

National Competition Council

**Template for applications for declaration
under part IIIA of the
Trade Practices Act 1974**

December 2006

Preamble

This document sets out the information that should be included in applications to the National Competition Council for declaration of an infrastructure service under part IIIA of the *Trade Practices Act 1974 (TPA)*.

The template seeks to gather the information the Council needs to analyse an application and undertake consultations with service providers and other interested parties. By gathering this information at the time an application is made the Council is looking to minimise the time taken to consider such applications.

Applicants are asked to answer all relevant questions. Where an applicant does not have access to precise or detailed information sought, they should provide a best estimate, or the best publicly available information, and indicate whether the service provider or some other party is likely to have the information concerned. Where applicants do not answer a question, they should explain why the question is not relevant or any other reason why an answer is omitted.

The numbered questions are intended to provide applicants with a template for their application. In addition, a brief discussion is included in each section to assist applicants to focus their answers to the related questions.

A more detailed discussion of the Council's process and of the declaration criteria is available in *The national access regime: A guide to Part IIIA of the Trade Practices Act 1974, Part B Declaration* (Guide to part IIIA), which is available on the Council's website, www.ncc.gov.au.

Complete applications and timing

The Council commences considering an application for declaration once it receives a complete application. To be complete an application should answer all the relevant questions listed in this document, including delineating the service to which access is sought and providing all relevant facts and supporting information.

Throughout their applications, applicants should refer to evidence to support their arguments and identify the source of factual material. Applications should include any modelling or expert evidence that the applicant wishes to use to support their views.

Applications should be provided electronically and in hard copy.

The Council strongly encourages applicants and their advisors to discuss their applications with the Council prior to lodgement.

The Council endeavours to deal with applications within four months, as specified in section 44GA of the TPA.

The **key milestones** within this 120 day period are as follow:

- Pre-application discussions with Council --
- Complete application lodged day 0
- Public notification of application day 1
 - o Application posted on NCC website
 - o Identified interested parties notified
 - o Public notice placed in newspaper
- Closing of submissions in response to application day 35
- Draft recommendation released day 70
- Closing of submissions in response to draft recommendation day 100
- Final recommendation provided to decision maker day 120

Those familiar with the Council’s past processes relating to part IIIA applications will note that the Council no longer intends to produce issues papers in relation to applications, although this step may be taken where the circumstances of a particular application make it necessary.

Where a complete application is submitted meeting this indicative timeframe is likely to be achievable in most cases. However, if an application is incomplete and significant information is omitted there is an increased possibility that the Council will need more than four months to consider the application.

Confidential information

The Council uses open public processes to consider applications. It treats applications that it accepts as complete as public documents, unless confidentiality is agreed. It publishes applications on its web site and provides them to interested parties.

Applicants wanting to submit confidential information should discuss the matter with the Council’s Secretariat prior to making the application. Where the Council agrees to accept confidential material, applicants should provide separate copies of their application, one with the confidential information clearly marked and another for public release with the confidential information removed.

Each of these versions should be provided in electronic and hard copy form.

Lodging applications

Electronic copies of applications should be sent to by email to:

info@ncc.gov.au

Hard copies should be sent by courier or delivered to:

Executive Director
National Competition Council
Level 9
128 Exhibition Street
Melbourne Vic 3000

Hard copies may also be mailed to:

Executive Director
National Competition Council
G P O Box 250
Melbourne Vic 3001

Applicant details

1.1 Who is the applicant?

Applicants should provide the Council with sufficient information to identify the company or individual making the application.

1.2 Who is the applicant's representative?

Applicants should provide the Council with the name of the person who is its authorised representative in relation to the application. The Council will direct its communications and requests for information to this person.

1.3 Contact details.

This should include relevant email addresses and a physical address for the delivery of documents, including the notification of any decision of the designated Minister or the Council related to the application or the declaration recommendation. Applicants should also provide a telephone number, email address and postal address for the representative nominated under question 1.2.

Service for which access (or increased access) is sought

Accurately defining the service is one of the most important parts of an access application. Information on service definition is available in section 3 of the Guide to part IIIA.

Applicants seeking declaration of more than one service must define and discuss the declaration criteria in relation to each service separately. A service can only have one access provider. If there is more than one access provider then there is more than one service and more than one application is required. The Council is, however, likely to use one process to consider applications for multiple, related services.

2.1 Describe the service the applicant wants to purchase from the service provider.

Declaration under part IIIA of the TPA provides for access to a service of a facility (or service of part of a facility) rather than the facility itself. Applicants should specify the service they wish to have access to in terms of what would be bought and sold, or for which there is a potential transaction.

