a), it is a noun meaning a right or ability or opportunity to make use of the service, and that 'increased access' is therefore an enhanced right, ability or opportunity to make use of the service.

In the present circumstances, Virgin Blue already has use of the facility of Sydney Airport. However, access is a concept that is broader than physical access, and includes the terms and conditions on which such physical access is available.

In our view, the notions of access and increased access include the terms and conditions upon which such access or increased access is made available at the facility. This is consistent with the view taken by the Tribunal in Re Duke Eastern Gas Pipeline Pty Ltd (2001) 162 FLR 1 where the Tribunal considered the meaning of 'access (or increased access) to Services' for the purposes of s 1.9(a) of the National Third Party Access Code for Natural Gas Pipeline Systems. There, the Tribunal rejected the applicants' argument that the statutory criterion regarding access or increased access was not enlivened unless access to the service was either unavailable or limited in some way. The Tribunal stated at 16:

> *'criterion (a) does not have as its focus a factual question as to whether access to the pipeline services is available or restricted. Put in that way, the question would not take sufficient account of the terms on which access is offered. Rather, the question posed by criterion (a) is whether the creation of the right of access for which the Code provides would promote competition in another market.'*

Such an interpretation is also supported by the legislation. Div 3 of Pt IIIA of the TPA explicitly recognises that access disputes in that Division cover aspects of access to a declared service: s 44 S . Further, s 44 V (2)(c) allows the ACCC in its determination of an arbitration of an access dispute to specify the terms and conditions of a third party's access to a service. Although Divs 2 and 3 of the TPA operate independently, their operation should be complementary as they relate to the same subject matter and it is therefore desirable that the construction of terms that are common to both Divisions be consistent.

The definition in s 44B of the TPA of a 'third party', in relation to a service, as being 'a person who wants access to the service or wants a change to some aspect of the person's existing access to the service' (emphasis added) also supports this interpretation.

This interpretation is further supported by the fact that it gives a meaning to criterion (a) that reflects its origin, namely cl 6(1)(b) of the Competition Principles Agreement, dated 11 April 1995, which provides:

> *'Subject to subclause (2), the Commonwealth will put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities where:*
>
> *...*

(b) access to the service is necessary in order to permit effective competition in a downstream or upstream market.'

In this proceeding, Virgin Blue is essentially seeking different terms and conditions for the use of the Airside Service; those terms and conditions being the opportunity for arbitration in default of commercial agreement between access seekers and the provider of the service in relation to matters and issues which affect Virgin Blue's ability to engage in competitive conduct in the dependent market. Accordingly, this is a case of increased access, where Virgin Blue is seeking an enhanced right, ability or opportunity to make use of the Airside Service at Sydney Airport in the sense that it is seeking different terms and conditions upon which the use of that Service is made available to it which involve the opportunity for arbitration in default of agreement.

Increased access will occur if declaration is made because the terms and conditions of access will change and the right of access will be enhanced. In the present circumstances this will occur because, whereas prior to declaration a decision to impose a charge by SACL or impose a term and condition as a prerequisite to gaining or continuing use of the Airside Service could not be challenged or appealed in any way, subsequent to declaration such charge or term or condition could be challenged, made the subject of negotiation and, if it could not be negotiated to a mutually acceptable resolution, could be referred to arbitration by the ACCC."

56 The Tribunal then dealt with the notion of promotion of competition in a dependent market. Consistently with prior decisions of the Tribunal *(Re Review of Declaration of Freight Handling Services at Sydney International Airport* (2000) ATPR 41-754 (the "*Sydney International Airport Review*") and *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR1), the Tribunal decided that it was necessary to undertake an analysis of the future with declaration as against the future without declaration. This was referred to as a comparison of the factual with a counterfactual. (This language derives from the analysis of past exercises of market power in respect of provisions such as s 46. Here, both possibilities are as to the future, as would be the case when proposed mergers are being assessed.)

57 Recognising that competition in the context of the Act is a process: *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) 25 FLR 169, the Tribunal stated at [148]:

"...a comparison of the factual and the counterfactual requires a forward-looking analysis which involves a comparison of the competitive conditions and environment likely to arise in the future with and without declaration."

