Attachment 1

DLA PIPER AUSTRALIA

MEMORANDUM

TO	:	Australian Airports Association
FROM	:	Simon Uthmeyer and Sophia Grace, DLA Piper
DATE	:	11 October 2018
SUBJECT	:	Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)

Australian Airports Association (**AAA**) has asked us to provide advice on Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**). In particular, AAA has asked us to advise on the threshold for declaration following the 2017 amendments to the declaration criteria in Part IIIA.

In providing our advice we have reviewed the following legal advices submitted in the Productivity Commission's 2018 inquiry into the economic regulation of airports:

- Advice of Johnson Winter & Slattery (**JWS**) to Airlines for Australia & New Zealand dated 5 September 2018 (**JWS Advice**);[1] and
- Advice of Gilbert + Tobin (**G+T**) to Virgin Australia Airlines Pty Ltd, Virgin Australia Regional Airlines Pty Ltd and Tigerair Airways Australia Pty Ltd dated 11 September 2018 (**G+T Advice**).[2]

For the reasons explained below, contrary to the G+T and JWS Advices we do not consider that the recent changes to the Part IIIA declaration criteria have significantly increased the threshold that must be met for declaration of services supplied by non-vertically integrated infrastructure operators, such as airports.

Compared to the approach of the Australian Competition Tribunal (**Tribunal**) and Full Federal Court (**Court**) to criterion (a) in the Port of Newcastle matter and the Court's approach to criterion (a) in the Sydney Airport matter, the 2017 amendments to criterion (a) increased the threshold for satisfaction of criterion (a). However, between the Court's decision in the Sydney Airport matter in 2006 and the Tribunal's decision in the Port of Newcastle matter in May 2016, the threshold for criterion (a) was not as low as that suggested by those decisions. This is because generally the Court's approach to criterion (a) in the Sydney Airport matter was not strictly followed by the NCC and the Tribunal until the Tribunal's decision in the Port of Newcastle. As a consequence, in practice, except for potentially between the time of the Tribunal's decision in May 2016 and the November 2017 amendments, the threshold for satisfaction of criterion (a) has remained at a similar level and the amendments to criterion (a) have not significantly changed that threshold. Further, in practice the perceived threshold for criterion (a) did not change significantly between May 2016 and November 2017 because by the

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[1] Airlines for Australia & New Zealand, *Economic Regulation of Airports, Submission to the Productivity Commission,* September 2018, Appendix D.

[2] Virgin Australia Group, *Economic regulation of airport services, Submission by the Virgin Australia Group on the Productivity Commission Issues Paper*, September 2018, Attachment A.

time of the Tribunal's Port of Newcastle decision, the Government had already announced its intention to seek to amend criterion (a).

In any event, the G+T and JWS Advices fail to acknowledge that the threshold for satisfaction of criterion (a) is currently similar to that adopted by the Tribunal in 2005 in the Sydney Airport matter. Significantly in that matter the Tribunal declared airside services at Sydney Airport, which effectively demonstrates that declaration of services provided by airports remains a credible threat following the 2017 amendments.

Introduction

Part IIIA of the CCA sets out the National Access Regime which is a legal framework through which infrastructure users can gain access to nationally significant infrastructure and potentially have their terms and conditions of access determined by the ACCC if they cannot agree them with the infrastructure provider.

Under the regime, a person (e.g. an access seeker) or Minister can apply to the National Competition Council (**NCC**) for a recommendation that a particular service be declared. The NCC reviews and consults on the application and makes a recommendation to the relevant Minister as to whether to declare the service. The Minister then decides whether to declare the service. Declaration gives any access seeker a right to negotiate the terms and conditions of access with the service provider and, if negotiations fail, a right to have the terms of access arbitrated by the ACCC.