Examples of services defined in previous applications are in box 1.

Box 1 Examples of service definition

Airport service

The use of runways, taxiways, parking aprons and other associated facilities (Airside 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.

Sewage services

A service for the transmission of sewage via Sydney Water's Sydney Sewage Reticulation Network from the Customer Collection Points to the Interconnection Points (Transmission Service).

A service for connection of new trunk main sewers owned and operated by Services Sydney to the existing Sydney Sewage Reticulation Network at the Interconnection Points (Interconnection Service).

Rail track services

Point-to-point rail track services provided by the use of the Wirrida–Tarcoola rail track under lease to Asia Pacific Transport.

Applicants should ensure they have identified all of the services that would need to be declared for access to enhance competition in other markets.

- 2.2 Describe how, and for what purpose, the applicant intends to use the service.**
- 2.3 What are the reasons for seeking access to the service?**
- 2.4 What activities would the applicant undertake if access was provided - what products and/or services would it produce?**
- 2.5 What would be the consequences for the applicant and others if access was not obtained?**
- 2.6 What alternative ways could the applicant produce or deliver its products or services? Or would it choose not to produce or deliver those products or services if access was not granted?**
- 2.7 If the applicant is seeking access to multiple services, describe how these services interrelate.**
- 2.8 Why is access to all of these services necessary?**
- 2.9 What are the consequences of not obtaining access to each of the services?**

If more than one service has been identified applicants should describe how these services are related and provide evidence and facts on the consequences of not obtaining access to all of the services. For example, if one of the services is not declared, does the applicant still seek access to the remaining services?

The rest of this guide refers to the service defined in the application as the service for which declaration is sought, as “the service”.

Facility used to provide the service

Applicants should clearly identify the infrastructure that provides the service. Further discussion on identifying the facility(ies) is in part 3 of the Guide to part IIIA.

3.1 Describe the facility(ies) used to provide the service.

Additional detail could be provided in appendices.

3.2 Where are the facility(ies) located?

Include a map and/or diagram that shows the location of the facility(ies), the points at which it connects with other relevant pieces of infrastructure, the location of any similar facility(ies) or proposed facility(ies) in the same region or that supply the same markets, and the location of relevant population centres or major users.

3.3 What is the minimum bundle of assets that must be declared to provide the service?

3.4 Why do all of these assets form the minimum bundle necessary to provide the service?

3.5 How are/would the facility(ies) be used to provide the service?

3.6 How would using the facility(ies) to provide the service affect the provision of other services ?

3.7 Is the owner or operator of the facility(ies) vertically integrated or associated with other entities operating in other parts of the production or distribution chain? If so, describe the nature of its relationship with the associated entities.

The service provider

4.1 Identify the service provider

The name of the entity the applicant considers to be the provider of the service. The provider is the entity with the authority to negotiate and grant access.

4.2 Provide contact details for the service provider.

4.3 Which entity is the operator of the facility (if different from 4.1 above)?

4.4 Which entity is the owner of the facility (if different from 4.1 above)?

4.5 Are any of the above entities a partnership or joint venture? If so, who are the parties to that partnership or joint venture?

4.6 Provide name and contact details, including details of the registered office for all of the entities identified above.

4.7 Is the provider of the service owned by a state or territory government? If so, which government(s) owns the provider.

This information allows the Council to determine who the designated decision maker is.

History of access negotiations

Applicants should describe any previous attempts to negotiate with the service provider for access, or increased access, to this or any similar services. Note whether the applicant was refused access, or was dissatisfied with the access terms and conditions offered by the service provider. Where possible, applicants should provide written documentation, including copies of correspondence.

5.1 Outline any history of previous access negotiations with the service provider.

5.2 What were the services under negotiation?

5.3 When did the negotiations take place and how long did they last?

5.4 What was the response of the service provider to the applicant's attempt to negotiate access?

5.5 What were the outcomes of the negotiations for the applicant?

5.5.1 What matters could not be agreed?

5.5.2 Why did the applicant consider that the service provider's offer (if any) was unreasonable?

Other interested parties

6.1 Identify and provide contact details for other parties likely to be interested in the application.

The applicant should provide the name and address of other parties who may wish to comment on the access application, including:

- others who may be interested in also obtaining access to the service
- owners or operators of similar facilities in Australia
- relevant industry bodies or associations
- Australian, State or Territory government departments or agencies
- other suppliers, or potential suppliers, in the markets in which it is claimed that competition would be promoted and
- significant customers in upstream or downstream markets.