58 The primary submission of Virgin before the Tribunal was that s 44H(4)(a) required the Tribunal to be satisfied that a right or ability or an increased or enhanced right or ability to use the service, as opposed to no right or ability or only a limited right or ability to use the service, would promote competition in the dependent market. The Tribunal rejected this and consequently rejected Virgin's submission as to the proper test for the question of promotion of competition, saying at [149]:

> *"The characterisation of the factual and counterfactual scenarios put forward by Virgin Blue in its primary submission was that the Tribunal is required to compare the future state of competition in the dependent market with a right or ability to use the service, and the future state of competition in the dependent market without any right or ability to use the service. We do not agree. In our view, the counterfactual should be understood by reference to the current conditions of access projected into the future. Virgin Blue currently has use of Sydney Airport, and to undertake a counterfactual analysis which discounts this fact would be wholly unrealistic."*

59 The Tribunal described what it saw as the task at [153] – [157] as follows:

> *"Put another way, the task of the Tribunal is to compare:*
> - *the opportunities and environment for competition in the dependent market if the Airside Service is declared; with*
> - *the opportunities and environment for competition in the dependent market if the Airside Service is not declared.*
>
> *This comparison is assisted by any evidence of monopolistic behaviour, or of a capacity and willingness on the part of the monopolist to engage in conduct which significantly disrupts or affects competition in the dependent market.*
>
> *The promotion of competition in the dependent market does not require a demonstration that there will be more efficient outcomes in the dependent market. Greater efficiency may follow declaration, but the critical issue is whether there will be an enhancement of the competitive environment and greater competitive opportunities in the dependent market.*
>
> *Whether competition will be promoted depends upon the extent to which a service provider has the ability, in the absence of declaration, to use market power to affect adversely competition in the dependent market. If a service provider has market power and the ability to use it in a way that adversely affects competition in a dependent market, and if the service provider has a history of so acting, declaration involving increased access to the service (in the sense of access on different terms and conditions with the ability to negotiate and, if necessary, have independent arbitration of those terms and conditions), would be likely to improve the environment for competition in the dependent market.*

> *Thus, the relevant comparison is the future with declaration (involving an assessment of what impact the opportunity for arbitration will have, such that future commercial negotiations would be conducted in the context whereby arbitration would be available to the parties as a circuit-breaker in the absence of reaching an agreement), and the future without declaration (this being understood by reference to the current conditions of access and the current and past behaviour of the service provider projected into the future).*"

60 In so concluding, the Tribunal rejected the proposition that as part of its consideration of s 44H(4)(a) it was required to surmise possible outcomes of any arbitration. It also rejected the proposition that the relevant task was to assess whether SACL would engage in anti-competitive conduct. It expressed the relevance of past or present conduct in the analysis at [151] and [152], as follows:

> *"...one should ask whether past or present conduct of the service provider informs us as to the likely future conduct of the service provider and the effect on competition in the dependent market of such conduct. If such conduct has, or is likely to have, an adverse effect on competition, then one looks at declaration and asks whether that will enhance competition in the dependent market by creating opportunities and an environment in which the impact of such conduct and its effect on competition may be lessened or diminished.*
>
> *When one considers the counterfactual, the current scenario may be used as a benchmark, taking into account past and current events and circumstances and extrapolating them into the future. A consideration of the factual involves an assessment of whether increased access on different terms and conditions would enhance the environment for competition in the dependent market and create or open up more opportunities for competitive conduct in the dependent market.*"

61 The Tribunal then undertook a detailed examination of the task that it had set itself by examining three broad subjects:

- SACL's use of its monopoly power
- whether there were any effective constraints on the manner in which SACL may exercise its monopoly power
- whether increased access to the Airside Service would promote competition in the dependent market

62 The analysis by the Tribunal of SACL's use of its monopoly power involved a

detailed discussion, first, of SACL's revenue and pricing policies for various Airside Services and charges at [167] – [366] The Tribunal concluded at [366] as follows:

> *"We are satisfied that, without declaration, SACL will seek to increase its revenues by reference to charges imposed either directly or indirectly on airlines by creating specific new charges calculated to increase revenue in a manner which will not be the subject of supervision or control and will be implemented in a manner which would not otherwise occur in a competitive environment."*

63 Secondly in the analysis of SACL's use of its monopoly power, the Tribunal examined the non-price terms and conditions in commercial arrangements between SACL and domestic airlines using Sydney airport at [367] – [477], including a number of specific incidents of particular complaint. The Tribunal concluded at [477] as follows:

> *"In the absence of declaration, we are satisfied that any commercial negotiations in the future as to the non-price terms and conditions on which the airlines utilise the facilities and related services at Sydney Airport are likely to continue to be protracted, inefficient, and may ultimately be resolved by the use of monopoly power producing outcomes that would be unlikely to arise in a competitive environment. The proposed force majeure clause and the retention of aircraft clause in the draft Aeronautical Services Agreement are examples of such outcomes. This situation is exacerbated by the lack of an appropriate dispute resolution procedure providing independent arbitration in any of the commercial agreements entered into or proposed between SACL and the airlines."*

64 The analysis by the Tribunal whether there were any effective constraints on the manner in which SACL might exercise its monopoly power involved: an analysis of the countervailing power of the airlines ([480] – [498]), the threat of re-regulation ([499] – [508]), non-aeronautical revenues ([509] – [512]) and these things in combination ([513] – [515]). The Tribunal's conclusions about these matters can be seen most easily in [515], as follows:

> *"... the airlines do not have any effective countervailing power, that the threat of re-regulation has had, and will continue to have, little effect on SACL's conduct, and that non-aeronautical revenue is an insufficient constraint in relation to the current and likely future levels of Airside Service charges in the medium term. In such circumstances, the combination of these matters does not bring together any effective constraints on SACL's exercise of monopoly power as they do not interact to enhance the significance of each other on the whole."*

65 The third element of the analysis, whether (in this case, increased) access to the Airside Service would promote competition in the dependent market, was described by the Tribunal in [516] and [517], as follows:

> *"In order for the Tribunal to declare the Airside Service on the basis of a finding that increased access to the Airside Service would promote competition in the dependent market, it is necessary to establish that, in the counterfactual, SACL's use of monopoly power in relation to use of the Airside Service would have an adverse impact on competition in the dependent market which would not exist in the factual with declaration. We are guided by SACL's past conduct in assessing how it will act in the future. Where SACL has misused its monopoly power in the past in such a way that has adversely impacted on competition in the dependent market, we can assume that in the future without declaration SACL will continue to misuse its monopoly power in a way which will have an adverse impact on competition in the dependent market. In the factual SACL will be constrained from misusing its monopoly power in the future because commercial negotiations will be conducted with the knowledge that, in default of agreement, independent arbitration is available.*
>
> *Whether increased access to the Airside Service will promote competition in the dependent market, in the sense of enhancing the environment for competition, can be ascertained by comparing the situation in the dependent market with declaration with the situation in the dependent market without declaration. That is, a comparison of the factual with the counterfactual."*

66 The conclusions reached by the Tribunal about the issues that will have an effect on the dependent market and that were extrapolated from its consideration of the present and past conduct by SACL were set out at [519], as follows:

> *"We are satisfied that the likely future without declaration will include the following circumstances:*
>
> - *the Domestic PSC* [the Domestic Passenger Services Charge] *for the Airside Service will continue to be imposed and will increase over time in accordance with SACL's 28 September 2004 model;*
> - *negotiations for new or varied contractual arrangements will continue to be long, drawn-out and inconclusive;*
> - *minimum service standards for SACL may not be established for some considerable time or at all;*
> - *new charges for services may be imposed by SACL upon airlines either directly or indirectly. We refer in particular to charges for ground handling services and the fuel throughput levy. SACL's carve out proposal would take some parts of SACL's revenue out of the asset base for revenue calculation purposes which has historically been regulated by the ACCC. This gives rise to a potential for SACL to double-charge*

for the use of assets in respect of which charges for the Airside Service are levied, presuming the asset base for revenue calculation purposes was not appropriately adjusted (a matter which SACL has not foreshadowed);

- *post-May 2006 SACL unilaterally may increase substantially the revenue it obtains from airlines from the imposition of its Airside Service charge. This involves calculations using SACL's valuation of land, asset beta, risk-free rate and the number of passengers passing through Sydney Airport, figures which are the subject of some controversy;*
- *the proposed force majeure clause, if implemented, is likely to reduce SACL's risk and increase the potential risk and cost liability of the airlines using the Airside Service at Sydney Airport."*

67 The Tribunal had little difficulty in concluding that there would be a promotion of competition in the dependent market if declaration were made, saying at [521] and [522]:

"It is likely that, without declaration, these issues will either remain the source of protracted dispute or be resolved by SACL in a manner which is brought about by the exercise of monopoly power and not brought about by an opportunity for an arbitrated solution. If declaration is made, the environment for the promotion of competition is enhanced in the dependent market because there will be an opportunity for all the matters to which we have referred to be resolved by means of independent arbitration, more in line with what would be expected in a competitive environment. ...