In order to be declared, the service must satisfy the 'declaration criteria'. In November 2017, the declaration criteria were amended (**2017 Amendments**).[3] The amendments followed from reviews of those criteria by the Productivity Commission in 2013 and the Competition Policy Review led by Professor Ian Harper completed in 2015 (**Harper Review**). The Harper Review's recommendations in respect of declaration criteria (a) and (b) were different from those of the Productivity Commission. The Government provided a single response to the Productivity Commission's and Harper Review's recommendations in which it supported the Productivity Commission's recommendations for changes to the declaration criteria (**Government Response**). That is, where the Harper Review's recommendations on the declaration criteria diverged from those of the Productivity Commission, the Government supported the Productivity Commission's recommendation and not those of the Harper Review.[4]

Criterion (a)

As a result of the 2017 Amendments, criterion (a) is now (section 44CA(1)(a) of the CCA):

> that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service

The underlining in the extract above shows the changes made to criterion (a).

We explain below that:

- the 2017 Amendments to criterion (a) were made to reframe the approach to criterion (a) to be similar to that applied by the Tribunal in the 2005 Sydney Airport matter in which the Tribunal declared the airside service at Sydney Airport;

[3] *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

[4] *Australian Government response to the Productivity Commission and Competition Policy Review recommendations on the National Access Regime*, 24 November 2005.

- while immediately prior to the 2017 Amendments, criterion (a) had a lower legal threshold, generally its threshold has been at a similar level to today despite the Court's decision in *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others* (2006) 155 FCR 124 (**Sydney Airport**) due to different approaches taken to criterion (a) following that decision and the impending amendments to the criterion; and

- G+T has reached its conclusion on the significance of the changes to criterion (a) for access to non-vertically integrated infrastructure on an incorrect premise.

2017 Amendments to criterion (a)

The 2017 Amendments to criterion (a) were made to reframe the approach to criterion (a) to be similar to that applied by the Tribunal in the 2005 Sydney Airport matter in which the Tribunal declared airside services at Sydney Airport.

Prior to the 2017 Amendments, the most recent interpretation of criterion (a) was that of the Court in its August 2017 decision on the application for declaration of shipping channel services at the Port of Newcastle. The Court endorsed its approach to criterion (a) in the Sydney Airport matter and upheld the Tribunal's decision to apply that approach.[5] Under that approach 'access' in criterion (a) took its ordinary meaning. The approach involved a comparison of 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 or with a restricted right or ability to use the service.[6]

The Court's Sydney Airport decision concerned an application by Sydney Airports Corporation Ltd for judicial review of the Tribunal's decision in *Virgin Blue Airlines Pty Ltd* [2005] ACompT 5 to declare the airside service[7] at Sydney Airport. The Tribunal had adopted an approach to criterion (a) which compared the future with declaration to the future without declaration.[8] The Tribunal concluded that under that approach, there would be a promotion of competition in the dependent market if the airside service were declared. On review, the Court upheld the Tribunal's decision to declare the airside service. However, in doing so the Court reconsidered the Tribunal's approach to criterion (a). Accordingly, both the Tribunal and the Court found that criterion (a) was satisfied in the case of the airside service at Sydney Airport, under different approaches to criterion (a). This fact appears to have been overlooked in the G+T Advice.

The 2017 Amendments were designed to re-instate the approach to criterion (a) prior to the Full Court's decision in Sydney Airport. That is, they were designed to re-instate an approach similar to that applied by the Tribunal. Under the Tribunal's approach and the current approach required by the 2017 Amendments to criterion (a):

- 'access' in criterion (a) means declaration; and

- criterion (a) involves a comparison of the future state of competition under the status quo (including where access may already be available under the status quo) against the future state

[5] *Application by Glencore Coal Pty Ltd* [2016] ACompT 6.

[6] *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others* (2006) 155 FCR 124 at [83]; *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 346 ALR 669 at [136] and [139].

[7] 'Airside service' was defined as a service for the use of runways, taxiways, parking aprons and other associated facilities necessary to allow aircraft carrying domestic passengers to take off and land using the runways at Sydney Airport and move between the runways and the passenger terminals at Sydney Airport

[8] *Virgin Blue Airlines Pty Ltd* [2005] ACompT 5.