Jurisdiction

7.1 Does the service include:

- **the supply of goods;**
- **the use of intellectual property; or**
- **the use of a production process?**

7.2 If yes, is this activity an integral but subsidiary part of the infrastructure service?

Some types of services are explicitly excluded from part IIIA. Section 3 of the Guide to part IIIA describes these exclusions. Where there is potential debate about whether the service falls under an exclusion, applicants should provide evidence on why they think the service is within the scope of part IIIA.

If the service potentially covers activities that fall within the exclusions, applicants should provide evidence on why that activity is an integral but subsidiary part of the service. The transmission of gas along a pipeline, for example, can involve the

supply of additional gas to fuel gas compressors. The supply of gas in this case may be an example of a subsidiary activity involving the supply of a good that is integral to the provision of a gas transmission service.

7.3 Is the service potentially subject to the access regimes applying to telecommunications or postal services?

Telecommunications carriage services and the supply of a service (including a bulk interconnection service and an incoming overseas mail service) by Australia Post, are subject to Australian Government industry specific regimes. These regimes restrict the application of part IIIA. Where there is potential debate about whether the service falls under these regimes, applicants should provide evidence on why the service is within the scope of part IIIA.

Criterion (b) – Uneconomical to develop another facility

The criteria limit declaration to services provided by facilities that exhibit “natural monopoly characteristics”. Criterion (b) tests whether the facility that provides the service is a natural monopoly. For the purpose of criterion (b), natural monopoly infrastructure exists if one facility can meet the entire range of relevant demand at a lower cost than two or more facilities. The Council assesses this by looking at the costs and benefits to society, rather than only private or commercial interests.

Other facilities supplying the service

8.1 Identify and describe any other facility(ies) that could provide the same service as the service for which access is sought.

8.1.1 Is the service provided by the other facility(ies) the same as that subject to the application? Describe any practical or technical differences.

8.1.2 Does the other facility(ies) serve the same origins and destinations as the facility covered by the application?

A facility that provides the same service as that defined in the application must have the ability to serve the same origins and destinations.

8.1.3 Would any modifications or investment be necessary for the other facility(ies) to provide the same service?

8.1.4 Could the other facility(ies) provide part of the service?

8.1.5 If it can provide only part of the service, explain which part it could provide.

Demand for the service

8.2.1 What is the current level of demand for the service:

- by the service provider
- by any existing access users (including the applicant) and
- by users of other facilities that provide the same service?

8.2.2 Are there existing contractual arrangements that reserve capacity for particular parties. If so, what is the duration of these arrangements. Can third parties enter into commercial arrangements to use any reserved capacity.

8.2.3 If access was granted, what would be the expected level of demand over the period for which declaration is sought:

- by the service provider
- by the applicant
- by any other existing users
- by any other new parties taking up access and
- by users of other facilities that provide the same service?

8.2.4 If access was not granted, what would be the expected level of demand over the period for which declaration is sought:

- by the service provider
- by the applicant
- by any other existing users
- by any other new parties taking up access, and
- by users of other facilities that provide the same service?

8.2.5 Explain how current and expected demand – with and without access being granted - have been calculated and the assumptions made in that calculation. Provide evidence to support the estimates and the sources of that evidence.

The current level of demand is the use of the service subject to the application in the facility identified in the application, and any other facilities that provides the same service. The expected level of demand estimates the extent to which future use of that service is likely to rise or fall, with and without access.

Applicants should provide disaggregated information (see the following table). If there is more than one other facility that provides the same service, the information on the other facilities should be provided separately for each facility. If demand is uncertain, applicants should provide a range that includes the maximum likely demand as its upper limit.

Table 1

	Use of the service by the service provider	Use of the service by the applicant	Use of the service by existing access users	Estimated use of the service by new parties taking up access	Use of the service in other facilities that provides the same service	Total
Current demand						
Future demand in X ¹ years <u>with access</u>						
Future demand in X years <u>without access</u>						

Source: Provide information on how the estimates in this table were calculated.

Capacity of the facility

- 8.3.1 What is the total current capacity of the facility?**
- 8.3.2 Is some of the facility's current capacity required for provision of services other than those for which declaration is sought or for other purposes?**
- 8.3.3 Does available capacity vary between peak and off peak, seasonally, or based on any similar factors. If so, how does available capacity vary?**
- 8.3.4 Are there any proposals or plans for alterations to the capacity of the facility. What changes in capacity are needed to meet expected demand?**
- 8.3.5 Explain how capacity was calculated and the assumptions made in that calculation. Provide evidence to support the estimates and the sources of that evidence.**

Explain whether the current facility has the capacity to meet reasonably foreseeable demand. Provide evidence on the expected excess capacity, or the expansion in capacity needed to meet future demand with and without access.

