EXPLANATORY SUMMARY

The Tribunal has prepared a brief summary to accompany the reasons for its decision. It must of course be emphasised that the only authoritative pronouncement of the Tribunal's reasons is that contained in the published reasons for decision. This summary is intended to assist in understanding the principal conclusions reached by the Tribunal, but it is necessarily incomplete.

The matter before the Tribunal was a review of the decision of the Treasurer of the Commonwealth of Australia on 30 June 1997 whereby, pursuant to s 44H of the *Trade Practices Act* 1974 (Cth), he declared:

> *"(1) … the service provided through the use of the freight aprons and hard stands to load and unload international aircraft at Sydney International Airport;*
>
> *(2) … the service provided by the use of an area at Sydney International Airport to: store equipment used to load/unload international aircraft; and to transfer freight from the loading/unloading equipment to/from trucks at the airport;"*

That decision was re-considered by the Tribunal.

The Tribunal has concluded that those services should be declared and has determined that the declaration be effective for five years from today's date.

Before the Tribunal can make the declaration it must be satisfied of the matters set out in s 44H(4) of the Trade Practices Act. The Tribunal is satisfied that:

(a) increased access to the services would promote competition in at least one market, other than the market for the services, namely the market for ramp handling services at Sydney International Airport;

(b) that it would be uneconomical for anyone to develop another facility, namely an international airport, to provide the services;

(c) the facility, namely Sydney International Airport, is of national significance having regard to the size of the facility and the importance of the facility to constitutional trade and commerce and the national economy;

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

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

(f) increased access to the services would not be contrary to the public interest.

The full text of the Tribunal's reasons for decision, delivered on 1 March 2000 is available at http://www.austlii.edu.au/au/cases/cth/AcompT/

AUSTRALIAN COMPETITION TRIBUNAL

Sydney International Airport [2000] ACompT 1

TRADE PRACTICES – Part IIIA *Trade Practices Act* 1974 (Cth) – services provided by Sydney International Airport - declaration of services by the designated Minister – application for review - re-consideration of declaration – meaning of promotion of competition – whether increased access to services would promote competition – whether competition would be promoted in at least one market other than the market for the services – nature of facility – whether uneconomical to develop another facility to provide the services – whether "anyone" in s 44H(4)(b) includes owner of existing facility - whether facility of national significance – whether access to the services can be provided without undue risk to human health and safety – no access regime in existence – increased access to the services not contrary to the public interest – residual discretion under s 44H(4) – air freight activities at Sydney International Airport – definition of market at Sydney International Airport – relevance of existing tender process to future competition – effect on competition of physical limitations at Sydney International Airport.

WORDS AND PHRASES: *"promote"*, *"uneconomical"*, *"anyone"*

Trade Practices Act 1974 (Cth): Pt IIIA, s 44B, s 44(H)(4)
Airports Act 1996 (Cth): s 192

Rail Access Corporation v New South Wales Minerals Council Ltd (1998) 87 FCR 577 cited
Re Queensland Co-operative Milling Association Ltd, Defiance Holdings Ltd (1976) 25 FLR 169 cited

RE: APPLICATION FOR REVIEW OF THE DECLARATION BY THE COMMONWEALTH TREASURER PUBLISHED ON 30 JUNE 1997 OF CERTAIN FREIGHT HANDLING SERVICES PROVIDED BY THE FEDERAL AIRPORTS CORPORATION AT SYDNEY INTERNATIONAL AIRPORT
No NSW 1 of 1997

GOLDBERG J, DR B ALDRICH & MR M WALLER
1 MARCH 2000
SYDNEY

GENERAL DISTRIBUTION

IN THE AUSTRALIAN COMPETITION TRIBUNAL

No NSW 1 of 1997

RE:	**APPLICATION FOR REVIEW OF THE DECLARATION BY THE COMMONWEALTH TREASUERER PUBLISHED ON 30 JUNE 1997 OF CERTAIN FREIGHT HANDLING SERVICES PROVIDED BY THE FEDERAL AIRPORTS CORPORATION AT SYDNEY INTERNATIONAL AIRPORT**
BY:	**SYDNEY AIRPORTS CORPORATION LIMITED**
THE TRIBUNAL:	**GOLDBERG J, DR B ALDRICH & MR M WALLER**
DATE OF DECISION:	**1 MARCH 2000**
WHERE MADE:	**SYDNEY**

THE TRIBUNAL:

1. Declares the service provided by the use of the freight and passenger aprons and the hard stands at Sydney International Airport for the purpose of enabling ramp handlers to load freight from loading equipment onto international aircraft and to unload freight from international aircraft onto unloading equipment.

2. Declares the service provided by the use of an area at Sydney International Airport for the purpose of enabling ramp handlers:
   (a) to store equipment used to load and unload international aircraft; and
   (b) to transfer freight from trucks to unloading equipment and to transfer freight from unloading equipment to trucks, at the airport.

3. Determines that the declarations in paragraphs 1 and 2 shall be effective on and from 1 March 2000 and shall expire on 28 February 2005.

GENERAL DISTRIBUTION

IN THE AUSTRALIAN COMPETITION TRIBUNAL

No NSW 1 of 1997

RE:	**APPLICATION FOR REVIEW OF THE DECLARATION BY THE COMMONWEALTH TREASUERER PUBLISHED ON 30 JUNE 1997 OF CERTAIN FREIGHT HANDLING SERVICES PROVIDED BY THE FEDERAL AIRPORTS CORPORATION AT SYDNEY INTERNATIONAL AIRPORT**
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THE TRIBUNAL:	**GOLDBERG J, DR B ALDRICH & MR M WALLER**
DATE:	**1 MARCH 2000**
PLACE:	**SYDNEY**

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REASONS FOR DECISION

THE TRIBUNAL: Goldberg J, Dr B Aldrich and Mr M Waller

1. INTRODUCTION

1 Sydney Airports Corporation Limited ("SACL") has applied to the Australian Competition Tribunal ("the Tribunal") pursuant to s 44J of the *Trade Practices Act* 1974 (Cth) ("the Act") to review the decision of the Treasurer of the Commonwealth of Australia on 30 June 1997 whereby he declared:

> *"(1) … the service provided through the use of the freight aprons and hard stands to load and unload international aircraft at Sydney International Airport;*
> *(2) … the service provided by the use of an area at Sydney International Airport to: store equipment used to load/unload international aircraft; and to transfer freight from the loading/unloading equipment to/from trucks at the airport;"*

The declaration was expressed to be effective from 1 August 1997 to 31 July 2002. However s 44I(2) provides that the declaration does not begin to operate until the Tribunal makes its decision on this review.

2 The genesis of the declaration was on 6 November 1996 when Australian Cargo Terminal Operators Pty Ltd ("ACTO") made three applications to the National Competition Council ("the Council") for the declaration of certain "services" at Melbourne and Sydney International Airports pursuant to Pt IIIA of the Act. Properly understood the applications were asking the Council to recommend under s 44G of the Act that the particular services be declared. In summary form the applications sought declarations in relation to each airport in respect of the following services:

(a) The service provided through the use of the freight aprons and hard stands to load and unload international aircraft;

(b) the service provided by the use of an area at the airports to store equipment used to load/unload international aircraft and to transfer freight from the loading/unloading equipment to/from trucks at the airports;

(c) the service provided by the use of an area to construct a cargo terminal at each airport.

On 8 May 1997 the Council recommended to the Treasurer (the designated Minister for the purposes of Pt IIIA of the Act hereafter called "the Minister") that he declare the two services referred to in sub-paras (a) and (b) in respect of Sydney and Melbourne International Airports and that he not declare the service referred to in sub-para (c). On 30 June 1997 the Minister declared the services to which we have referred but decided not to declare the services provided by the use of the area to construct a cargo terminal at Sydney International Airport ("SIA") as the application in relation to that service "failed to satisfy the criterion that the service in question must relate to a facility which is not economically duplicable".

3 On 21 July 1997 the Federal Airports Corporation ("FAC") applied to the Tribunal for a review of the Minister's declaration in respect of SIA.

4 On 1 July 1998 SACL took over from FAC responsibility for the management of SIA and the land relating to SIA was transferred from FAC to the Commonwealth.

5 By virtue of the provisions of s 44K(4) of the Act the review of the Minister's declaration to be conducted by the Tribunal is a re-consideration of the matter. A number of parties were granted leave to appear on the review. In addition to ACTO, SACL and the Council, leave was granted to the following parties to appear – Ansett Australia Limited ("Ansett"), South Pacific Airmotive Ltd ("SPAM") and International Business Management Services Pty Limited ("IBMS").

6 ACTO provides independent cargo terminal operator service to client airlines. IBMS provides catering and ramp handling services to airlines in respect of narrow bodied aircraft. SPAM provides passenger and ramp handling services to airlines. Ansett is an airline operator and provides Cargo Terminal Operator ("CTO") facilities and ground and ramp handling services to airlines.

2. THE LEGISLATION

7 It is desirable to place the review in its context which is derived from Pt IIIA of the Act. The background to the introduction of Pt IIIA into the Act and the manner in which the declaration procedure works is set out by the Full Federal Court (Black CJ, Wilcox and

Goldberg JJ) in *Rail Access Corporation v New South Wales Minerals Council Ltd* (1998) 87 FCR 517 at 518-519 in the following terms:

> *"On 11 April 1995, the Commonwealth of Australia, the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania, the Australian Capital Territory and the Northern Territory entered into the 'Competition Principles Agreement' (the Agreement). By the Agreement, the Commonwealth, State and Territory Governments agreed to adopt certain principles of competition policy and to apply competition laws across the public sector. The Agreement stated the 'objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities'. This was to be achieved by the structural reform of public monopolies, so as to remove from the public monopoly any responsibility for industry regulation and to introduce competition to markets traditionally supplied by a public monopoly.*
>
> *Clause 6(1) of the Agreement provided that, subject to subcl (2), the Commonwealth would put forward legislation to establish a regime for third-party access to services provided by means of significant infrastructure facilities 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, its importance to constitutional trade or commerce or its importance to the national economy; 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."*
>
> *As a result of the Agreement, the Commonwealth enacted the* Competition Policy Reform Act. *That enactment made substantial amendments to the Act and inserted s 2, which stated that the object of the Act was to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".*
>
> *The* Competition Policy Reform Act *inserted into the Act a new Pt XIA, headed 'The Competition Code'. It also inserted Pt IIA, headed 'The National Competition Council'. This Part gave the Council the functions of carrying out research into, and providing advice on, matters referred to it by the Minister. The Trade Practices Tribunal became the Australian Competition Tribunal.*
>
> *Another Part inserted into the Act by the* Competition Policy Reform Act *was Pt IIIA, headed 'Access to Services'. This Part provided a procedure whereby a service can be 'declared', with the result that an interested party can obtain access to the use of that service. Part IIIA is sometimes said to provide an access regime for essential services, but the expression 'essential services'*

does not appear in the Part. Section 44B of the Act contains the following relevant definitions:

> *"'provider', in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service;*
>
> *'service' means a service provided by means of a facility and includes:*
>
> *(a) the use of an infrastructure facility such as a road or railway line;*
>
> *(b) handling or transporting things such as goods or people;*
>
> *(c) a communications service or similar service;*
>
> *but does not include:*
>
> *(d) the supply of goods; or*
>
> *(e) the use of intellectual property; or*
>
> *(f) the use of a production process;*
>
> *except to the extent that it is an integral but subsidiary part of the service."*
>
> *The declaration process operates, in general terms, in the following way:*
>
> *(a) the designated Minister, or any other person may apply to the National Competition Council for a recommendation that a particular service be declared: s 44F(1);*
>
> *(b) the National Competition Council must make a recommendation to the Minister either that the service be declared or not declared: s 44F(2);*
>
> *(c) on receiving a declaration recommendation the Minister must either declare the service or decide not to declare it: s 44H(1); and*
>
> *(d) the provider or person requesting access can apply to the Australian Competition Tribunal for a review of the Minister's decision: s 44K.*
>
> *Once a service is declared, the person requesting access negotiates an access agreement with the provider of the service. If there is a dispute as to any aspect of access, the Australian Competition and Consumer Commission arbitrates the dispute (s 44S). A party to such an arbitration can apply to the tribunal for review of the determination (s 44ZP) and may appeal to this Court on a question of law arising out of the Tribunal's decision (s 44ZR)."*

It can therefore be seen that obtaining access to a service as defined involves two stages. The first stage requires a declaration of the service which, of itself, does not entitle any person or organisation access to the service. Rather the declaration opens the door, but before an applicant to use the service can become entitled to use the service the applicant must progress to the second stage and either reach agreement for access with the service provider or, in default of agreement, have its request for access determined through an arbitration by the

Australian Competition and Consumer Commission ("the Commission"). It is at the second stage that the terms and conditions on and subject to which access is to be given are worked out and, in default of agreement, determined through an arbitration by the Commission. Note, for example, s 44V(2)(c) of the Act which provides, inter alia, that the Commission's determination may specify the terms and conditions of the third party's access to the service. In this review the Tribunal is concerned only with the first stage.