...

In reaching this conclusion, we have not lost sight of the fact that we are concerned to consider the promotion of 'competition' in the dependent market rather than the promotion of 'competitors'. The limited number of participants in the dependent market, and, in particular, the existence of a virtual duopoly, makes it inevitable that we focus on effects on the participants, particularly the major participants."

68 After elaborating upon particular issues in this assessment (the impact of the change in domestic Airside Service charges from maximum take-off weight to passenger-based charging, the impact of increase in revenue and the impact of non-price terms and conditions), the Tribunal expressed its conclusions about s 44H(4)(a) at [581] – [585], as follows:

"The issue whether increased access to the Airside Service will promote competition in the dependent market is complex because the answer is derivative. In this context, increased access equates to access on different terms and conditions; in particular, on a term that if any airline which uses

Sydney Airport is unable to agree with SACL on any aspect of access to the Airside Service then an access dispute will arise which, in the absence of a negotiated resolution, will be arbitrated and determined by the ACCC.

Increased access does not mean that an airline will inevitably be able to alter, vary or modify the terms upon which it is given access to the Airside Service. Rather, it means that the commercial environment will change and the airline will have the opportunity to seek to achieve such alteration, variation or modification by independent arbitrated determination in default of a negotiated resolution.

An example exposes the distinction: if the Airside Service is declared, Virgin Blue will not be able to require SACL to change the Domestic PSC to an MTOW - based charge or any other charge. However, Virgin Blue will have the opportunity, if it wishes, to seek to negotiate that charge with SACL on mutually acceptable terms. If it cannot do so, it will have the opportunity, indeed the right, to notify the ACCC that an access dispute exists and to have the ACCC, by arbitration, determine whether the nature, structure and level of the Airside Service charge should be changed and, if so, in what manner. A similar situation can also arise, for example, if Qantas asks SACL to lay down certain minimum standards of service delivery in relation to the provision of the Airside Service. If SACL is unwilling to do so, Qantas would have the option of referring the matter to the ACCC for an arbitrated determination.

It can be seen from our analysis of the factual and the counterfactual that a comparison of the circumstances and state of competition between the factual and the counterfactual discloses that declaration of the Airside Service would bring about increased access (that is, access on different terms and conditions) to the Airside Service at Sydney Airport which would promote competition in the dependent market. The environment for competition in the dependent market will be enhanced if declaration of the Airside Service is made compared to the state of competition in the dependent market if the Airside Service is not declared.

We are therefore satisfied, in terms of criterion (a), that increased access to the Airside Service would promote competition in at least one market other than the market for the Airside Service, that is, the dependent market."

The arguments on the application

SACL's Submissions

69 SACL submitted that the Tribunal failed to direct itself to the correct question. The central question, it was submitted, was to identify whether the supply of the Airside Service had, in fact, been denied or restricted. Only then could a question of access or increased access arise, and only then could one undertake a counterfactual analysis for s 44H(4)(a), that

counterfactual analysis being between the future state of affairs with the denial or restriction as found and the future state of affairs without such (found) denial or restrictions on access. The counterfactual analysis was not between the future state of affairs with and without declaration as the Tribunal had approached the matter.

70 Related to this fundamental complaint was the submission that the Tribunal erred in concluding that a change in terms and conditions of access (which were more favourable) was increased access. SACL submitted that a change in terms and conditions will only operate to increase access when the change is to a term that effectively operates as a restriction on access and the change removes or reduced that restriction.

71 SACL said that the determination should therefore be set aside.

Virgin's submission

72 Virgin supported the result before the Tribunal. It did so putting three separate submissions. The first was that the approach of the Tribunal in comparing the future with and without declaration was a correct application of the existing approach of the Tribunal as used in earlier reviews. The second was that the correct approach was not that applied by the Tribunal, but a simpler one: to compare the future with access (or increased access) to the service with the future without access (or increased access). Using this test, Virgin submitted the decision of the Tribunal could not have been any different and so the decision should not be interfered with. The third was that SACL's submission was both wrong and one that had not been put to the Tribunal.