¹ X should relate to the period for which access is sought.

In some cases, spare capacity is necessary to provide a safety margin in the operation of the facility. In other cases, capacity may be needed to provide other services. For example, if the service under the application is the use of a railway line to operate freight trains, some of the capacity of the facility may be needed to provide passenger services. Applicants should estimate the amount of capacity (if any) that would be needed for other purposes.

Table 2

	Total capacity of the facility	Use of the facility (Totals from Table 1)	Projected changes in usage	Other uses	Excess or shortfall is capacity for high and low periods of usage
Current capacity					
Future capacity in X ² years <u>with access</u>					
Future capacity in X years <u>without access</u>					

Source: Provide information on how the estimates in this table were calculated.

8.4. Estimate any expected increase in capital or operating costs if access was provided to the existing facility(ies)

8.4.1 Would it be necessary to expand the existing facility(ies) to meet reasonably foreseeable demand?

8.4.2 Could the capacity of the existing facility(ies) be expanded to meet reasonably foreseeable demand? If so, how would it be expanded and at what cost?

8.4.3 Would access affect the cost of operating the existing facility(ies)? If so, how would it affect operating costs and what would be the size of the cost change?

8.4.4 Explain how the expected increase in capital and operating costs was calculated and the assumptions made in that calculation. Provide evidence to support the estimates and the sources of that evidence.

Providing access may require an expansion in the existing facility(ies) or change its operating costs. Applicants should explain how they reached their estimates and provide evidence to support those estimates.

² X should relate to the period for which access is sought.

8.5. Estimate the capital and operating costs of developing another facility(ies) to provide the service subject to the application

8.5.1 What are the costs of building and operating another facility(ies) to provide the service?

8.5.2 What would be the capacity and route/location of the new facility(ies)?

8.5.3 How would the capital costs of building another facility(ies) compare with the cost of expanding the existing facility(ies)?

8.5.4 How would the operating costs of the new facility(ies) compare with the operating costs of the existing facility(ies) with access?

8.5.5 Explain how the expected capital and operating costs were calculated and the assumptions made in those calculations. Provide evidence to support the estimates and the sources of that evidence.

Estimate the cost of the best alternative facility capable of providing the service. The alternative should reflect the most cost effective technology and route/location available.

8.6. Identify environmental, planning or other regulations that significantly affect construction of another facility(ies)

8.6.1 Describe the regulation.

8.6.2 How does the regulation affect construction of another facility(ies)?

Describe the impact of any relevant Australian, state, territory or local government regulation.

8.7. Identify whether the service provider has natural, economic or technical advantages from being the first established facility(ies)

8.7.1 What are these advantages and how significant are they?

8.7.2 How do these advantages benefit the owner of the existing facility(ies) over new entrants? For example, the incumbent may benefit from access to the only feasible location, strong brand loyalty, benefits from

owning and established network, or costs to customers of switching between suppliers.

8.7.3 Could these advantages be overcome by a new entrant or are they permanent? What would a new entrant need to do to overcome any incumbency advantages?

8.7.4 How would access overcome these advantages?

Describe any incumbency advantages that confer a monopoly on the service provider. An incumbency advantage is a natural, economic or technological advantage associated with the initial establishment of a facility. These advantages could mean that new businesses are unable to gain the same advantages as the incumbent.

8.8. Outline any economies of joint production between the service and other services provided by the facility(ies)

8.8.1 What other services have economies of joint production with the service subject to the application?

8.8.2 Why cannot the provision of these services be separated?

8.8.3 What would be the cost of separating these services?

If there are overwhelming economies of joint production between the service and other services provided by the facility(ies), it would be uneconomic to build another facility that separately provides the service. Describe any significant economies of joint production and their implications for developing another facility(ies).

Criterion (a) – access (or increased access) would promote a material increase in competition in at least one market other than the market for the service

Criterion (a) addresses whether a facility that exhibits natural monopoly characteristics (thus satisfying criterion (b)) is also a bottleneck facility. This aims to limit access to facilities that occupy a strategic position in the service delivery chain, where it is likely to enhance the environment for competition in related markets that are upstream or downstream from the facility(ies) (dependent market(s)).