> of competition where access is granted on reasonable terms and conditions through declaration.[9]

This is noted in the Government Response, where the Government states:[10]

> The Government agrees that this criterion should be comparison of access under the current situation versus access on reasonable terms and conditions through declaration as this is the most meaningful, realistic measure. In effect, this would re-establish the pre-2006 interpretation of criterion (a).

Similar statements were made in the Exposure Draft Explanatory Materials to the *Exposure Draft - Competition and Consumer Amendment (Competition Policy Review) Bill 2016*, which states:[11]

> Paragraph 44CA(1)(a) requires an assessment of the effect of access (or increased access) following a declaration on competition in at least one market, other than the market for the service. The amendments to paragraph 44CA(1)(a) are intended to restore the pre-2006 interpretation of how the criterion was applied.
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> The amendments require the decision maker to consider whether access (or increased access) on reasonable terms and conditions following declaration would promote a material increase in competition in a market other than the market for the service. That is, the amendments focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.
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> This requires a comparison of two future scenarios: one in which access (or increased access) is available, and one in which no additional access is granted. In comparing these two scenarios, the granting of access (or increased access) must promote the material increase in competition.

As noted in the introduction to our advice, the 2017 Amendments to criterion (a) were made in response to a recommendation of the Productivity Commission in its 2013 inquiry report on the National Access Regime (**2013 Report**). In its 2013 Report, the Productivity Commission observed that:[12]

> … Prior to 2006, the NCC and decision makers applied criterion (a) as requiring that declaration would promote competition in a dependent market. The approach adopted was to compare the status quo against the future state of competition in a dependent market with declaration of the infrastructure service.
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> The Federal Court's 2006 decision in *Sydney Airport Corporation Limited v Australian Competition Tribunal* (the Virgin Blue case — in which Virgin Blue was seeking better terms and conditions of access to services provided by the Sydney Airport Corporation) applied a new interpretation of criterion (a). The decision lowered the hurdle for declaration by requiring a comparison of the state of competition without *access* (even though access was already provided to Virgin Blue) and the state of competition with access.

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[9] Productivity Commission, *Inquiry Report, National Access Regime*, 25 October 2013, page 249.

[10] *Australian Government response to the Productivity Commission and Competition Policy Review recommendations on the National Access Regime*, 24 November 2005, page 2.

[11] *Exposure Draft Explanatory Materials, Exposure Draft – Competition and Consumer Amendment (Competition Policy Review) Bill 2016*, at [13.18] to [13.20]. We observe that the form of criterion (a) in the exposure draft legislation was substantively the same as that enacted – it read 'that access (or increased access) to the service, on reasonable terms and conditions, following a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service'. As such, the only difference was that the word 'following' in the exposure draft legislation was replaced with the words 'as a result of' in the final form of the amending act.

[12] Productivity Commission, *Inquiry Report, National Access Regime*, 25 October 2013, page 17.

> The Federal Court's interpretation of criterion (a) in the Virgin Blue case means the potential effect of access regulation on competition is overstated to the extent that any existing access arrangements promote competition in a dependent market. It has been argued that, using the Federal Court's test, access to almost all natural monopoly infrastructure would satisfy criterion (a) — the criterion may be satisfied even where the market power of a service provider is constrained due to the countervailing market power of users, or where the provider has an incentive to provide access.

The Productivity Commission concluded that:[13]

> Criterion (a) should be amended so that it is only satisfied where access to an infrastructure service on reasonable terms and conditions through declaration (rather than access per se) would promote a material increase in competition in a dependent market. This amended criterion would require a comparison of the future state of competition under the status quo (including where access may already be available under the status quo) against the future state of competition where access is granted on reasonable terms and conditions through declaration.

Accordingly, the Productivity Commission concluded that criterion (a) should be reframed as a test of whether declaration (not access) would promote competition. This was the approach taken by the Tribunal in the Virgin Blue case in 2005 where the Tribunal decided to declare airside services at Sydney Airport. The JWS and G+T Advices overlook this.

Threshold prior to the 2017 Amendments

While immediately prior to the 2017 Amendments, criterion (a) had a lower legal threshold, generally its threshold has been at a similar level to today despite the Court's decision in the Sydney Airport matter due to different approaches to criterion (a) following that decision and the impending amendments to the criterion.