3. SCOPE OF THE REVIEW

8 As the review by the Tribunal is a re-consideration of the matter, the Tribunal cannot declare a service unless, in accordance with s 44H(4), it is satisfied 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."*

Although the Tribunal has to be satisfied affirmatively of each of these matters, the matters principally in contest in this review were those set out in sub-pars (a), (b), (d) and (f).

9 SACL said that Pt IIIA of the Act had its genesis in the recommendations of the Hilmer Committee in 1993 (Report on National Competition Policy, 25 August 1993) and that the Committee had recommended:

> *"the establishment of a new legal regime under which firms can be given a right of access to essential facilities when the provision of such a right meets certain public interest criteria."*

SACL submitted that the principal rationale behind this recommendation was to give firms a right of access to a facility controlled by a vertically integrated monopolist; see Hilmer report

241, and that an access declaration is most appropriate where the facility in question is controlled by a vertically integrated monopolist.

10 Any submission as to the proper construction of the provisions in Pt IIIA of the Act, or as to the policy underlying Pt IIIA based upon the Hilmer report, must be considered with caution. The legal regime to enable access to essential facilities recommended by the Hilmer Committee was not implemented by Pt IIIA of the Act. The Hilmer Committee recommended an access regime which provided for an access declaration not only to indicate the facility subject to the declaration but also to indicate matters such as pricing principles governing access and any other terms and conditions to protect the legitimate interests of the owner of the facility. The recommendation provided for the Minister to make the access declaration but only if recommended by the Council and on terms and conditions either agreed by the owner of the facility or recommended by the Council.

11 With that caveat in mind, the Tribunal is prepared to accept that an access declaration may be particularly appropriate where a facility, by means of which a service is provided, is controlled by a vertically integrated monopolist. But the provisions in Pt IIIA of the Act are not limited in their application to a vertically integrated organisation, and we cannot see anything in the Hilmer report to suggest that the Hilmer Committee intended its proposed new legal regime would be limited to facilities which are vertically integrated with potentially competitive activities in upstream or downstream markets.

12 SACL also placed reliance on the proposition that the Hilmer Committee had noted that where the owner of a facility is not vertically integrated, the principal competition concern is not access to the facility but rather the prices which the owner of the facility charges for access: Hilmer report 240. But that is not to say that in an appropriate situation, as in the present situation, the issue may turn out not to be access pricing but rather access itself. In this matter the issue is not the prices SACL charges ramp handlers but rather whether SACL should be granting wider access to the services which are provided by means of SACL's facility. The Hilmer Committee also noted that where the owner of a facility was not competing in upstream or downstream markets, the owner usually had little incentive to deny access, because maximising competition in vertically related markets maximised its own profits. In the present matter SACL does want to deny access, or at least regulate access,

because it appears to want to control and decide itself who shall operate ramp handling activities at the airport.

13 The Tribunal was also referred to s 192 of the *Airports Act* 1996 (Cth) ("Airports Act") which, in effect, makes a privatised airport a declared service for the purposes of Pt IIIA of the Act. No lease has yet been granted in respect of SIA so that it is not subject to the provisions of s 192 of the Airports Act. The Tribunal takes the view that its re-consideration of the matter should be determined by reference to the issues which arise under Pt IIIA of the Act and not by reference to the issues which arise by virtue of s 192 of the Airports Act. Putting the point another way, the Tribunal does not consider it appropriate to approach the re-consideration with a disposition in favour of declaration because of the provisions of the Airports Act and, in particular, s 192 or to be influenced by those provisions.

3.1 The services declared by the Minister

14 It is important to identify with precision the actual "services" which are the subject of the Minister's declaration as some of the witnesses were confused as to the nature of the "services" declared. The definition of "service" in s 44B of the Act is such that a service, although separate and distinct from a facility, may consist of the "use" of a facility. Section 44B defines "service" as meaning:

> *"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."*

As the Full Court said in *Rail Access Corporation v New South Wales Minerals Council Ltd* (supra) at 524:

> *"The definition of 'service' in s 44B of the Act makes clear that a service is something separate and distinct from a facility. It may, however, consist merely of the* use *of a facility. The definition of 'service' distinguishes*

> *between the use of an infrastructure facility, such as a road or railway line, and the* handling *or transporting of things, such as goods or people, by the use of a road or railway line. The fact that one service provider, such as Freight Rail Corporation, is using the railway line infrastructure facility made available to it by Rail Access Corporation for the purposes of carrying coal by rail does not mean Rail Access Corporation is carrying on, or is the provider of, a service of carrying coal by rail."*

SACL does not itself provide a service of loading and unloading either passengers or freight from international aircraft at SIA. Such services are provided by other organisations who are given access to the airport to enable them to carry out these activities. We emphasise this point because it might be thought, as some witnesses did, but nevertheless erroneously, that the service declared either constituted or included the service of loading and unloading international aircraft at SIA and to transfer freight. For example, Professor Parry (an economist called by SACL) said in his witness statement that:

> *"I assume that the services that have been declared by the Commonwealth Treasurer* 'to load and unload international freight at Sydney International Airport … and to transfer freight …' *are services offered within a market".*

The services declared by the Minister were:

> *"the service provided through the use of the freight aprons and hard stands"*

and

> *"the service provided by the use of an area at Sydney International Airport to: store equipment used to load/unload international aircraft; and to transfer freight from the loading/unloading equipment to/from trucks at the airport".*

The services related to the use of two general areas. First the area provided through the use of the freight aprons and hard stands. Secondly, the area required to store equipment and to enable the transfer of freight from the equipment to and from trucks at the airport. We take this reference to the second area to include the areas required for the movement of freight between CTOs and aircraft.

15 The references in the relevant parts of the Minister's declaration to "to load and unload international aircraft" and "to load/unload international aircraft" and "from the loading/unloading equipment to/from trucks at the airport" are not part of the declared services as such but are rather a descriptive reference of the purpose for which the declared services are provided. As we noted earlier, SACL provides the services through the use of

the freight aprons and hard stands and the areas where freight is transferred and equipment stored for a number of purposes and activities which may, at any given time, be carried on concurrently. For example, when an aircraft lands and becomes stationary at the terminal it is necessary for a number of persons, carrying on quite different activities, to have access to the aircraft. Passengers are to be disembarked, freight is to be unloaded, the aircraft is to be cleaned and its toilets emptied, catering contractors must remove and replace food and associated food preparation and food presentation equipment, engineering checks, maintenance and service must be carried out to the aircraft, the aircraft has to be refuelled. None of these activities or services is provided by SACL.

16 Thus, when the Minister declared the relevant "services" he was declaring those services to the extent to which they were provided by SACL by means of the facility of most (see par 99 below) of the airport itself. Putting the matter another way, the service provided by SACL is the making available of the freight aprons, hard stands and other areas to enable other persons carrying on other activities to provide their own services. It makes no sense to construe the services declared by the Minister as including the services of loading and unloading international aircraft or transferring freight because no such services have been, or are, provided by SACL. Whether the services provided by the use of the physical facilities are in the same or different markets from the services facilitated by the use of those facilities addressed separately in pars 90-99 below.

17 The Tribunal is satisfied that the Minister's description of the services in his declaration is an accurate and succinct recording of the services which were the subject of ACTO's two relevant applications. Those services were described in one of ACTO's two applications in the following terms:

> ***"(c) Declared Service***
>
> *The services we seek to have declared are the services of the Federal Airports Corporation (FAC) whereby ACTO can gain access to international aircraft for the purpose of aircraft loading and unloading and/or gain access to freight that has been unloaded from an international aircraft (or to deliver freight to be loaded on to international aircraft).*
>
> *ACTO provides international Cargo Terminal Services (CTO services) to international airlines and proposes to provide Ramp services and requires access to the freight and passenger apron of Sydney and Melbourne airports to provide these services.*

ACTO seeks access to the passenger and freight apron areas and international aircraft parking bays in a number of different ways:

- *to operate equipment required to load and unload widebodied aircraft such as main deck loaders and lower deck loaders and the associated tugs, air stairs and dollie/barrow towing equipment on the freight and passenger apron.*
- *direct truck access to main deck loaders serving freighter aircraft*
- *direct truck access to dollies located on the freight apron or passenger apron and used to transport freight to/from passenger and freighter aircraft*

The FAC service we seek to have declared is the FAC's control of access to the freight apron or hard stand and the passenger aircraft apron for the purpose of providing Ramp services to these carriers and to enable ACTO truck loading and unloading."

The services were described in the other relevant ACTO application in the following terms:

(c) Declared Service

The services we seek to have declared are the services provided by the Federal Airports Corporation (FAC) where by ACTO can gain access to international aircraft for the purpose of loading and unloading those aircraft or gain access to freight that has been unloaded from an international aircraft or to deliver freight to be loaded on to international aircraft.

ACTO is seeking access to space on airport where ACTO can park and maintain its equipment and operate truck loading and unloading activities. The required space must be located such that equipment parked in this space is accessible to the freight and passenger apron so that freight can be handled in a timely manner and must be of sufficient area to enable truck loading and unloading operations."

What is clear from the ACTO applications, the Council's recommendation and the Minister's declaration, is that the services sought to be declared are the services provided by SACL by means of the facility it controls which for present purposes (although this is disputed by some parties) we will describe as the airport. Those services are the provision or making available by SACL of the use of the freight aprons, hard stands, areas where equipment may be stored and areas where freight can be transferred from loading/unloading equipment to/from trucks at the airport. Those services are not (as described by Professor Parry) "the services of loading and unloading international aircraft and transferring freight at Sydney International Airport". The point can be tested by asking what services are provided by SACL? It provides or makes available the use of freight aprons, hard stands and equipment storage areas and freight transfer areas to a variety of organisations, such as ramp handlers but it does

not provide or make available the service of loading and unloading international aircraft and transferring freight at the airport.

3.2 Financial viability of parties

18 SACL made much of what it called the lack of financial viability of SPAM and ACTO. SACL sought to demonstrate that both companies did not have the financial resources to carry on ramp handling activities at SIA. The relevance of evidence on this issue, which was led by SACL, and which was the subject of cross-examination of SPAM and ACTO witnesses, was challenged. It was put by SACL that the financial viability of applicants for access was relevant to the issue as to whether access or increased access to the relevant services would promote competition in at least one market other than the market for the service. This issue arises because the Minister cannot declare a service unless the Minister is satisfied, *inter alia*, that access or increased access to the service would promote competition in at least one market other than the market for the service: s 44H(4)(a).