Whether competition could be enhanced depends on the service provider having market power and the ability and incentive to use that power to adversely affect

competition in a dependent market. The Council will undertake a comparison of the current state of competition in the dependent market(s) as compared to the state of competition in the dependent market(s) with a right or ability to use the service arising from access (or increased access). In assessing criterion (a), the Council:

- defines the dependent market(s) in which competition may be promoted, and verifies that these markets are separate from the market for the service to which access is sought
- determines whether access (or increased access) would promote a more competitive environment in the dependent market(s), which requires assessing:
 - o whether the incumbent service provider has the ability and incentive to exercise market power to adversely affect competition in the dependent market(s) and
 - o whether the structure of the dependent market(s) is such that access (or increased access) would serve to constrain the service provider from exercising its market power, thereby promoting competition.
- examines barriers to entry and competitive conditions in the dependent market(s). Access (or increased access) may not promote competition in markets that have high barriers to entry that are unrelated to the bottleneck facility, or that are already effectively competitive.
- assesses whether the effects of access (or increased access) are large enough to have a material impact on the competitive environment in the dependent market(s).

Market Definition

9.1 Describe the demand and supply chain upstream and downstream from, or otherwise linked to, the service for which access is sought

9.1.1 What products or services are or could be provided at the various upstream and downstream points in the demand and supply chain?

Applicants should describe the demand and supply for products and services that are upstream and downstream from the service to which access is sought.

9.2 From the analysis in question 9.1, identify the market(s) in which competition is likely to be promoted as a result of access to the service. These are termed dependent markets.

9.3 Define the product, geographical and functional dimensions of each of the dependent markets

- 9.3.1 What are the products or services that compete in the dependent market(s)? If there are products or services that are potentially substitutable for those identified in the dependent market, explain why they are not considered to be part of that market.**
- 9.3.2 Are there suppliers of other products or services that could change their production to supply products or services into the dependent market? If so, who are these suppliers, what are they currently producing and how would they need to change their activities? How quickly might they make such changes and at what cost?**
- 9.3.3 Is there potential for suppliers or customers to move between products or services purchased in or from different regions? If so, what would suppliers and consumers need to do to move between regions, how quickly can this occur and how does it affect competition?**
- 9.3.4 Are any factors changing demand and supply over time, for example new technology, changing market conditions or market growth? If so, what are these changes? How quickly are they occurring? How are they affecting competition in the dependent market(s)?**
- 9.3.5 Describe the assets used to produce the products or services in the dependent market(s).**
- 9.3.6 Could the assets used in the dependent market also be used to produce products or services at the next layer in the production or distribution chain? Is it possible to separate these assets from assets at other levels in the production or distribution chain? (The answer to this question should focus on the separability of assets in the dependent market and assets used to produce the service to which access is sought.)**

Section 5 of the Guide to part IIIA discusses market definition. Applicants should define any downstream or upstream markets where competition would be increased by access to the service. They should describe the scope of these markets, including the product(s) and the region(s) covered by the market, giving reasons for their claims about the boundaries of the relevant market.

The market(s) in which competition is promoted must be functionally separate from the market for the service. Demonstrating these markets are separate requires identification of the different vertical stages in the production and or distribution chain. Evidence on the following is needed: facts demonstrating that the costs of

separating the service in the dependent market from the service to which access is sought are not so high that these functions must be undertaken together, and facts demonstrating that each layer uses assets sufficiently specific and distinct to that layer such that the assets cannot readily produce the output of the other layer (ie that they are economically distinct).

For each dependent market:

Market competition

9.4 Describe the businesses that supply or could supply products or services in the dependant market?

9.4.1 How many businesses are there?

9.4.2 Are the businesses large or small?

9.4.3 If there are only a few actual or potential suppliers, name them.

9.5 Describe the customers that purchase or could purchase products or services in the dependent market?

9.5.1 How many customers are there?

9.5.2 Are they industrial or domestic (consumers or other end users)?

9.5.3 If there are only a few actual or potential customers, name them.

9.6 What is the size of the dependent market in volume and dollar terms?

Explain how the estimates of the size of the dependent market(s) were calculated and the assumptions made in that calculation. Provide evidence to support the estimates and the sources of that evidence.

9.7 What are the current barriers to competition or entry in the dependent market?

9.8 Describe the current level of competition in the dependent market

9.8.1 Is the dependent market competitive?

9.8.2 Are there other sellers and buyers competing in the dependent market that are not reliant on the service subject to the application?