Qantas submissions

73 Qantas submitted that the Tribunal's approach to s 44H(4)(a) was correct. It also submitted that even if SACL's submission were correct, s 44H(4)(a) would be satisfied in this case.

The NCC's submissions

74 The NCC submitted that the Tribunal's approach was correct.

The meaning and content of s 44H(4)(a) and the disposition of the application

75 Only one party (SACL) sought have the determination set aside.

76 For the reasons that follow, the submissions of SACL that it is necessary for the engagement and operation of s 44H(4)(a) to identify and determine the existence and extent of a denial or restriction of access should be rejected.

77 Nowhere in the text or structure of Part IIIA, or the context of, and background to, its passing is there any foundation for the construction propounded by SACL. Part IIIA is not, and was never intended to be, a regime to set right what might be said to be unacceptable conduct. To require the Tribunal (and before it the NCC and the Minister) to conduct a factual investigation of this kind to identify and determine a denial or restriction of access is to intrude into s 44H(4)(a) an enquiry not justified by the text or structure of Part IIIA.

78 The context and background and evident purpose of the legislation make clear that the regime is not only engaged when some denial, or restriction of supply of the service can be demonstrated. Such a construction would limit the operation of this Part and impede it by an anterior and collateral factual enquiry. Further, to the extent that the found denial or restriction acts as a focal point or governor of the enquiry as to the promotion of competition contemplated by s 44H(4)(a) the section would be acting more like a remedy for a wrong, rather than as a public instrument for the more efficient working of essential facilities in the economy.

79 Further, the possibility that one might need to decide whether access was being denied or restricted or merely that monopoly charges were being made to people who could pay them (which could be part of this antecedent enquiry) reveals the tension between the section so operating and the underlying aims of the Act, and in particular s 2 of the Act, and also of Part IIIA itself. The whole scheme of Part IIIA, when understood against the background to its passing, is antithetical to s 44H(4)(a) operating to limit the possibility of declaration except where it can be demonstrated as a fact that the service provider has in the past denied or restricted access to the service or supply of the service.

80 The above is enough to lead to the conclusion that the application should be

dismissed. However, Virgin's second argument that there is a simpler construction of s 44H(4)(a) to that which was applied by the Tribunal was fully argued and should be dealt with. This is especially so given the central importance to the Australian economy and business life of the efficient and timely working of the Act.

81 We agree with the submission of Virgin that the relevant enquiry in s 44H(4)(a) is the comparison between access and no access and limited access and increased access. That is what the words say. They do not say that it is necessary to examine whether declaration of the service would promote competition; they say "access or increased access ... would promote competition."

82 The Tribunal reached the view that the relevant enquiry was whether declaration of the service would promote competition by construing "access" as "regulated access under Part IIIA." It correctly rejected the view that it should surmise the outcome of any arbitration that may occur. It correctly recognised that access (or increased access) may not be achieved by the operation of Part IIIA. Even if the parties cannot agree on the terms of access or increased access, there is no guarantee that an arbitration will bring about access, or access on any particular terms. Thus, it considered that the surrogate for "access under Part IIIA" is "declaration under Part IIIA".

83 We disagree with this approach whereby "access" becomes "declaration under Part IIIA". Whilst Part IIIA is entitled "Access to Services", the two stage approach, if engaged, does not necessarily lead to access or increased access to the service for anyone. It is a convenient and meaningful heading, in particular in the light of the terminology and nomenclature of the debate, discussion and background leading up to the passing of the amending Act. But "access" is an ordinary English word. Taking into account the context and background, we think that in this part of s 44H, the word "access" is being used in its ordinary English sense. Virgin is correct in its submission that all s 44H(4)(a) requires is a comparison of the future state of competition in the dependent market with a right or ability to use service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service.

84 We do not accept the Tribunal's basis for rejecting the submission that it would be unrealistic to undertake a counterfactual analysis which discounts the fact that Virgin has

access. That, with respect, is not the point. The terms of s 44H(4)(a) do not incorporate the requirement for comparison with what is factually the current position in any given circumstances. Once a declaration is made any potential user can take advantage of it. Thus, it is an unnecessary constriction of a provision by way of pre-condition, to engage in a detailed factual enquiry heavily dominated by the past and the present.