19 The Tribunal is of the view that evidence of the financial viability of a party who desires access to the relevant service is not admissible or relevant on a consideration of what the Tribunal calls the first stage of the access regime provided by Pt IIIA of the Act. The task to be undertaken by the Minister, and on re-consideration by the Tribunal, is to determine whether, in accordance with the statutory criteria in s 44H(4), a service should be declared. If a service is declared then, in the absence of an access regime being put in place in accordance with s 44ZZ of the Act, a party seeking access to the service is to negotiate such access with the provider of the service. If such negotiations are unsuccessful it is open to the party seeking access to have the issue of its access arbitrated by the Commission. It is at that stage of the inquiry that the financial viability of the party seeking access may be relevant.

20 It was put by SACL that, in order to determine whether access or increased access to the service would promote competition in the relevant market, it was necessary to have regard to the financial viability of the party seeking the declaration, as such financial viability would be relevant as to whether or not competition would be promoted in the future in the relevant market. However, the Tribunal thinks this is a misunderstanding of what occurs at the first stage. The declaration of a service pursuant to s 44H of the Act is akin to unlocking the door, but whether or not a particular party can then go through the door depends on the party's

ability to negotiate an access agreement with the provider or, in default of an agreement, to have an arbitrated outcome of that situation.

21 The Minister and the Tribunal do not look at the promotion of "competitors" but rather the promotion of "competition". Such an analysis is not made by reference to any particular applicant seeking to have a service declared. At the point of time at which a decision is to be made as to whether or not to declare a service under s 44H, it may not be known who will be seeking access if the relevant service is declared.

3.3 Expert evidence

22 The Tribunal heard expert evidence from four economists who were called as expert witnesses. Professor Williams was called by the Council. Professor Parry was called by SACL. Professor Maddock was called by Ansett. Mr Ergas was called by SPAM. The main thrust of the expert evidence was directed to the issues of market definition, the definition of "service" and "facility" and whether an access declaration would promote competition in the relevant market. In a number of respects the views of the economists were in agreement but there was a divergence in particular respects. Criticism was made of some of these views on the basis that relevant documentation had not been considered and unjustified assumptions had been made. The Tribunal has taken these criticisms into account in evaluating the evidence given by the economists.

4. THE AIR FREIGHT INDUSTRY

23 Before addressing each of the matters specified in s 44H(4), in respect of which the Tribunal must be affirmatively satisfied, it is necessary to understand the nature and structure of the air freight industry and the role played in that industry by an international airport. We will therefore consider the nature of the operations and transactions involved in handling air freight and the particular considerations involved at SIA.

4.1 Operations and transactions in handling air freight

24 Air freight handling operations at an international airport are concerned with moving outgoing freight from a shipper's premises under due control to a departing aircraft, and with unloading incoming freight from an arriving aircraft for delivery to the consignee. The

operations are typically performed through a chain of distinct businesses, each conducting certain elements of the physical movement and handling of freight and each performing some part of the related administration. Customs and other relevant export approvals must be obtained and necessary documentation generated. Incoming air freight must be cleared by customs and quarantine authorities before delivery to the consignee. The commercial operators that handle freight export and import necessarily comply with the airport's security requirements as administered by the airport's controlling authority. Moreover, airlines undertaking the carriage of freight ordinarily require conformity of freight handling practice with standards and procedures laid down by the International Air Transport Association ("IATA").

25 Other relevant factors bearing on the manner of the handling of air freight are:

- Both freight and passenger baggage are commonly stowed in aircraft in standardised container units called "unit load devices" ("ULDs"). Freight handling arrangements make provision for the consolidation of loose items of freight into ULDs, and for breaking down of ULDs into their component consignments at the destination airport.

- Freight movement at an airport must be conducted with regard for security in movement between the two distinct zones of the airport — the secure area ("air-side") within which aircraft move and are loaded, unloaded and serviced, and the public area outside the security fence ("land-side").

- The air-side loading and unloading of aircraft is performed with specialised equipment, and the movement of freight to and from the aircraft uses specialised vehicles — ordinarily trains of flat-top carts ("dollies") pulled by small tractors ("tugs"). These vehicles are not licensed to travel on public roads and do not leave the airport. It follows that procedures for transferring freight from the consignor to the aircraft, and from the aircraft to the consignee, must provide for the freight to be physically transferred at the airport between the on-airport dollies and vehicles licensed for public roads.

26 Strengthened areas at an airport on which aircraft park for unloading and loading passengers and freight (at SIA typically immediately adjacent to the passenger terminal) are variously known as "aircraft bays", the "apron", the "hard stand" and the "ramp". There seem to be

nuances of meaning and usage in the uses of these terms, but for the purposes of these reasons they are taken to be synonymous. Where possible the Tribunal has preferred the term "apron" as referring to that area of the airport available for aircraft parked for various purposes that include passenger transfer, freight loading and unloading, refuelling and maintenance. In this respect we have followed the usage adopted by SACL in its draft licences for cargo terminal operators and ramp service operators.

27 The specialised forms of commercial enterprise that have developed to perform various functions within the air freight handling system are each required to satisfy the complex needs and constraints that bear on their function. The operational sequence of such businesses, and the pattern of contractual arrangements, as described below, relates to out-bound freight. In-bound freight follows much the same sequence in reverse.

4.2 Freight forwarder

28 In a single transaction, the shipper of freight contracts with a freight forwarder for certain goods to be delivered to a consignee at an overseas destination. The freight forwarder's quoted price includes, in addition to the direct transport cost, charges for preparing certain documentation. The freight forwarder in turn contracts with an airline to deliver the goods to the overseas destination, choosing the airline on the basis of cost, past relationships and the level of service and convenience required. The freight forwarder then collects the goods to be shipped from the consignor, prepares a standard international cargo document known as the Air Waybill, labels the goods suitably and obtains export permits that are required for certain classes of goods.

29 In Australia, more than 100 freight forwarders are accredited by IATA and follow IATA rules and regulations for international freight forwarding. Freight forwarders also receive in-bound freight for delivery to consignees. The major freight forwarders have bonded premises off the airport, approved by the Australian Customs Service ("ACS") for the storage of goods in bond and for the breaking down of imported containers of freight prior to delivery.

4.3 Cargo Terminal Operator

30 The freight forwarder delivers the out-bound goods to a CTO nominated by the airline. The CTO has contracted with the airline to provide CTO services, which include the consolidation of loose items of freight into unit loads in time to meet scheduled aircraft departures, the arranging of customs and quarantine inspection and the completion of all the required documentation and administrative procedures. Each airline usually works with only one CTO. The CTO may be owned by or associated with an airline, or may be independent of any airline. The CTO's premises are typically located on airport land at the boundary between air-side and land-side, where they provide (for both out-bound and in-bound freight) the point of controlled transfer between the freely accessible commercial environment outside the airport and the space where freight moves on trains of dollies pulled by tugs, where high security must be maintained and where customs and quarantine supervision is required. It is also administratively feasible for a CTO to be located off-airport, subject to special arrangements to meet customs and quarantine requirements and suitable and secure procedures within the airport for transfer of freight between air-side dollies and trucks able to travel on public roads to and from the off-airport CTO.

31 At the date of the hearing three on-airport CTOs operated at SIA — Qantas, Ansett and Australian Air Express, which is jointly owned by Qantas and Australia Post. Qantas had about 60% of the business, with the remainder being shared about equally between the other two CTOs. ACTO also offered services from an off-airport CTO facility.

4.4 Ramp handler

32 The loading and unloading of freight and passenger baggage at the aircraft on the apron is conducted by a ramp handler, who is contracted to the airline operating the aircraft. The airport authority is not a party to the ramp handling contract although the ramp handler necessarily operates on airport property. The ramp handler transports freight between the aircraft and the CTO and transports passenger baggage between the aircraft and the terminal. The ramp handler provides the equipment, vehicles and operating staff required for the air-side transfer of freight and passenger baggage. Ramp handlers might also be contracted to clean passenger aircraft and to perform other tasks on the apron, such as "push-back" where a large tug assists the aircraft to move from the apron on departure.

33 The contracted ramp handler does not necessarily undertake all the functions that are performed for an aircraft on the apron. Airlines determine the scope of the duties of the contracted ramp handler, suiting their own operating practices and commercial preferences. Functions other than ramp handling are also performed in servicing an aircraft on the apron, and often at much the same time — for example refuelling, provision of catering supplies and engineering inspection and minor maintenance. The apron space immediately around an aircraft is commonly congested with vehicles and personnel of the various suppliers of services.

34 At the time of the hearing, four ramp handlers operated at SIA — Qantas and Ansett, and two small operators — SPAM and IBMS. SPAM's licence to operate at SIA extended only until November 1999, and the restricted IBMS licence was scheduled to expire on 31 December 1998. Qantas and Ansett offer ground handling services also at other Australian airports and SPAM also operates at Melbourne International Airport.

35 The services that might be performed by a ramp handler (and by other suppliers of services) fall within a larger classification known as "ground handling services". The IATA listing and categorisation of ground handling services includes all the airport services that are required by an operating airline. The Sydney Airport Freight Study (to which we refer in detail below) also adopts this definition, which includes, for example, functions remote from this review such as support services for passengers within the terminal. In this review, witnesses appeared on occasions to confuse "ramp handling" and "ground handling", sometimes using the terms as if synonymous. SACL witnesses in particular seemed to apply the term "ground handling services" much more narrowly than the broader IATA definition, but perhaps still with a wider scope than "ramp handling services". Nevertheless a witness's intended meaning was typically apparent from the context. In this re-consideration we adopt the term "ramp handling" for the group of services that centres on the loading and unloading of freight and baggage, and where possible apply "ground handling" only to the full range of support services.

36 It is notable that, although the typical ramp handler is capable of offering the customary suite of ground services to airlines, the preferred practices of individual airlines might encourage alternative groupings of ground handling services in more specialised enterprises. Specialised ground handlers known generally as Fixed Base Operators support the particular

needs of executive jet operations at airports around the world. At SIA, they operate at a small general aviation terminal that is located in the north-east sector of the airport, distant from other international aircraft. Also at SIA, two small ground service operators have in recent years won the custom of certain non-aligned airlines with infrequent services to Sydney, by offering distinctive niche services: IBMS confined its ramp handling to narrow-bodied aircraft (thus saving on expensive ramp handling equipment) and has also offered catering services. SPAM supplemented its ramp handling capability with engineering services and the conduct of customised passenger support services. SPAM did not seek to service B747 freighters. Among the larger ramp handlers, there can also be differences in capability. For example, it was said in uncontested evidence that Ansett has a lesser capability to handle B747 freighters than Qantas does.

37 All the commercial participants in the freight handling sequence — the freight forwarder, the CTO, and the ramp handler — have direct contractual relations with the airline that carries the freight internationally. The airport authority does not participate contractually in freight handling operations, although the airport's facilities are essential to their conduct. Rather the airport authority stands in a role that is distinct from those of the commercial entities that together undertake the chain of contracted international air freight activities. Its role might be described as being to facilitate the conduct of freight handling though the airport, consistent with its obligations for orderly, safe, secure and commercially sound airport operation. The Commission of the European Communities usefully made the general point in its Consultation Paper "Ground Handling Services", dated 14 December 1993, which was tendered in evidence:

> *"Whether or not the market is fully open to competition, the airport authority or corporation as the body managing and regulating the airport, must be entitled to take the measures necessary for efficient management and for security and safety. It must be able to require service suppliers at the airport to comply with the rules and conditions it considers appropriate for these purposes."*

SACL, among its numerous functions, polices the safety and security of airport freight operations, enters into leases with CTOs and other licensees occupying airport land and premises, provides and manages essential operating and equipment storage space made available to ramp handlers and charges appropriate fees for its services.