9.8.3 Is there the potential for other suppliers or buyers to enter the dependent market that are not reliant on the service subject to the application?

If the dependent market(s) is already effectively competitive, with products or services supplied from a range of sources, then access is less likely to promote competition.

Increasing competition

9.9 How will access (or increased access) increase competition in the dependent market?

9.9.1 Explain how access (or increased access) to the service for which declaration is sought would affect competition in the dependent market.

9.9.2 Explain how the effect(s) explained in 9.9.1 amount to a material increase in competition in the dependent market.

9.9.3 How would the size of the dependent market be affected by access (or increased access)? Estimate the size of the dependent market if access (or increased access) was available.

9.9.4 Would access (or increased access) affect some types of customers or suppliers more than others?

9.9.5 What affect would access (or increased access) have on barriers to competition or entry in the dependent market?

9.9.6 How would access (or increased access) affect innovation and the operation of niche suppliers in the dependent market(s)?

Describe how access would affect each of the dependent market(s) where it is claimed that competition would be increased. Discuss how access affects competition and whether some sectors of the market(s) would be affected more than others. Explain how the impact on competition will amount to a material increase in competition.

9.10 Is there any evidence that the access provider is exercising its market power?

9.10.1 Has access been denied?

9.10.2 Is the service provider charging prices that exceed the competitive level for the service?

9.10.3 For a vertically integrated service provider, is it engaging in behaviour to leverage its monopoly power into the dependent market? How is the access provider using its vertical integration in ways that disadvantage potential competitors? How is the access provider benefiting from these actions and how is it affecting competitors?

9.10.4 Explain the evidence to support any claims that the access provider is exploiting its market power and the source of that evidence.

The application should establish that the service provider has the ability and incentive to exercise market power in a way that limits competition in the dependent market(s). Section 5 of the Guide to part IIIA discusses factors that affect a service provider's ability and incentive to exercise market power.

Even if the service provider theoretically has market power it may not have the incentive to use that power in a way that reduces competition in the dependent market. These incentives may be weak if the dependent market is already competitive, there are other facilities that provide a similar service, or regulation or other commercial imperatives mean that exercising market power would not benefit the infrastructure owner.

Evidence of actual exercise of market power by a service provider would demonstrate the ability and incentive to exercise market power.

9.11 Do the access provider's customers or suppliers have countervailing market power?

9.11.1 How reliant are the customers on the service provided by the access provider? Do the customers have access to alternatives to the access provider's service?

9.11.2 Does countervailing power vary between customers or customer groups? If so, how does it vary and what groups are affected.

The access provider may not have the ability to exploit its market power if its customers are able to choose alternative services and therefore are not locked in, or heavily reliant, on the access provider's service.

9.12 Are there any other facilities that provide similar or competing services to the service for which access is sought?

9.12.1 Describe any facility(ies) not described in question 8.1.

9.12.2 Describe the service the other facility(ies) provides and the extent to which it differs from the service to which access is sought.

9.12.3 Does this facility(ies) (or could it) provide services in the dependent market?

9.12.4 Has the access seeker sought to use this facility(ies) instead of the one to which access is sought? If so, what was the outcome of those discussions? If not, why not?

9.12.5 How would the cost of using the other facility compare with the cost of using the facility under the application?

9.12.6 Does the other facility(ies) constrain the access provider's ability to exploit its market power?

The existence of a facility(ies) that provides similar services could limit the service provider's ability to exercise market power. This depends on whether those similar services can, or could potentially, feed into the dependent market and whether the costs, available capacity and services offered by the competing facility makes it a viable alternative. Applicants should discuss whether facilities that provide similar services constrain the market power of the access provider.

9.13 Are there any government policies or commercial imperatives that limit the service provider's ability to use market power?

9.13.1 Identify any such policies or incentives.

9.13.2 How do they affect the service provider's ability to use its market power and what scope, if any, remains for it to continue to use its market power?

In some industries there are commercial imperatives or government policies or regulations that mean that it is not in the service provider's interest to exploit its market power, even if it had such power.

9.14 Are there any other factors that might limit the access provider's ability and incentive to exercise market power?

9.14.1 If so, what are these factors and what are their affects?

Describe the effects on the access provider's ability to exercise market power of any other relevant factors.

9.15 Establish that there are no other barriers to competition in the dependent markets that would prevent access from having a material impact on competition

9.15.1 Are there significant barriers to competition that would remain even if access was introduced?

9.15.2 Are existing customers locked into long term contracts?

Applicants should establish why they believe the potential barriers are not significant, and would not pose a significant barrier to competition.