85 That is not to say that what has happened in relation to the service, how the provider has behaved and the degree to which it can be said that monopolistic behaviour has or has not impeded the efficient operation of the market in question may not be relevant considerations attending the making of the decision. For instance, if it can be demonstrated that the service has been provided in a manner that can be described as fair, even-handed and in a way most likely to maximise vigorous competition in the downstream market, that may be a powerful and relevant consideration as to why no declaration should be made. Thus, it may be that a with and without declaration counterfactual (or some aspect of it) can be seen as relevant to the decision at hand. That enquiry is simply not mandated by the pre-condition of satisfaction in s 44H(4)(a).

86 This construction of s 44H(4)(a) conforms to the purpose of Part IIIA revealed by the background and context: see in particular the Hilmer Report, the COAG explanatory material referred to above and clause 6 of the Competition Principles Agreement referred to above. None of this material reveals any necessity to examine the current state of access or to engage in an enquiry based on assessing the future with and without declaration. The essential precondition discussed was that access (that is in its ordinary meaning) was necessary to permit effective competition in a downstream or upstream market.

87 Nor does the use of the phrase "increased access" lead to the conclusion that the base for the analysis is the current state of affairs. There was no separate treatment of the phrase in the background material. Access was discussed in the COAG explanatory material as the ability of buyers to purchase the use of essential facilities on fair and reasonable terms. Increased access can be seen as nothing more than an increased or enhanced ability to do so.

88 In our view, the test used by the Tribunal for the operation of s 44H(4)(a) is not justified by the words of the provision as understood in their context and the background to the introduction of Part IIIA.

89 In any given enquiry, there may be room in deciding whether or not to declare the service, to analyse the question whether the engagement of the regime under Part IIIA by the declaration will have an effect on the competitive process in the dependent market. But that enquiry, formalised in the way it was by the Tribunal, is not what is called for by s 44(H)(4)(a)

Relief

90 What then should happen to the Tribunal's decision? It should not be set aside based on the arguments propounded by SACL.

91 Virgin submitted that, on its alternative construction, which we favour, it is clear that s 44H(4)(a) would be satisfied. It submitted that this conclusion could be easily reached because (as substantially found by the Tribunal) (a) Sydney Airport is a natural monopoly and SACL exerts monopoly power; (b) the Airside Service is a necessary input for effective competition in the dependent market; (c) neither Bankstown or Richmond Airport could provide the service; and (d) the parent company of SACL had the first right of refusal to build and operate any second major airport within 100 kilometres of the Sydney CBD. Further, there was no real debate among the experts before the Tribunal that, given the strategic nature of Sydney as Australia's largest city and a significant gateway to international air travel, access to Sydney Airport is essential to compete in the domestic air passenger market.

92 In these circumstances, there appears little doubt that on Virgin's alternative argument s 44H(4)(a) must have been satisfied here.

93 SACL put no submission to the effect that the matter should be remitted to the Tribunal for rehearing if the correct construction of s 44H(4)(a) was as submitted by Virgin. Despite a specific invitation at the hearing in which counsel for SACL was taxed with the consequences of the correctness of Virgin's alternative argument, SACL put no submission that the decision might conceivably have been different on this hypothesis.

94 Having regard to the exhaustive and meticulous reasons of the Tribunal, after a full hearing, we do not think that the decision should be interfered with. Whilst we consider that the Tribunal misconstrued s 44H(4)(a) by infusing an overly elaborate body of considerations

into that criterion, the nature of those detailed considerations (the comparison of the future with and without declaration) are not such as to be irrelevant (as understood by reference to *Peko-Wallsend*) to the enquiry as a whole as to whether to declare the service, even though they were irrelevant to a consideration of s 44H(4)(a). In these circumstances, we would simply dismiss the application. We see no reason why SACL should not pay the costs of the application of all parties.

I certify that the preceding ninety-four (94) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices French, Finn and Allsop.

Associate: 

Dated: 18 October 2006

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The Fifth Respondent filed a submitting appearance	Australian Government Solicitor
Date of Hearing:	2 and 3 May 2006
Date of Judgment:	18 October 2006