5. PARTICULAR CONSIDERATIONS RELATING TO SYDNEY INTERNATIONAL AIRPORT

38 SIA is Australia's major international airport, and is the nation's primary air-freight hub. In 1997, some 337,000 tonnes of in-bound and out-bound airfreight was cleared at SIA by Australian Customs, with a value exceeding $21 billion. About 50% of international air freight entering and leaving Australia passes through Sydney. Some of this is transhipped in Sydney and transported to or from Melbourne and Brisbane by road. About 80% of freight entering and leaving SIA travels in the holds of passenger aircraft and the remaining 20% in dedicated freight aircraft. Accordingly international air freight moving through SIA is predominantly loaded and unloaded from aircraft standing on aprons adjacent to the international passenger terminal, the associated ramp handlers are typically contracted to handle both freight and passenger baggage and freight aircraft are usually serviced on aprons close to the cargo terminals of the on-airport CTOs.

39 The number of international aircraft using SIA has been growing strongly for many years, and is projected to continue growing. The volume of air freight handled in 1997 was more than 50% higher than in 1990 and future growth is forecast at 6% to 9% annually. The estimated freight capacity of present installations will be reached during the year 2000, requiring additional facilities to be constructed. The number of passengers handled has been increasing at about 6% annually and will surge for a period in 2000 because of traffic generated by the 2000 Olympic Games.

40 The provision of a second commercial airport in the Sydney area in further response to projected growth in passengers and freight is an unresolved issue in government policy. The future second airport ("Sydney West") will be operated by SACL. The secondary airports in the Sydney region were transferred to subsidiaries of SACL in July 1996, immediately following the transfer of SIA to the control of SACL from FAC under the *Airports (Transitional) Act* 1996 (Cth).

41 Witnesses for SACL described SIA as one of the smallest international airports in the world in relation to the traffic it handles, so that the efficient use of its available space is a critical management issue. Further, SIA's proximity to well-settled parts of Sydney introduces a concern to control aircraft noise in residential areas beneath flight paths with a consequence in public policy that aircraft arrivals and departures are subject both to a late night curfew and

to noise abatement procedures that affect the pattern of runway use. The pattern of aircraft movements at SIA also exhibits morning and afternoon traffic peaks that exacerbate airport capacity problems. Mr Mezgailis, Planning and Environment Manager for SACL, said that numerous investigations and reports, while differing in detail, have agreed in concluding that the airport will reach its maximum runway capacity in 2006, assuming that present patterns of aircraft movement continue.

42 Being situated between developed suburban areas and Botany Bay, the airport has little room for expansion of its boundaries. The western boundary is limited by the Cooks River. A canal bounds the airport to the north. Two runways already extend to the south into Botany Bay on reclaimed land. An intersecting runway divides the airport's remaining land into four distinct but confined quadrants in which airport facilities might be located. Movement of vehicles and equipment between sectors is restricted by limitations on the capacity of the present perimeter roads.

43 The north-west sector is used for international passenger and freight aprons and terminals and related facilities for public access and car parking. It is the most extensively developed sector of the airport in relation to its available space. The north-east sector is occupied by domestic passenger and freight terminals with related facilities for public access and parking, the Qantas base and other aircraft maintenance facilities and facilities for general aviation. The other two sectors, to the south-east and the south-west, have significant but limited space available that might in principle be used for additional aprons, related terminals and the like.

5.1 Planning for increased demand

44 Mr Mezgailis described the planning system adopted at SIA for allocation of limited space among competing priorities. Proposals for new or changed facilities in response to the forecasted increase in passenger numbers or other imperatives are considered and approved within this framework. SACL's planning system necessarily responds to the Airports Act which requires a master plan that looks forward twenty years. However SIA's master plan is yet to be developed, and a Draft Planning Strategy dated 1990, as supplemented in 1993, presently subsists as the basic planning framework. The responsible Minister has advised the Chairman of SACL that a master plan for SIA is to be submitted not later than 30 June 2001.

45 The two Draft Planning Strategy documents each reflect the circumstances during their preparation, proposing a basis for the rational allocation of land and for decisions on new facilities with a five-year planning horizon. However changes in forecast passenger and freight traffic, notably after Sydney's winning of the 2000 Olympic Games, have highlighted the difficulty of firm planning even five years ahead. Shifts in government policy, in respect of the operation and future of SIA relating to aircraft noise and to a second Sydney airport, have also required reconsideration of established plans. The 1990 Draft Planning Strategy envisaged a pattern of land use at SIA that differs radically from that now contemplated by SACL. Progressive closure of the east-west runway would allow extensive extension of airport facilities into the south-east and south-west sectors. The 1993 supplementary document retreated somewhat from this plan but maintained an intention to develop new international freight facilities in the south-west sector. No closure or partial closure of the east-west runway is apparently now contemplated.

46 A major current expansion of facilities in the north-west (international) sector is presently proceeding, with the aim of satisfying the demand forecast for 2003, but to do so in time for the Olympic Games. The project will provide extended passenger terminals with additional passenger aircraft aprons, aprons for freight aircraft, changed arrangements for CTOs and for ramp handling equipment and vehicles and for the storage of empty ULDs and public rail transport and road access (with car parking) of a capacity to meet future needs. SACL is to acquire industrial land across the canal (the "Northern Lands") with the intention of moving CTO facilities to this new area, which would be provided with air-side road access to and from the aprons where freight is loaded and unloaded. The leases on the CTO facilities operated by Ansett and Australian Air Express have expired, potentially releasing space close to the international passenger terminal for construction of passenger aircraft aprons. Qantas has a long lease (until 2017) on the adjacent site of its CTO premises, and its relocation to the Northern Lands is not considered practical in the short term.

6. REVIEW OF AIR FREIGHT HANDLING AT SYDNEY INTERNATIONAL AIRPORT

47 In recent times there has been a process of review by SIA of the air freight handling activities at the airport and its strategy for regulating and promoting those activities. That process of review and its outcome is relevant to the issue whether increased access to the services sought to be declared would promote competition in the relevant market.

6.1 Competition in airport services as an airport management issue

48 Before the 1990s, public policy in relation to the aviation industry gave little emphasis to the fostering of competition. Ms Alroe, Manager Aviation Services at SIA, provided a context for the present review in her written evidence:

> *"The two-airline policy, which was in place from 1952 until 1990, has dramatically influenced the competitive environment at Sydney Airport. The effects of this policy at Sydney Airport are still felt today. In particular, Qantas and Ansett dominate the domestic/interstate jet traffic almost exclusively. Similarly, they dominate the whole range of ground handling services at the international terminal (which includes passenger handling and freight handling services)…"*

Neither the Draft Planning Strategy of 1990 nor its 1993 Supplement refers to competition considerations. This is not surprising because they precede both the 1995 amendments to the Act and the earlier period when the National Competition Policy was being negotiated. They also precede the Airports Act with its explicit access provisions that apply to a designated airport leased to a private operator. Today, the eventual leasing of Sydney's airports to a private operator is envisaged under government policy which has been applied already to major international airports in Melbourne, Brisbane and Perth.

49 The House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform, conducting an inquiry into exports of perishable and time sensitive goods, held hearings in Sydney in September 1996. Its report of 26 November 1996 (the "Vaile Report") emphasised the need for more competition in CTO services.

50 The new awareness of competition issues in airport operation was not confined to Australia. On 15 October 1996 the Council of the European Union ("EU") issued Council Directive 96/67/EC on access to the ground handling market at European community airports. This directive laid out criteria governing access to the ground handling market at Community airports.

51 On 14 December 1993, the Commission of the European Communities in Brussels had issued its Consultation Paper entitled "Ground Handling Services", directed to developing a framework for the market for ground handling services (as defined by IATA) in accordance

with competition. The Paper characterised the situation at that time in terms that have close parallels with the conclusions of the Sydney Freight Study:

> *"Airlines are thus not always able to choose between competing suppliers; suppliers have a margin of discretion to set prices that are barely transparent, at levels which may not effectively reflect their costs, or which exceed those which would result from the free interaction of supply and demand. Furthermore, the lack of competition and the restrictions on carriers providing their own services could prevent carriers from improving the quality of services or matching them to the specific needs of their customers. Lastly, service suppliers holding a monopoly can in practice favour certain carriers to the detriment of others …"*

52 The Paper recognised that airport management must exercise control over safety and security, and might need to limit the number of suppliers of a particular service because of considerations of space or capacity. They proposed procedures that can be abstracted in some relevant respects as follows:

> *"… The airport would be entitled to impose requirements needed for the proper management of the infrastructure and for the preservation of safety and security [but] would … comply with … fundamental principles*
>
> - *… to be non-discriminatory*
> - *… to be suited to the purpose in view*
> - *… to be in proportion to that purpose*
> - *… not reduce the openness of the market to a point below what was required by Community legislation*
>
> *Impartial tendering procedures… at Community level for the designation of suppliers of services wherever their number was limited."*

53 The EU Directive of October 1996 on access to ground handling made orders that included provisions that we summarise as follows:

- Member States of EU may limit the number of suppliers in baggage handling, ramp handling, fuel and oil handling, freight and mail handling; but may not have fewer than two in any category at an airport;

- From 2001, none of the authorised suppliers may be directly or indirectly controlled by either the managing body of the airport or an airline that carried more than 25% of passengers or freight through the airport in the preceding year. (At SIA, such a rule

would exclude Qantas from operating a ramp handling business. The logic of the EU directive is to stop the improper use of market power by a dominant carrier);

- Selection criteria shall be established following consultation with the Airport Users' Committee (an elected committee representative of all airlines using the airport); the selection criteria shall be relevant, objective, transparent and non-discriminatory;

- The space available for ground handling must be divided among the various suppliers on the basis of relevant, objective, transparent and non-discriminatory rules and criteria;

- Suppliers shall be selected for a period of no more than seven years;

- The managing body may exclude from the airport any supplier that fails to comply with rules to ensure the proper functioning of the airport, provided that the rules are applied in a non-discriminatory manner;

- Any party with a legitimate interest has a right of appeal to a public authority other than the managing body of the airport and independent of it.

54 This directive relates to the administration of airport access under a different jurisdiction to that of the Tribunal, and in a different legal framework. Nevertheless one finds in the directive a similarity with the philosophy which underlies the access provisions of the Act, as set out in the Competition Principles Agreement, the relevant parliamentary documents and the commonality of issues that must in practice be addressed by administrative process. The Tribunal found this evidence useful in highlighting the considerations that we might take into account in evaluating the future use of the tender process and its associated selection criteria.

6.2 The Freight Study

55 In June 1996, FAC commissioned Western Global Pty Ltd to conduct a comprehensive study of air freight handling arrangements at SIA (the "Freight Study") with the aim of providing:

> *"a freight handling strategy which would ensure [that] growing demand from the air freight industry and the trading community is met and performance improved to global standards."*

The terms of reference noted that FAC "is reviewing air freight handling arrangements while also considering the relocation of freight handling facilities to accommodate International Terminal expansion". Mr Halleen, Freight Manager at SIA, gave evidence of his understanding that the Freight Study originated not only in the imperatives of planning to accommodate airport growth, but also in:

- complaints from non-resident, non-aligned airlines about the prices charged by Qantas and Ansett for freight handling services; and

- persistent complaints from both airlines and freight forwarders about delays, damage, and the poor quality of service in freight handling by Qantas and Ansett.

The report by Western Global Pty Ltd, entitled "International Freight Handling Study for Sydney (Kingsford Smith) Airport" was tendered in evidence as a confidential exhibit. It was marked "Internal working document only". What follows is written with regard to this claim of confidentiality, while having regard also to counsel for SACL making the substance of the Freight Study's relevant conclusions publicly evident in putting his client's case to the Tribunal. The copy of the Freight Study tendered in evidence was dated "Final, March 1997", but other evidence indicates that a near-final draft of the Study report was submitted to FAC in December 1996.