We observe that while the Court's 2006 Sydney Airport decision should have lowered the legal threshold for criterion (a), generally that decision was not strictly followed in every case by the NCC and the Tribunal until the Tribunal's decision in the Port of Newcastle matter in 2016. At the time of the Tribunal's Port of Newcastle decision, the Government had already announced its intention to seek to amend the CCA to implement the Productivity Commission's recommendation in respect of criterion (a).[14]

This means that, in practice, the threshold for criterion (a) has generally remained at a similar level despite the Court's Sydney Airport decision, and the 2017 Amendments to criterion (a) have not significantly changed that threshold.

The fact that in decisions subsequent to the Sydney Airport decision the Tribunal and NCC did not strictly follow the approach to criterion (a) in that decision was recognised by the Productivity Commission in its 2013 Report where it noted that:

- '[i]n the Pilbara rail case, the Tribunal may have re-raised the hurdle for satisfying criterion (a)';[15] and
- the declaration focused competition test it was recommending for criterion (a) 'is consistent with the current position of the NCC on the interpretation of the competition test following the Tribunal's 2010 decision in the Pilbara rail case'.[16]

[13] Productivity Commission, *Inquiry Report, National Access Regime*, 25 October 2013, page 249.

[14] *Australian Government response to the Productivity Commission and Competition Policy Review recommendations on the National Access Regime*, 24 November 2005.

[15] Productivity Commission, *Inquiry Report, National Access Regime*, 25 October 2013, page 171.

The Government's 2006 amendments to criterion (a) to introduce a requirement that access (or increased access) promote a 'material increase in competition', rather than 'promote competition' also cast doubt on the status of the Court's approach in Sydney Airport. For example, we observe that in the Productivity Commission's last enquiry into the economic regulation of airport services, the Productivity Commission stated the following in respect of the Sydney Airport decision:[17]

> The interpretation adopted by the Full Federal Court in deciding that the domestic airside services should be declared caused concerns that the threshold for declaration had been lowered to such an extent that Part IIIA could supplant the light-handed regime. However, that decision revolved around superseded declaration criteria. Since October 2006, Part IIIA has incorporated a higher threshold requirement that access promote a *material* increase in competition in a related market and also an 'objects clause' that emphasises economic efficiency. More recently, the Government introduced reforms to Part IIIA that streamline administrative processes (eg binding time limits and limited merits review).

In addition, in the NCC's 2015 recommendation in respect of the Port of Newcastle declaration application, the NCC decided that in assessing the effect of access (or increased access) on competition, it was permitted to consider the effect of access (or increased access) on such reasonable terms and conditions as may be determined in an arbitration under Part IIIA of the CCA.[18] The NCC noted that criterion (a) was amended subsequent to the Sydney Airport decision to require a 'material increase in competition'.[19] The NCC also considered that the Court's conclusion in the Pilbara rail matter that 'access' means access on such reasonable terms and conditions as may be determined in the second stage of the Part IIIA process[20] may not be entirely reconcilable with the Court's decision in Sydney Airport.[21] Accordingly, the NCC's approach involved considering whether increased access to the shipping channel service on such reasonable terms and conditions as may be determined via the second stage of the Part IIIA process would promote a material increase in competition in a dependent market.[22] As noted in the G+T advice,[23] this approach is similar to a with or without declaration test, such as that applied by the Tribunal in the Sydney Airport case.

G+T's conclusion based on incorrect premise

The view in the G+T Advice that criterion (a) is now 'far more' difficult to satisfy in respect of non-vertically integrated infrastructure[24] is incorrectly premised on:

- the NCC finding in the Sydney Airport matter that criterion (a) was not satisfied, however, the Court finding that it was. In doing so, G+T overlooks the fact the Tribunal found criterion (a) was satisfied on the same approach to interpreting criterion (a) as the NCC; and

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[16] Productivity Commission, *Inquiry Report, National Access Regime*, 25 October 2013, page 173.