9.16 Show that the effects of access (or increased access) would be large enough to have a material impact on the dependent market.

9.16.1 How important is the service to which access is sought in meeting customer demands in the dependent market?

9.16.2 How large a part of the total cost of supplying the dependent market is the cost of the service to which access is sought?

9.16.3 How large an effect is access likely to have on the costs of the declared service, taking into account the constraints discussed previously?

9.16.4 How large an effect is access likely to have on the quality of the declared services? Are the quality characteristics important in the dependent market? If so, why are they important?

Even if access (or increased access) would, in theory, improve the environment for competition, it is necessary to show that its impact in the dependent market would be material.

Criterion (c) –national significance

Criterion (c) is a test of materiality 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, ensuring only facilities that play a significant role in the national economy fall within the scope of part IIIA.

While declaration is concerned with access to services rather than facilities, criterion (c) relates to the national significance to the facility(ies) providing the service.

- 10.1 Describe how the facility(ies) is important to the nation, answering any of the following questions that are relevant to its national significance**
- 10.2 What is the size of the facility(ies)? What did it cost? What area or distance does it cover or serve?**
- 10.3 What is the volume or value of goods or services going through the facility(ies)?**
- 10.4 How does the facility(ies) contribute to trade between the States and Territories? What is the volume or value of that trade?**
- 10.5 How does the facility(ies) contribute to trade between Australia and places outside Australia? What is the volume or value of that trade?**
- 10.6 How important is the facility(ies) in providing services in other significant markets?**
- 10.7 Are there any other characteristics of the facility(ies) that make it nationally significant?**

The factors that demonstrate the facility(ies) is nationally significant include, but are not limited to, its size, importance to constitutional trade and commerce³ and importance to the national economy.

Criterion (d) –human health or safety

Criterion (d) provides that declaration should not occur where access, or increased access, to the service may pose a genuine risk to human health or safety. Some facilities require a degree of spare capacity for appropriate safety margins. In addition, access to facilities may need to be governed by conduct codes and operational guidelines. For a service to be declared, access must be possible without compromising system and operational integrity, and safe scheduling or timetabling must be feasible.

- 11.1 Can access be provided without putting human health and safety at risk?**
- 11.2 Is access currently provided in a safe manner?**
- 11.3 Is access provided safely on similar infrastructure?**

³ This includes trade or commerce among the States, between a State and a Territory, between Territories, or between Australia and other countries.

- 11.4 How would the provision of access affect safety?**
- 11.5 Could procedures be established to deal with safety issues?**
- 11.6 Provide details of any relevant regulation that deals with safety issues.**
- 11.7 Are there any other factors that indicate safety might be a problem?**

The applicant should establish that it is possible to provide access safely. It is not necessary for procedures to be in place, as long as it would be possible to establish them when negotiating or setting the terms and conditions of access.

Criterion (e) – application of an effective access regime

Services already covered by an effective access regime cannot be declared under part IIIA of the TPA. The main purpose of criterion (e) is to exclude from part IIIA industry-specific access regimes that state or territory governments have develop consistent with the principles in the Competition Principles Agreement.

Part IIIA provides guidance on what constitutes an effective state or territory access regime. There is no legislative guidance on how to assess the effectiveness of Commonwealth or private access regimes.

- 12.1 Is the service already covered by an access regime? If so:**
- 12.1.1 Is the regime established by state, territory or Commonwealth regulation?**
- 12.1.2 Are there any other documents that establish the regime? If so, what are they, what matters do they regulate and what is their legal status?**
- 12.1.3 When was the regime established?**
- 12.1.4 Have there been any attempts to negotiate access under the regime? If so, when did they occur and what type of service was under negotiation?**
- 12.1.5 Have the attempts to negotiate access under the regime been successful? If so, when did access under the regime apply and what was the service covered? What were the conditions of access?**

12.1.6 Have the attempts to negotiate access under the regime been unsuccessful? If so, why did they fail?

Identify whether there is an existing access regime and, if so, describe the legal backing for that regime and the experience of previous access seekers.

12.2 What is the scope of the existing access regime?

12.2.1 What services and facilities are covered by the regime?

12.2.2 What is the process for negotiating access under the regime?

12.2.3 Does the regime provide a right to negotiate? If so, what is the nature of that right?

12.2.4 Does the regime have a regulator? If so, what organisation is the regulator and what are its role, scope and powers?