56 The Freight Study was highly critical of Qantas and Ansett in their roles as established CTOs and ramp handlers. In final submissions, SACL's counsel referred to the Freight Study as concluding that prices were high and service poor across the market, and that the then current situation, with two resident airlines (in effect) providing the only ramp functions, and the same two airlines and Australian Air Express (a consortium of Australia Post with Qantas) providing the only CTO operations, "was not an acceptable competitive structure for the future". The Tribunal sees no damaging breach of confidentiality in quoting the Freight Study as follows:

> *"Non-resident airlines … must … have a choice of service providers to ensure continually improving performance without the possibility of competitive disadvantage. The current operators have a priority focus … on their own direct business and the treat third party handling as a means of delivering higher utilisation of their facilities, equipment and human resources not as a primary market."*

In the Tribunal's view more recent developments, by which both Qantas and Ansett have extended their alliances with other major international airlines, make the potential disadvantage of non-resident airlines that do not belong to those alliances — the so-called non-aligned airlines — all the more pertinent.

57 Strategy discussions within FAC in early 1997 led to a Board directive that the recommendations of the Freight Study be implemented in relevant respects. As described by Mr Halleen, implementation of the Freight Study in all its aspects has involved three parallel strands:

- Internal approvals needed to implement the various Freight Study recommendations. This approval process began prior to final completion of the Freight Study so that expressions of interest could be promptly called;

- A tender process, by which organisations interested in supplying either CTO or ramp handling services were identified, short-listed, considered in detail and selected, with a view to the negotiation of licences to operate;

- Negotiations with a third party developer to construct new CTO facilities on the "Northern Lands" for lease to selected CTO operators.

Of these, only the second strand, the tender process, which has led to the selection of additional operators of ramp handling services at SIA and their prospective licensing, is directly relevant to this review. The merits and demerits of the process were explored at length in written and oral evidence and in cross-examination, and were the subject of strongly expressed submissions by the parties, concerned either to defend or attack its design, conduct and consequences.

6.3 Federal Airports Corporation and Sydney Airports Corporation Limited strategies

58 In authorisation matters, the Tribunal has customarily sought to examine the business strategies underlying the relevant conduct. It has taken the view that the identification and weighing of public benefits and anti-competitive detriments that is required of the Tribunal under the Act will ordinarily be assisted by an analysis that reaches deeper into the commercial circumstances than a more superficial review of the anti-competitive

consequences of the relevant conduct in isolation would allow. In this matter also, some understanding of the strategic intentions of SACL as the provider of the relevant service has been helpful to our consideration of relevant access issues. The usefulness to the Tribunal of evidence as to strategic intentions was stressed at directions hearings. No SACL executive of sufficient seniority to be knowledgeable on large issues of strategy was presented as a witness with whom the Tribunal could explore significant strategic perspectives in confidential session, as has commonly been the Tribunal's practice. The Tribunal has therefore been obliged in certain respects to infer SACL's strategic intentions from the evidence available.

59 We have already noted the explicit strategy recommended in the Freight Study, of using a tender process. We might summarise this general strategy as follows:

> Future FAC relationships with operators of CTO and ramp handling services would be contractual rather than rely on regulation. The airport authority's ability to exercise control over CTOs and ramp handlers would be ensured by limiting the number of permitted operators, calling for tenders, and having successful tenderers enter into a licence agreement which imposes performance conditions.

60 The "Phase One Committee" was formally named the Freight and Ground Handling Services Strategy Committee. It pursued, as one of its functions, the final definition of freight strategies for submission to airport management. The document recording the resulting Freight and Ground Handling Services Strategy was submitted by SACL in evidence. The report of the Phase One Committee noted that neither Qantas nor Ansett had (at the relevant date) any written contractual rights relating to ramp handling services. The performance standards for which licensees will be accountable to SACL as a condition of their operating licence are set out in draft licence agreements submitted in confidential evidence. The obligations to be imposed by the licence extend beyond satisfying considerations of safety, security and orderly operation of the airport into the meeting of minimum operational requirements, particularly in regard to the timeliness of performance of certain of the licensee's functions.

61 The particular strategies adopted in relation to CTOs are not directly relevant to this review, but reflect the above general strategy. They may be summarised as follows:

- On-airport CTOs would be relocated to the Northern Lands, freeing up for other uses the space they presently occupy.

- The number of on-airport CTOs would be limited to three or four because of limitations of space on the Northern Lands, and the need to 'create an environment which allows operators to obtain a critical market mass for sustainable development'.

- A common-user by-pass facility ("CUB") would be built, thus allowing the operations of off-airport CTOs, as recommended by the 1996 Vaile Report. A CUB is a transfer station located across the airport security fence, available for general use, at which made-up ULDs of freight can be transferred between air-side dollies and trucks that can carry them to or from bonded off-airport premises.

The construction of a temporary CUB immediately adjacent to the Qantas CTO premises was seen as responding, inter alia, to the needs of ACTO, the original applicant for declaration in this matter, while avoiding the obvious problems that SACL foresaw in ACTO's original proposal, now abandoned, for trucks to be driven directly on to the airport aprons.

62 Corresponding strategies for ramp handlers were also directed to the management of airport space and the limitation of numbers of licensed operators. The first was explicit, and the application of the others was apparent from the evidence:

- The number of licensed ramp handlers would be limited to three or four. The Strategy document recorded that this explicit strategy :

  "Assumed [the] limited capacity of the International apron and supporting building infrastructure to accommodate more than four operators and their associated equipment, personnel and facilities".

  As described later in these reasons, this assumption was defended by witnesses for SACL, and contested by other witnesses.

- The use of air-side land for Qantas and Ansett ramp handling equipment would be managed more strictly. SACL witnesses made reference on more than one occasion to their obligation to exercise greater control over wasteful use of apron space and other air-side space by Qantas and Ansett in their role as ramp handlers.

- The use of air-side land by small ramp handlers would be terminated. Witnesses for SACL were guarded in respect of this strategy while agreeing that the right for SPAM and IBMS to work as ramp handlers had been or would be withdrawn.

63 The planned exclusion of SPAM and IBMS from the airport was justified by FAC at the time by pointing to the absence of any written licence to operate (although neither Qantas nor Ansett had any formal ramp handling licence either). Mr Leach for SPAM and Mr Willis for IBMS protested in evidence at the arbitrary treatment of what each considered to be a viable business that had been capable of growth. In explaining SACL's continuing intentions to terminate the access previously enjoyed by these operators, SACL witnesses made much of the management imperatives consequent on air-side space shortages and related congestion in the movement and use of equipment and vehicles, with the consequent risk of costly and dangerous accidents. The issues of space availability and operational safety at SIA insofar as they affect, or are affected by, the operations of ramp handlers are addressed more fully later in these reasons.

6.4 The tender process

64 The prominence accorded the tender process in this proceeding might seem surprising. Its implementation lies in the past, and has contributed (as have other past events such as the exclusion of SPAM and IBMS) to the present situation on which choices for the future have to be founded. What's done is done, it might be argued, so that criticism of the conduct of the tender process is irrelevant here. Certainly it is not the role of the Tribunal to express a view as to whether the FAC and then SACL might have done things differently in the period since 1996. Rather the Tribunal's conclusions require our consideration of the options available for the future, of which declaration of the services at issue is the particular option under review.

65 The relevance of the tender process for the Tribunal in this proceeding arises rather from its prospective future application. It was submitted by SACL that the tender process is a peculiarly effective and appropriate device for selecting ramp handlers and other airport service licensees in the circumstances of SIA, and should be the preferred mechanism for the future. This submission was challenged by other parties. Evidence of the past operation of

the tender process is therefore relevant as exemplifying the manner in which the process would work in the future.

66 The three component stages in the tender process have been implemented in turn since early 1997.

6.5 Call for expressions of interest

67 This first phase of the tender process was described by Mr Halleen as a market assessment. Press advertisements on or around 22 March 1997 initiated the process formally, advising that relevant documentation was available and calling for submissions by parties capable of providing services at SIA in three categories: International Cargo Terminal Operations (which are not the subject of this review), International Ground Handling Services (which we here call ramp handling services to avoid confusion with IATA terminology), and Independent Freighter Operations (the class of businesses known as integrators, also not the subject of this review). The opportunity to tender was also widely notified to numerous freight handling operators around the world who are registered with IATA. The selection criteria were not revealed in detail in the documentation but were indicated in summary.

68 The Phase One Committee set up to receive and evaluate expressions of interest was comprised of ten members as from 1 May 1997. Three members did not participate in the evaluation — Mr Ellis, a senior Sydney solicitor who was independent Chairman of the Committee, Mr O'Connor, a Sydney chartered accountant who acted as Probity Auditor and Mr Johnson, FAC's Project Development Director. The seven evaluating members comprised four of FAC's senior operating managers with relevant experience, the Managing Director of Western Global Pty Ltd and two independent advisers with relevant experience. The Committee received nineteen expressions of interest in supplying ramp handling services within the stipulated time frame. The Committee's procedures required that the seven evaluating members should read independently and evaluate the expressions of interest, scoring each of them against formal selection criteria that were provided by FAC to the Committee at the outset. Agreed weightings of the criteria were then applied to the aggregate scores, coupled with sensitivity analyses to check how rankings would be affected if the weighting of the criteria were different. The integrity of the process by which the expressions of interest were evaluated by Committee members against the selection criteria is considered

by the Tribunal to be beyond question. The suitability of the selection criteria prescribed to the Committee by FAC is a separate issue, which is addressed in the next section of these reasons.

69 As a result of the Phase One Committee's work, it was agreed at its meeting on 28 May 1997 that seven ramp handler respondents should be short-listed and invited to make more detailed submissions for consideration.

6.6 Selection of licensees by evaluation of business plans

70 The second phase of the tender process for ramp handlers began with the short-listed organisations being invited to submit detailed business plans for their operations at SIA on the basis of a brief supplied by FAC. Again the full selection criteria were not revealed to candidates in the brief but were indicated in summary. A Ground Handling Services Evaluation Committee was formed, with the task of evaluating the business plans received against the selection criteria, and making final selections. The Committee first met on 22 January 1998 and reported on 24 April 1998. It comprised four evaluating members (three FAC officers and one experienced independent auditor – see par 68), and five others (including Mr Ellis as Independent Chairman and Mr O'Connor as Probity Adviser). The procedures adopted were similar in principle to those used in the first phase of the tender process, and again the Tribunal has no cause to question their integrity. Two evaluations were undertaken, one preliminary, one final. Sensitivity analyses demonstrated that the ranking of the successful candidates would have been unaffected by significant changes in the weightings of the selection criteria.

71 Of the seven firms invited to submit business plans, only five did so. From these, the Evaluation Committee was concerned to select two ramp handlers in addition to Qantas and Ansett. These two established ramp handlers had been advised after the first phase of the tender process that they had been selected to continue to provide ramp handling services at the Airport on condition that they entered into licence agreements on similar terms to those ultimately negotiated with the new entrants.

72 The two new entrants selected to supply independent ramp handling services were:

- Jardine Airport Services Australia Pty Ltd ("Jardine"), a subsidiary of Jardine Matheson (Australia) Ltd, a company associated with the large international Jardine Matheson Group which presently operates airport services in Hong Kong.

- Ogden International Facilities Corporation (Asia Pacific) Pty Limited ("Ogden"), a division of the Ogden Corporation, a US corporation. Ogden Aviation is the world's largest independent aviation support services company, operating at ninety-one airports in twenty-three countries.