[17] Productivity Commission, *Inquiry Report, Economic Regulation of Airport Services*, 14 December 2011, page 30.

[18] NCC, *Final Recommendation, Declaration of the shipping channel service at the Port of Newcastle*, 2 November 2015 at [4.76].

[19] NCC, *Final Recommendation, Declaration of the shipping channel service at the Port of Newcastle*, 2 November 2015 at [4.73] and [4.86].

[20] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 277 ALR 282 at [112]. Note the Full Federal Court said this in relation to criterion (f). See also the Tribunal's decision in *In the matter of Fortescue Metals Group Ltd* [2010] ACompT 2 at [1066] and [1166] in respect of criteria (a) and (f), respectively. This issue was not addressed by the High Court on appeal.

[21] NCC, *Final Recommendation, Declaration of the shipping channel service at the Port of Newcastle*, 2 November 2015 at [4.73].

[22] NCC, *Final Recommendation, Declaration of the shipping channel service at the Port of Newcastle*, 2 November 2015 at [4.77].

[23] G+T Advice at [3.15].

[24] G+T Advice at [3.24], [3.27], [3.37] and [3.42].

- G+T's view that the NCC would have found criterion (a) was satisfied in the Port of Newcastle matter had it been vertically integrated. There is no basis for this view.

In their advice, G+T refer to the decisions of the NCC and Court in respect of the Sydney Airport matter, however, they omit any substantive discussion of the Tribunal's decision. They then state that 'the Court's different approach to the interpretation of criterion (a) led it to a conclusion that was diametrically opposed to the NCC's'.[25] We observe that the Tribunal's approach to interpreting criterion (a) in that matter was similar to that of the NCC and the Tribunal concluded that criterion (a) was satisfied whereas the NCC did not. The reason for this different conclusion was in part because of additional evidence before the Tribunal on review and a divergent view as to the threat of increased regulation. While the Court applied a different approach to interpreting criterion (a) to the Tribunal, it came to the same conclusion on criterion (a). Accordingly, G+T's emphasis on the different conclusions on criterion (a) being reached by the NCC and the Court due to their divergent approaches to interpreting criterion (a) is misplaced.

There is also no basis for the statement in the G+T Advice that 'had PNO been vertically integrated, the NCC would have found criterion (a) to have been satisfied'.[26] A conclusion as to the outcome of the criterion (a) analysis were Port of Newcastle Operations (**PNO**) vertically integrated cannot be presupposed. It must depend on the facts – for example, whether PNO was trying to advantage its position in the dependant market through how it priced or gave access to the shipping channel service (eg. by favouring its vertically integrated operations).[27]

In addition, we observe that the G+T Advice incorrectly suggests that the Harper Review supports a view that the changes to criterion (a) were made to increase the threshold for criterion (a) and to confine the scope of the National Access Regime.[28] Contrary to the statement in the G+T advice, the Government did not accept the Harper Panel's recommendation on criterion (a). The Harper Review agreed with the Productivity Commission's recommendation that criterion (a) should be expressly focused on the effect of declaration (rather than access) on promoting competition in dependent markets. However, the Harper Panel remained concerned that 'criterion (a) sets a low threshold for declaration'.[29] Accordingly, the Harper Review recommended criterion (a) should be amended to require that access on reasonable terms and conditions through declaration promote a *substantial* increase in competition in a dependent market that is *nationally significant*. We note that the quote from the Harper Review in the G+T advice has been edited in a way which misstates the Harper Panel's view.[30] That quote should read:[31]

> The Panel agrees with the PC's proposed change to criterion (a), <u>but</u> considers that criterion (a) sets too low a threshold for declaration. The burdens of access regulation should not be imposed on the operations of a facility unless access is expected to produce efficiency gains from competition that are significant. This requires that competition be increased in a market that is significant and that the increase in competition be substantial. [Underline emphasis added]

[25] G+T Advice at [3.12].