12.2.5 Does the regime provide for independent arbitration if agreement is not reached? If so, who is the arbitrator (or how is an arbitrator chosen), what are the role, scope and powers of the arbitrator?

12.2.6 What guidance, if any, does the regime give the arbitrator in resolving access disputes?

12.2.7 Do the regulator and/or the arbitrator have information gathering powers?

12.2.8 Is the regime legally enforceable by third party access seekers?

12.2.9 Does the regime result in efficient outcomes?

For state and territory access regimes, clauses 6(2)–(4) of the Competition Principles Agreement (the clause 6 principles) set out the criteria for judging effectiveness. The Council must assess whether a state or territory regime is effective at the time it considers an application for declaration. In its assessment, the Council applies the clause 6 principles. Applicants should demonstrate, against the clause 6 principles, why they think the existing regime is not effective.

If a state or territory access regime already covers the service, the Council may seek additional information from the applicant about the performance of that regime against the clause 6 principles.

In considering the effectiveness of a Commonwealth or private regime, the Council has regard to:

- whether outcomes produced by the regime are efficient;
- the legal enforceability of the regime by all interested persons; and
- whether the regime reflects the clause 6 principles.

Applicants should demonstrate why they think the existing regime is not effective against these principles.

Criterion (f) – public interest

Criterion (f) does not address the concerns of criteria (a)–(e); rather, it enquires whether any other matters lead to the conclusion that access would not be in the public interest. When criteria (a)–(e) are met, there is a presumption that access is in the public interest, but this presumption can be rebutted. To fail against criterion (f) access must be shown to have a negative effect on the public interest.

In applying the public interest test, the Council considers whether, for the community as a whole, the costs of access outweigh the benefits.

13.1 Outline issues that should be considered in determining whether access is contrary to the public interest. Where relevant discuss the impact of access on:

- 13.1.1 the development of alternative access regimes and arrangements**
- 13.1.2 consistency across access regimes or arrangements**
- 13.1.3 the direct regulatory and compliance costs associated with access**
- 13.1.4 incentives to invest**
- 13.1.5 any other costs associated with access**
- 13.1.6 the achievement of other government policy objectives**
- 13.1.7 ecologically sustainable development**
- 13.1.8 social welfare and equity considerations, including community service obligations**
- 13.1.9 government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity**

13.1.10 economic and regional development, including employment and investment growth

13.1.11 the interests of consumers generally or of a class of consumers

13.1.12 the competitiveness of Australian businesses

13.1.13 the efficient allocation of resources.

The TPA does not define the ‘public interest’, and the term is difficult to define with any specificity. Relevant public interest considerations vary among applications.

A key public interest consideration is the impact of access on economic efficiency. Another issue that frequently arises is the costs of regulation. That is, the costs and inefficiencies associated with access.

Direct regulatory costs include the costs of negotiating access with third parties or arbitrating an access dispute.

In determining whether the benefits of access are likely to outweigh the costs, it may help to compare the direct costs of access with the potential reductions in the price of the service (this is relevant where there is evidence of monopoly pricing by the service provider).

Residual Discretion

The Council has a residual discretion not to recommend declaration of a service even if it is satisfied that all the matters specified in s. 44G(2) of the TPA apply. However, this discretion is extremely limited given the nature and content of the declaration criteria.

14.1 Identify any considerations the Council should take account of as part of its residual discretion

14.1.1 Why are these considerations relevant to the Council’s recommendation?

14.1.2 What are the implications of these considerations for the Council’s recommendation?

The Council’s residual discretion includes discretion not to recommend declaration where it considers the application is not made in good faith or it would be economical to develop another facility to provide part of the service subject to declaration.

Duration of declaration

Every declaration must include an expiry date. This can be a specified future date and/or involve an event that may occur in the future. The appropriate period of declaration varies according to the circumstances of each application.

15.1 Specify the preferred period of declaration

15.1.1 Why is this period preferred?

15.1.2 What would be the consequences of a longer or shorter period?

Applicants should specify their preferred period of declaration and give reasons for their preference. The factors considered in establishing a period could include:

- the importance of long term certainty for businesses
- the need for declaration to apply for a period sufficient to influence the pattern of competition in the dependent market(s) and
- the desirability of periodically reviewing of the need for declaration.

Objects and purpose of part IIIA and the TPA

The objects of part IIIA are contained in section 44AA and the purpose and objects and purpose of the TPA are contained in section 2.

16.1 Is there anything further you consider the Council should take into account in respect of the application and the objects and purpose of the TPA, particularly part IIIA?