6.7 Negotiation of licences

73 The third phase was the negotiation of licence agreements with the two successful candidates to supply ramp handling services. This phase of negotiation was not complete at the end of the formal hearing but the Tribunal was subsequently informed that agreements had been executed and copies of the executed documents were submitted to the Tribunal. The Ramp and Passenger Handling Services Licence Deed between SACL and Jardine is dated 18 January 1998 and the licence is for a period of five years commencing on 1 June 1999. There is an option for a further licence term. SACL and Jardine have also entered into a sublease of certain parts of the airport for a period of five years from 1 June 1999. The Ramp and Passenger Handling Services Licence Deed between SACL and Ogden is dated 15 March 1998 and the licence is for a period of five years commencing on 1 June 1999. There is an option for a further licence term. SACL and Ogden have also entered into a sublease of certain parts of the airport for a period of five years from 1 June 1999.

7. RELEVANT MARKETS

74 There was an issue between the parties and the expert economists called by them as to whether there was a separate market for ramp handling services or CTO services. Professor Parry, called by SACL, expressed the view that the services which are the subject of the Minister's declaration fall within the market for the provision of services for the operations of international aircraft, that is ground handling and freight handling services. It followed, said Professor Parry, that there was relevantly no other market in which

competition would be promoted by the making of the declaration and that there was no separate market for ramp handling services or for CTO services.

75 Professor Parry's views rely upon what he saw as the perfect complementarity between the service provided by the freight aprons and hard stands and the bundle of services that is ground handling. Professor Parry also relied upon the substitutability on both the demand and supply side as between the services of loading and unloading international freight at SIA (which he saw as the declared services) and other ground handling services.

76 The Tribunal does not accept the proposition that there is no separate market for ramp handling services or for CTO services and is satisfied that there is a separate market for each of these services. The underlying economic arguments relevant to market definition are discussed in detail below (pars 80-97). The Tribunal considers that Professor Parry's views and conclusions proceeded in large measure from a fundamental misunderstanding of what are the declared services. Professor Parry's starting point was that the declared services are "the services of loading and unloading international aircraft and transferring freight at SIA". That is a misstatement of the services which were declared. In the course of examination-in-chief Professor Parry appeared to change his position when he argued that the declared services were the service provided through the use of the freight aprons and hard stands and the use of an area at the airport. He appeared to say that that had always been his position but that is not so. Professor Parry's misstatement of the services declared permeated his primary evidence where he expressed his opinions. Professor Maddock (an economist) called by Ansett also appeared to have a misunderstanding as to what were the declared services as he appeared to confuse the services sought to be declared with the services provided by the ramp handling operators

77 The services declared by the Minister were:

> "*(1) ... the service provided through the use of the freight aprons and hard stands to load and unload international aircraft at Sydney International Airport;*
>
> *(2) … the service provided by the use of an area at Sydney International Airport to: store equipment used to load/unload international aircraft; and to transfer freight from the loading/unloading equipment to/from trucks at the airport;"*

Although these are the terms of the Minister's declaration it is important to identify what in fact are the services the subject of the recommendation to him as the Tribunal is re-considering "the matter" which was before the Minister (s 44K(4)) which was the Council's recommendation to him. There were three applications made to the Council of which only two are relevant for present purposes.

78 SACL submitted in the alternative that if there was a separate market for the provision of ramp handling services, then the declared services were not provided in a functional market separate from the ramp handling market. This submission again misunderstands the nature of the declared services which are provided at a point which is essentially upstream from the point at which the ramp handling services are provided.

79 Although the principal market advanced as the market in which competition would be promoted was the market for the supply of ramp handling services it was also submitted that an alternative market was the market for the supply of international air services. Little evidence was directed to this issue and, in particular, there was no evidence before the Tribunal as to how ramp handling costs might affect the cost structures of the international airlines. The Tribunal is not satisfied that declaration of the services would promote competition in the market for the supply of international air services.

80 We turn to the issue of the functional delineation of markets. The tests for declaration of a service in respect of which the Tribunal must be satisfied are set out in par 8 above. Our consideration of s 44H(4)(a) in particular requires that we define relevant markets, and distinguish between the market for the service subject to declaration and any other dependent markets upstream or downstream from it. The distinction between the relevant service and the facility providing the service, which is addressed in par 14 above, must also be considered carefully. Due recognition is required of the fact that a facility might provide multiple services that individually may or may not meet the declaration criteria set out in s 44H(4).

81 The expert economic evidence before the Tribunal exhibited sharply differing views in relation to the existence of markets separate from the service subject to declaration, the promotion of competition and the definition of the facility providing the service. These differences of view stem in large part from the fact that airports typically provide a bundle (sometimes called a cluster) of services, utilising a different variety and mix of assets (or

facilities in the terms of s 44B). Subsets of the bundled services may be considered to fall into separate functional markets, perhaps requiring only a subset of the airport facilities. For example, the service provided by the use of airport runways is plainly not in the same market as the service provided by the users of the runways, the airlines.

82 As noted above, a facility for the purposes of the Act is a physical asset (or set of assets) essential for service provision and which also exhibits the features of a natural monopoly. An asset or group of assets with this characteristic is termed a bottleneck. As expert evidence heard by the Tribunal attested, the defining feature of a bottleneck is that access to it is essential in order to compete in upstream or downstream markets. For potential access seekers, and competition policy generally, the bottleneck's power and salience derives from:

- economies of scale, that is, the unit cost of service provision falls sharply as the scale of operations increase.

- economies of scope, that is, the facility produces a number of different but complementary products, thus enabling the owner to produce them at a lower unit cost than if they were provided using separate sets of assets.

- the specialised nature of the assets, that is, they have no alternative economic value in use, thus facing potential entrants with high unrecoverable or "sunk" costs in the event of unsuccessful entry.

83 These features produce very high barriers to entry to potential competitors so that, in the absence of non-market controls (such as government ownership or regulation), the incumbent has very substantial power in the choice of pricing and service provision, a choice very largely unencumbered by the threat of entry into the market by a competitor.

7.1 Airports as natural monopolies

84 The Tribunal heard that most major commercial airports around the world exhibit strong natural monopoly or bottleneck characteristics. Once the basic infrastructure (runways, taxiways, control tower) is in place, the owner of the facility faces sharply falling costs of servicing increments of demand (economies of scale). By contrast, a new entrant would have to replicate this basic infrastructure which is inherently capital intensive.

85 Such airports also typically provide a bundle of services, (for example, international and domestic passenger and freight services). In addition, many airports also benefit from economies of scale and scope generated by strong network effects associated with their geographical location and the absence of viable alternative transport modes. Passengers typically travel to destinations, not airports, and airlines will prefer to locate at one airport so that they may gain commercial benefits from interconnecting with other services and airlines.

86 SIA exhibits very strong bottleneck characteristics:

- Not only is it Sydney's only international airport, it is Australia's major international airport, handling some 50% of international airfreight leaving and entering Australia;
- it handles the largest portion of total international passenger traffic entering and leaving Australia;
- it is a national and regional inter-connector with domestic passengers travelling overseas, with the two domestic carriers (Qantas and Ansett) having invested very large sums in their passenger handling facilities.

87 Public policy in relation to SIA and Australia's other major airports also reflects their strong monopoly characteristics. Section 192 of the Airports Act provides for automatic declaration of privatised airports under Pt IIIA of the Act in the absence of access undertakings acceptable to the Commission.

88 Moreover, under current government policy, Sydney West, Sydney's future second airport, is to be developed and operated by SACL. This reflects the overwhelmingly strong market position of SIA in terms of the scale and quality of the infrastructure, the airport's rich network of connections and its closeness to the Sydney CBD. An airline's existing investment in facilities at SIA, together with the benefits of interconnection with other airlines, provides a very strong incentive not to move to the new airport unless forced to do so by rising costs or a compulsory shifting of services. Thus, someone other than SACL seeking to establish the new airport would face the large initial investment with no alternative economic use and a narrow initial customer base at the mercy of SIA's pricing and traffic allocation policy.

89 To express this point another way, the product offering from SIA, in the form of the rights to use its rich cluster of assets and services, is quantitatively and qualitatively much deeper and more varied than that prospectively on offer at the proposed new Sydney West. Unless Sydney West were to replace, rather than augment, SIA services, then even the development of a second airport would not, certainly at least for some substantial period, offer the same services (and associated markets) as access to the relevant services at SIA. The evidence indicated that should Sydney West be developed, it would initially be as a supplement to SIA focusing on regional traffic.

7.2 Definition of Markets at Sydney International Airport

90 For the purposes of s 44H(4)(a), the Tribunal needs to be satisfied as to the existence of "at least one market ... other than the market for the service" in which competition would be promoted. This section addresses the question whether ramp handling constitutes a separate downstream market from the market for the declared service.

91 In relation to the question of market delineation, the Tribunal adopts the market definition established by the Tribunal in *Re Queensland Co-operative Milling Association Ltd, Defiance Holdings Ltd* (1976) 25 FLR 169 at 190:

> *"A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market.) Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive."*

This definition was supported by all the economic experts who gave evidence to the Tribunal. The definition of the appropriate markets for the functions performed in relation to freight handling at SIA were, however, very much in the eye of the beholder.

92 In reaching its view on this matter, the Tribunal has had regard to both the contested expert economic evidence and commercial reality and commonsense. The Tribunal was presented with two widely divergent views that can be summarised as follows.

93 On one view, ramp handling and CTO services constitute distinct functional markets, with their own economic and commercial characteristics, within a broad (or cluster market) for airport services as a whole in the Sydney region. As such they are functionally separate from the provision of the physical infrastructure which they require to deliver ramp handling and CTO services to international aircraft using SIA. This functional distinction was argued to remain valid even if these services were subsumed within a somewhat more broadly defined market for ground handling services.

94 The other view put to the Tribunal was that ramp handling and CTO services are economically and commercially indistinguishable from essentially all other freight related functions relating to servicing international aircraft at SIA. This view was advanced on three distinct grounds.

95 First, from the premise that ramp handling and CTO services definitionally form part of the services declared by the Minister and, as such, do not constitute separate functional markets. This is addressed in detail at pars 14, 15 and 74-76 above. In short, it is incorrect and the Tribunal has therefore rejected the argument.

96 The second argument relates to the undeniable perfect complementarity in supply and demand between the facilities providing the declared service and ramp handling and CTO services. The Tribunal accepts the strong supply side and demand side complementarity between other airport services and the declared services and the underlying facilities. But the Tribunal was also presented with other examples of perfectly complementary products on the supply side that were clearly in different functional markets.

97 The Tribunal was struck by the parallels here with the provision of railway track and train services. Though in the past usually vertically integrated, track services and the running of passenger or freight trains can be, and increasingly are, provided separately. As such, they operate in functionally distinct markets, even though there is perfect complementarity between them. To put it another way, these complementarities do not appear to give rise to economies of joint consumption or joint production that dictate the services must be performed within the same economic entity. The evidence presented to the Tribunal suggested similar considerations apply to the services provided by SIA's physical infrastructure and ramp handling and CTO services. In other words, just because there is a

one for one relationship between airport aprons and ramp handling services does not mean that the supply of these two types of services are in functionally the same market.

98 The third line of argument arose from claims for very strong economies of joint production, consumption, substitutability and complementarity in both consumption and supply between CTO and ramp handling services and the broader markets for ground handling and other services that are provided to international aircraft (including physical infrastructure). As with perfect complementarity, the existence of such pervasive economies could be expected to result in an overwhelming preponderance of vertically or horizontally integrated firms supplying the complete range of servicing functions for international aircraft. The Tribunal was not, however, presented with compelling evidence of such economies:

- services at SIA are provided both inside and outside vertically or horizontally integrated structures (as they are at many other international airports). It is, of course, true that the market for ground handling at SIA has been dominated by Qantas and Ansett but the evidence indicated that that situation could be the result of either underlying commercial logic or the apparently cosy relationships associated with the
- FAC's tendency to be a lazy monopolist;

- economies of scale do not in practice appear to be very large. Though SACL set a minimum capital requirement of $5 m for the tender process, it admitted a degree of arbitrariness in this threshold and was prepared to entertain lower figures. Ogden's and Jardine's business plans indicated an intention to commit higher investment than $5 m but this seemed to reflect the minimum performance conditions imposed via the SACL tender process which appeared designed to match that offered by the main incumbent operators. In evidence SPAM indicated an entry cost of some $2 m for ramp handling at SIA;

- SACL's own tender process revealed a number of companies, who did not form part of a vertically or horizontally integrated chain, willing and able to enter ramp handling or CTO markets.