[26] G+T Advice at [3.18]

[27] NCC, *Final Recommendation, Declaration of the shipping channel service at the Port of Newcastle*, 2 November 2015 at [3.18]

[28] G+T Advice at [3.31] and [3.32].

[29] Harper Panel, *Competition Policy Review, Final Report*, March 2015, page 433.

[30] G+T Advice at [3.31].

[31] Harper Panel, *Competition Policy Review, Final Report*, March 2015, page 433.

Further, the observation in the G+T Advice that the Harper Panel considered the scope of the National Access Regime should 'be confined to ensure its use is limited to exceptional cases'[32] is of no import since the Harper Panel's recommendations on key declaration criteria (criteria (a) and (b)) were not accepted by the Government or implemented in the 2017 Amendments.

Further, we do not agree with the view in the G+T Advice that 'any access seeker attempting to satisfy criterion (a) would face substantially higher practical difficulties under the amended criteria than previously'.[33] G+T explains that this view is because of the addition of the words 'on reasonable terms and conditions, as a result of declaration of the service' which G+T considers require an assessment of the reasonableness of the current terms and conditions, compared with those that would result from an arbitration conducted post-declaration.

However, the view that access would be on reasonable terms and conditions has been the case since the Court's decision in Sydney Airport. The Court stated that:[34]

> … 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.

Further, the Tribunal's analysis of criterion (a) in the Pilbara Rail matter preceded on assumption that access was on reasonable terms and conditions.[35] The Tribunal has also noted that the analysis does not require the decision maker to surmise the possible outcome of any arbitration that may occur.[36] To the extent G+T are suggesting that the amended criterion (a) requires the decision maker to assess whether each of the current terms and conditions of access are reasonable and to surmise what would be the terms and conditions determined in an arbitration, that is not the case.[37]

Rather, where an access seeker already has access and is seeking increased access through declaration, the Part IIIA case is likely to focus on those of the current terms/conditions of access the access seeker considers unreasonable (i.e. the reason for the declaration application) and whether access on terms and conditions that are reasonable as a result of declaration (without specifying what those terms and conditions would look like) would promote a material increase in competition. Such matters are likely to be raised and considered in any Part IIIA case concerning increased access in any event as they go to the core of the reason an access seeker (who already has access) seeks declaration.

Criterion (b)

As part of the 2017 Amendments, declaration criterion (b) was amended to restore a natural monopoly test (section 44CA(1)(b) of the CCA).[38] Prior to amendment, criterion (b) in Part IIIA of the CCA had most recently been interpreted as a private profitability test.[39]

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[32] G+A Advice at [3.32].

[33] G+T Advice at [3.43].

[34] *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others* (2006) 155 FCR 124 at [86].

[35] *In the matter of Fortescue Metals Group Ltd* [2010] ACompT 2 at [1066].

[36] *Virgin Blue Airlines Pty Ltd* [2005] ACompT 5 at [150]; *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others* (2006) 155 FCR 124 at [82]; *In the matter of Fortescue Metals Group Ltd* [2010] ACompT 2 at [1066].

[37] See also Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* at [12.21] which notes that the reference to reasonable terms and conditions 'does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration'.

[38] Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 at [12.22].

In respect of G+T's view that criterion (b) has become more difficult to satisfy in a practical sense,[40] we observe that:

- Contrary to G+T's view, in recommending the amendments to criterion (b) in its 2013 Report, the Productivity Commission observed that there were practical issues with the private profitability test that may limit its effectiveness and mean that declaration might not occur in circumstances it was warranted. The Productivity Commission said:[41]

> First, there are some practical issues with the private profitability test that may limit its effectiveness. Since the Federal Court's judgment in the Pilbara rail case, the NCC has consistently expressed a strong view that a private profitability test would be unworkable in practice. In particular, the NCC has emphasised that — in instances where another facility that could provide the service has not already been, or is not committed to being, developed — the NCC and the designated Minister would almost always face competing assessments of profitability from access seekers and service providers, and it would be very difficult to be satisfied that a facility is unprofitable to duplicate (NCC 2011c)….
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> Given a decision maker has to be affirmatively satisfied that a facility is uneconomic to duplicate, sufficient uncertainty over the question of whether a facility is unprofitable to duplicate could prevent declaration in cases where declaration is warranted.