The Tribunal is satisfied that ramp handling and CTO services constitute distinct functional markets.

99 In summary, the Tribunal considers that the relevant market landscape has the following main features:

- a cluster market for international airport services in the Sydney region;
- a series of separate, functionally differentiated, markets for services required by international passenger and dedicated freight aircraft carrying freight flying into, and out of, SIA;
  - two of these separate markets are for ramp handling and CTO services.
- a market, controlled by SACL, for the provision of the complete suite of physical assets necessary to service international airlines flying into and out of the Sydney region:
  - these assets exhibit very strong monopolistic (or bottleneck) characteristics because of pervasive economies of scale and scope and barriers to entry derived both from high sunk costs and the market size and location.
- a "facility" that comprises the minimum set of physical assets necessary for international aircraft to land at SIA, unload and load passengers and freight and depart in a safe and commercially sustainable manner, that is, all the basic air-side infrastructure, such as the runways, taxiways and terminals and the related land-side facilities integral to the effective functioning of air-side services. This is, in practical terms, the whole of the airport.

8. WILL INCREASED ACCESS TO THE SERVICES PROMOTE COMPETITION IN AT LEAST ONE OTHER MARKET OTHER THAN THE MARKET FOR THE SERVICES? (s 44H(4)(a))

100 This is the first matter to which attention is addressed in s 44H(4) in respect of which the Tribunal must be affirmatively satisfied. It involves a consideration of issues such as whether there is a separate market other than the market for the service, what is involved in the concept of the promotion of competition, the effect or consequence of the now established tender process and whether there is any room for more ground handling organisations at SIA.

101 SACL, supported by Ansett, submitted that:

- There is no market other than the market for the service in which competition will be promoted by the making of the declaration and that there is no separate ramp handling market.

- A finding that increased access would promote competition requires satisfaction that there is more than a likelihood that declaration would have the requisite effect and that the promotion of competition must be substantial and not merely trivial or transient.

- Declaration will not result in the promotion of competition in any relevant market.

- As a result of the Freight Study a tender process had been implemented, the object of which was to promote competition so that declaration of the service will not promote competition beyond that which will arise as a result of the tender process. This submission appears to suggest that competition cannot be enhanced or promoted any further as a result of the implementation of the tender process.

- The market cannot sustain any further ground handlers other than the current four organisations Qantas, Ansett, Jardine and Ogden and it is not possible for more than four ground handlers to operate at SIA.

- Niche ground handlers will not promote competition.

- There are significant barriers to entry into the ground handling services market brought about by the need to obtain a critical mass of business.

102 SACL's first submission, that there is no relevant market other than the market for the service, crystallises the central issue that the Tribunal must resolve under s 44H(4)(a). The alternative view is that the market in which ramp handlers compete for the custom of the airlines is a distinct field of rivalry, and that the airport authority is not a participant in it. Rather, on this view, the airport authority as the operator of a bottleneck facility dispenses, as the relevant product of its administration, rights for ramp handlers to take part in the commercial rivalry of ramp handlers for business. Similarly, the airport authority dispenses, in the form of licences and leases, rights for a wide variety of commercial tenants and

commercial services to operate on airport premises and to compete for business. The reasons accompanying the Minister's declaration adopted, in effect, this alternative view.

103 In our consideration of the definition of markets at SIA we have found that there is a market for ramp handling services separate from the market for the services declared by the Minister (see pars 90-99 above).

8.1 The meaning of "promotion of competition"

104 The principal submission of SACL was that any declaration would not promote competition in any relevant market beyond the competition which would exist under the tender process and a regime in which Jardine and Ogden were participants. In the context of that submission SACL submitted that the concept that "access (or increased access) to the service would promote competition" was to be construed as meaning access would "advance" competition rather than "encourage" competition. Resort was made to dictionary definitions of "promote":

- The Oxford English Dictionary (2nd ed) – "2. To further the growth, development, progress, or establishment of (anything); to help forward (a process or result); to further , advance, encourage … 5. To cause to move forward in space or extent; to extend."

- The Macquarie Dictionary (2nd revision) – "1. to advance in rank … 2. to further the growth, development, progress, etc., of; encourage."

105 In short, SACL submitted that the notion of promotion involved something stronger than "encourage" and rather involved advancing an extent or degree of competition. Ansett submitted that s 44H(4)(a) required more than the possibility or likelihood of competition in a relevant market and that what was rather required was the Tribunal to have a degree of confidence (greater than a mere likelihood) that declaration will have the requisite effect on competition. Ansett also submitted that the Tribunal had to be satisfied that the promotion of competition would be substantial and not merely trivial or transient. The Council's submission was that s 44H(4)(a) required the Tribunal to consider whether there would be a significant non-trivial increase in competition in the relevant market with the declaration as opposed to the situation without the declaration. SPAM emphasised that s 44H(4)(a) did not

require satisfaction that access would "increase" competition or a finding that the competition promoted would be "effective" competition.

106 The Tribunal does not consider that the notion of "promoting" competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of "promoting" competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.

107 We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on "access", which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial.

108 The Tribunal is concerned with furthering competition in a forward looking way, not furthering a particular type or number of competitors. In this matter, therefore, the Tribunal must be reasonably satisfied that declaration would, looking forward, improve on the competitive conditions in the relevant markets that are likely to exist as a result of the SACL tender process as compared with a situation where there was no declaration.

109 The evidence before the Tribunal focused very heavily on the competitive conditions before and after the SACL tender process. In particular, SACL emphasised the need to look at the before tender situation (with low competitive pressure associated with FAC behaviour, characterised as a lazy monopolist) and compare it with the after-tender situation. In this context, SACL pointed to a less than satisfactory competitive situation in the past (reflected in high charges and poor service quality) and argued that its tender process has led to improved and more effective competition outcomes (notably, reduced charges).

110 The Tribunal accepts that the current situation, proposed and in fact implemented by SACL, is better than it was under the previously existing arrangements. Two further full service operators, Jardines and Ogden, are being introduced, albeit at the cost of removing other, smaller incumbents. Charges appear to have fallen, though the link with the tender process was disputed.

111 The before and after tender competitive position is not, however, the appropriate focus of the Tribunal's concern in relation the s 44H(4)(a) test. In reaching a view as to whether increased access "would promote competition", the Tribunal must look to the future on a similar basis to the way it looks at the authorisation provisions, namely the future with or without declaration. Clearly, the Tribunal must have regard to the factual position as it now stands, with the tender process completed and Jardine and Ogden selected. But it must also determine what impact, if any, declaration would have on competitive conditions over and above the post-tender outcomes.

8.2 First and second best outcomes

112 In general, economic efficiency is optimised by competition within and across markets that are unhindered by artificial barriers to entry. In the absence of such barriers, competitive equilibrium in terms of price and supply is determined by the size of the market and the technological and other determinants of supply and demand, giving rise to what the language of economics calls "first best outcomes". All the economic experts subscribed to this view.

113 In this matter, however, SACL argued that constraints of space and associated safety issues require a restriction on the number of service providers in the ramp handling and CTO markets, thus rationing access to the market. FAC and then SACL chose to implement this restriction via a tender process involving competition for the market for a set contractual period, with provision for two extensions, subject to satisfactory performance. The economic experts agreed that such an outcome was "second best", essentially because the information content and incentive structures associated with restricted entry were less rich and compelling than those generated by free market entry.

114 Mr Ergas put this point well:

> *"Tender processes replace continuing and open competition* in *the market by periodic competition* for *the market. As a general matter, economists regard competition for the market, effected to the exclusion of continuing and open competition in the market, as a second-best option, to be used mainly when the costs associated with continuing and open competition in the market are high."*

115 The distinction between first and second best outcomes is important. If market entry controlled by the SACL tender process is not justified on the economic facts, then the Tribunal can feel confident that the criterion under s 44H(4)(a) will be met if a declaration is made. Therefore in the following section we examine the underlying economic arguments for market entry in the future via the SACL tender process, setting aside issues of space and safety (considered below) which the Tribunal does not consider as enduring constraints on entry.

8.3 The economic case for selection by tender

116 The Tribunal heard evidence from a range of witnesses that, in the absence of regulatory constraints on entry to ramp handling services, competitive equilibrium would be three to four firms supplying the market. In other words, the size of the market at SIA would provide sustainable profits for no more than four firms. We consider this issue later in these reasons.

117 SACL supported this view by reference to experience at thirteen comparable international airports, where the median number of suppliers was two, with independents in a clear minority except in the United States. It was clear, however, that the overall pattern was not dictated by market economics. Instead, it was a reflection of regulatory barriers to entry by independents, with a mandated monopoly via either direct government ownership and/or preferential treatment for the national carrier. The Tribunal considers this is not a helpful basis on which to base judgements about future appropriate market structures and behaviour at SIA. (Such barriers appeared to be the motivation for the European Directive (referred to in pars 50-54), offered in evidence, aimed at removing unjustified barriers to entry.)

118 SACL stressed the need for new entrants selected via the tender process in addition to Qantas and Ansett:

- to have sufficient financial and operational scale and capability to constitute a credible competitive threat to the incumbents;

- to be limited to two (in addition to Qantas and Ansett) so as to have potential access to a "critical mass" of the SIA ramp handling market to remain viable in the face of competition from the incumbents.

119 Professor Parry's observations on these issues are worth quoting extensively since they capture the economic arguments supporting the SACL approach:

> *"56. I assume that the SACL freight reform process, through the licensing of two new, independent ground handlers, is likely to lead to an increase in competitive conduct (rivalrous behaviour) in the assumed market for the provision of ramp handling services.*
>
> *57. However, I assume that the major underlying structural constraints on competition in that market -significant entry barriers - will NOT change as a result of the participation of the two new, independent service providers. That is, I assume that there will continue to be significant structural constraints on competition in the assumed market for the provision of ramp handling services, although there is likely to be an increase in competitive conduct as a result of the entry of new, independent operators. I assume that this enhanced competitive conduct is more likely and more likely to continue with the entry of 'substantial', 'quality' service providers that are better able to secure contracts with international airlines.*
>
> *58. That is, I assume that competitive conduct is more likely to be enhanced, given the nature of economies of scale/scope, with the entry of service providers able to secure and maintain a sufficient share of the* available *market for ramp handling.*
>
> *59. In my opinion, reflecting the significance of economies of scale/scope relative to market size; the constraints on physical capacity; and, the safety and operational constraints at Sydney International Airport, it is unlikely that the assumed market for the provision of ramp handling services could sustain the efficient entry of more than the two new service providers.*
>
> *60. Therefore, in my opinion,* increased access *to the services in question is not likely to promote competition in the market for the provision of ramp handling services,* beyond that which will arise as a result of the actions by SACL *as part of the freight reform process*."

120 The Tribunal questions a number of these statements and underlying assumptions relating to the economics of this market. The Tribunal has not seen evidence of significant economies of scale in the ramp handling market. Detailed comparisons of capital intensity or capital/labour ratios for this market sector were not presented to the Tribunal. As however indicated in par 98 above there was no persuasive evidence presented to the Tribunal to suggest this is a highly capital intensive business, even at the entry and performance levels arising out of the SACL tender process emphasising comprehensive capabilities.