- In response to the Harper Panel's recommendation to maintain the private profitability test for criterion (b), the Government considered that this would set too high a bar for declaration. The Government said:[42]

> The Harper Review's recommendation for this criterion would keep the bar for declaration very high, potentially leading to inefficient duplication of infrastructure and weakening the incentive for commercially negotiated outcomes.

Accordingly, the Government is of the view that the current approach to criterion (b) lowers the bar for access seekers from the previous approach which was law since the Court's 2010 decision in the Pilbara rail matter.[43]

Criterion (d)

As part of the 2017 Amendments, the public interest declaration criterion (now criterion (d) in section 44CA(1)(d) of the CCA) was amended to be framed as an affirmative test. Criterion (d) requires the decision maker to be satisfied that access (or increased access) to the service on reasonable terms and conditions as a result of declaration would promote the public interest.

The amendment raised the hurdle for criterion (d) as the criterion previously required that access would not be contrary to the public interest.[44] Of course this not mean, however, that criterion (d) will

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[39] See the High Court's decision in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379; see also, the Full Federal Court's decision in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57.

[40] G+T Advice at [4.15].

[41] Productivity Commission, *Inquiry Report, National Access Regime*, 25 October 2013, pages 157 to 158.

[42] *Australian Government response to the Productivity Commission and Competition Policy Review recommendations on the National Access Regime*, 24 November 2005, page 3.

[43] *In the matter of Fortescue Metals Group Ltd* [2010] ACompT 2.

[44] *Australian Government response to the Productivity Commission and Competition Policy Review recommendations on the National Access Regime*, 24 November 2005, page 6; Productivity Commission, *Inquiry Report, National Access Regime*, 25 October 2013, page 181.

be applied in a way that thwarts genuine applications for declaration. Rather, in making its recommendation on the public interest criterion, the Productivity Commission said:[45]

> The Commission is of the view that the current construction of the public interest test sets a hurdle for declaring an infrastructure service that is too low to ensure that access regulation is only applied where it is likely to generate net benefits to the community. In keeping with the broader principle that government intervention should promote community welfare, a service should only be declared where the decision maker is satisfied that access would be in the public interest test.

Ease of making declaration application

In addition to the discussion of the threshold for declaration above, we observe that the initial process of making a declaration application to the NCC under Part IIIA is straightforward and inexpensive. Further, the NCC, the Minister and the Tribunal (on review) are subject to statutory timelines for their decisions (which can be extended in the case of the NCC and Tribunal).[46] While the costs and timelines of the declaration process have the potential to increase (particularly where Tribunal review is sought of the Minister's decision), the recent amendments to the declaration criteria should serve to provide greater certainty as to the interpretation of those criteria than in the past with the potential to reduce the instances of Tribunal review.

Further, given that the initial process of making a declaration application is straightforward and inexpensive, that in itself may be sufficient to act as a constraint to airports in their dealings with users. We note, for example, that it appears that in the past airlines have used declaration applications as a means of putting pressure on airports in commercial negotiations. For example, in 2014 Tiger Airways applied for declaration of the Domestic Terminal Service at Terminal 2 at Sydney Airport and withdrew its application a month later. In 2012, at the time of seeking access to the airside service at Sydney Airport, Virgin Blue Airlines also sought declaration of a domestic terminal service. Two months later, Virgin Blue Airlines withdrew its application in respect of the domestic terminal service following commercial agreement with Sydney Airport Corporation on terminal access.

Conclusion

Having regard to the discussion of the threshold for declaration above and the ease of making a declaration application, we consider that the threat of declaration under Part IIIA remains an effective constraint on airports in their dealings with users.

Simon Uthmeyer and Sophia Grace
DLA Piper

11 October 2018

[45] Productivity Commission, *Inquiry Report, National Access Regime*, 25 October 2013, pages 178 to 179.

[46] Sections 44GA, 44H(9) and 44ZZOA of the CCA.