121 The structural constraints referred to by Professor Parry appear in large measure to reflect the treatment of Qantas and Ansett who, within a framework of regulated entry, have a continuing position of advantage at SIA in relation to ramp handling, by virtue of their ability to self handle the large proportion of passenger and freight traffic accounted for by their operations

122 The underlying reasons for SACL's decision to continue to allow Qantas and Ansett to self handle and compete for other airlines business (par 71) was not explained. As noted above, the decision seems to have been taken after the first stage of the tender process. Qantas and Ansett were, therefore, not subject to the same selection methodology as that designed to select an additional two ramp handlers. Instead, they were allowed to continue to self handle, and compete for servicing of other airlines, provided they agreed to the same licence conditions as the new entrants.

123 Commonsense would say that SACL would not lightly challenge or, in the event, abrogate the major incumbent airlines' position in ramp handling. To do so would obviously impinge on the legitimate business interests of Qantas and Ansett. On the other hand, the record of the incumbents in terms of cost, quality of service and, in some cases, safety raises questions as to whether the incumbents should have not have been treated on equal terms in the tender process as external candidates. The Tribunal notes in this respect that the EC Directive 96/97 (pars 50-54) does provide for limitation or even exclusion of self handling on safety grounds, a key consideration in SACL's decision to limit access to the ramp handling market.

124 Be that as it may, it is clear that the treatment of the incumbents biases the selection criteria towards entities with similar operating characteristics and economics as the main incumbents.

This in turn effectively precludes competitive entry by lower cost operators offering a markedly novel or different mix of service and price. SACL's witnesses challenged the economic value of such entry on the basis that it had failed to erode Qantas and Ansett dominance in the past.

125 The Tribunal makes two observations here. First, as noted earlier, as a seemingly lazy monopolist FAC did not see its role to promote competition. Secondly, and more importantly, from an economic perspective new entrants can be a source of innovation and therefore competitive pressure. This is not a matter of the number of entrants but the variety of the competitive behaviour that wider entry would generate. The importance of this factor will, of course, vary between industry sectors depending on a range of factors, such as entry costs and the maturity of the sector. From the evidence available to the Tribunal, however, it would seem that the airline industry is currently undergoing significant structural change, with very heavy economic regulation giving way to a more light handed and market driven approach. Looking to the future, the Tribunal would tend to give more weight to arrangements that maximise opportunities for competitive entry than did SACL or the expert witnesses who supported the SACL tender process.

8.4 The merits of the tender process

126 We turn to a consideration of whether the implementation of the tender process as an alternative to declaration is such that declaration of the service will not promote competition beyond that which will arise as a result of the tender process.

127 In proposing the future adoption of the tender process with its sequence of rigorous procedures, SACL relied on two contentions:

- that access to the ramp handling market at SIA must be limited by selective licensing as a matter of practical necessity, good management and sound policy; and

- that the number and identity of licensed ramp handlers should be determined by SACL as the successor of FAC because certain of the relevant considerations are matters that practical operating management can best evaluate, it having been proved that the task can be done effectively by the airport authority.

These propositions intrude on the right of an airline carrying freight to or from SIA to choose, and to contract with, a preferred ramp handler to service its aircraft. The Tribunal has also necessarily considered the merits of the tender process that SACL proposes to continue using in two further respects:

- must the number of ramp handlers be limited so that selection is necessary?
- if so, are the selection criteria adopted by FAC appropriate for future use by SACL?

128 We note also that the provisions of Pt IIIA of the Act do not explicitly contemplate that access to the services provided by means of the facilities will, in the ordinary course, be so limited, although common-sense dictates that any facility has limits to its capacity. None of the matters set out in s 44H(4) provides that the number of organisations who are to have access to a service is to be limited. So long as the Tribunal is satisfied that access to a service can be provided without undue risk to human health or safety, the issue of the number of organisations to whom access should be provided is a matter to be determined at the next stage after to declaration of the service, namely by agreement or in default of agreement by resolution of an access dispute pursuant to Div 3 of Pt IIIA of the Act. If access cannot be agreed, the organisation seeking access is entitled to have the Commission arbitrate the access dispute and determine whether access should be provided. It is appropriate and relevant at that stage for the Commission to determine whether access to the service should be limited to any particular number or organisations. Section 44X of the Act specifies the matters which the Commission must take into account in determining the access dispute. These matters include:

> "*(a) the legitimate business interests of the provider, and the provider's investment in the facility;*
> …
> *(c) the interests of all persons who have rights to use the service;*
> …
> *(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;*
> *(g) the economically efficient operation of the facility.*"

In addition, pursuant to s 44X(2) the Commission is entitled to take into account "any other matters that it thinks are relevant". The Tribunal considers that these provisions in s 44X enable the Commission to consider whether, in any particular circumstances, access to a service should be limited to a particular number of organisations.

129 The tender process was recommended by the Freight Study, but primarily as a device to raise operating standards:

- by introducing additional operators into the ramp handling and CTO markets, and
- by exercising due control over their performance.

130 Prior to 1996, access to the use of SIA's facilities to conduct ramp handling operations was not restricted in such a manner. Two essential qualifications sufficed for the intending ramp handler — a contract with an airline to supply services, and a capacity to satisfy airport security requirements. On the uncontested evidence of Mr Leach of SPAM, the same situation of "open access" applies in practice today at Melbourne and Brisbane International Airports.

131 The tender process raises two questions. First, does SACL need to select ramp handling operations for its own reasons? Secondly, if the tender process is to be used, how will it operate in the future? Dealing with the first question, SACL submitted that it was the organisation best equipped and authorised by statute to carry out the difficult balancing of all the functions involved in managing the airport, balancing the competing demands for the very scarce space, and balancing the critical function of ensuring safety and efficiency with respect to all operations at the airport.

132 SACL was saying, in effect, that it was better qualified than the Commission to determine who would be the appropriate organisation to carry on commercial activities at SIA. Clearly SACL has experience and qualifications in operational matters but that does not give it any particular experience or qualification to determine issues relating to the promotion of competition, or to have an understanding of the economic and policy considerations underlying the promotion of competition. It is for SACL to determine safety and operational standards; but it is not for SACL to determine whether and to what extent the relevant markets should be open to competition. Put shortly, although SACL may want to control the tender process and thereby determine who shall have the right to have access to the relevant services at SIA, it does not have the right to do so if, by so doing, there will be constraints on competition in the markets in which those services are provided.

133 Although SACL placed considerable emphasis on the tender process, Mr Ellis, the independent chairman of the Phase One Committee, acknowledged that the emphasis and experience of the Phase One Committee was on airport operations and that no member of the Committee had specialised knowledge or experience in relation to competition issues. Further, the Freight Study was undertaken by an organisation with expertise in management, logistics and technology applications. Western Global Pty Ltd did not, in the Freight Study, specifically address competition issues or policy although there was passing references to competition. In describing its terms of reference Western Global Pty Ltd said that the Study would determine:

> *"the best approach to deliver real and sustainable performance improvement while protecting the safety, security and efficiency of the airport"*

It saw its task as being to:

> *"(a) identify existing and future constraints*
>
> *(b) develop a strategic direction that will ensure the handling and servicing of inbound and outbound airfreight at Sydney Airport is not inhibited by inadequate facilities and systems.*
>
> *(c) provide options for Ansett and Australian Air Express in relocating at the end of their lease period."*

The passing references to competition were an assumption that FAC needed a mechanism to improve performance and sustain a competitive environment and an objective of, inter alia, the provision of a choice of competitive services. Otherwise there was no consideration of competition issues.

134 The declaration of the service does not preclude SACL from having input into the issues of safety and operational factors when an organisation wishes to obtain access to the relevant service. This opportunity is open to SACL when an access dispute is arbitrated by the Commission under Div 3 of Pt IIIA of the Act and, in particular, by reference to s 44X.

135 We move to the second question, how will the tender process operate in the future? In the absence of any submission from SACL that either the tender procedures or the selection criteria proposed for future use would vary from those adopted in the evaluation of applicants for ramp handling service licences in 1997/1998, the process and criteria then adopted

become the prospective conduct that the Tribunal must consider as an alternative to declaration.

8.5 The proposed selection criteria

136 The documentation issued to applicants in response to the 1997 call for expressions of interest included a short statement of the four general selection criteria that would be applied generally in FAC's evaluation in the following terms:

- The capability of the organisation to provide the services;
- The track record of the organisation in performing the services at other airports;
- The capacity of the organisation to provide the finances to support the operation;
- The depth of services to be provided by the organisation.

137 While broadly expressed, such criteria represent a reasonable basis in principle for the evaluation of applications for the supply of strategically important services, such as any prudent commercial organisation might adopt. That having been said, the Tribunal considers that such broad criteria are not sufficient in practical application — to allow systematic internal evaluation of applicants, or to provide due guidance to would-be entrants in framing their applications for access, or to assure applicants that the selection process is non-discriminatory. In the event, more detailed statements of FAC's selection criteria were developed and supplied to those Committee members undertaking the evaluations, but were not published. The complete selection criteria were tendered in confidential evidence, with tabulations that illustrated how they were used to rank the applicants.

138 It suffices here that the Tribunal should state its conclusion in regard to the effect of each of the above four general selection criteria in turn, applied according to the more detailed confidential criteria laid down originally by FAC for use in the evaluation of ramp handlers in 1997/1998, and now proposed for future use by SACL.

8.6 The capability of the organisation to provide the services

139 On the face of it, the criteria adopted under this head are unexceptionable in seeking information bearing on the skills and depth of management, and explicit plans and strategies

in certain essential respects. However the Tribunal feels some concern at the specifics of the criteria, in that the orthodox structures and formal management practices of a substantial and established organisation would very likely be regarded highly in a formal evaluation, and that smaller, less structured but no less competent organisations (very possibly with lower overheads) would be disadvantaged.

8.7 The track record of the organisation in performing the services at other airports

140 This group of criteria relates to information as to the extent of an applicant's operational experience, and the airlines serviced. Despite the focus of the Freight Study and of SACL submissions on the objective of improved operational performance, the selection criteria did not address directly the operational performance of applicants. Further, the criteria does not have regard to a candidate's track record in providing services at SIA. In the 1997/1998 evaluation, this meant that no weight could be attached to SPAM's operations conducted at SIA for a number of small airlines. Whatever the merits of that decision, the criteria as presently expressed give deliberate emphasis to the quantum of experience elsewhere, without explicit regard to performance. Moreover, because of the dominance of Qantas and Ansett in the provision of ramp handling services at Australian airports, only large ramp handlers operating at overseas airports were likely to rate highly. This may have been an adequate basis of judgement in the 1997/1998 process, but can scarcely be considered adequate for the future.

8.8 The capacity of the organisation to provide the finances to support the operation

141 This group of criteria is defined with explicit and demanding detail, whereas it might have been expected that the financial criteria would seek little more than an adequate demonstration of creditworthiness, and a capacity to fund the ownership or lease of necessary equipment. However the SIA tender criteria look for details as to an applicant's internal financial management to an extent that we consider unnecessary. After all, the principal in any operational contract entered into by a ramp handler is an airline, not the airport authority. More generally, we consider that the form and emphasis of this criteria introduces a bias towards large and financially very strong corporate applicants. It introduces correspondingly a bias against small or newly formed applicants, whatever the experience and skill of their key people and whatever the substance of the funding that they may have

assembled. In particular, in our view, future application of this group of criteria would make less likely, and could preclude, the entry of any potentially innovative operator into ramp handling at SIA.

8.9 The depth of services to be provided by the organisation

142 This group of criteria refers to the scope of the ramp handling services that an applicant proposes to offer airlines, and also to the likelihood (in the view of the evaluating committee) of the applicant's commercial success in that regard. The detailed criteria appear to assume that the larger the range of services to be offered, the better. Evidence from SACL managers amply confirmed their preference for ramp handlers that offer a "full suite" of services, apparently because the greatest choice might then be offered by the smallest number of operators, not necessarily the optimum outcome for the public interest. In particular, application of such criteria in the future could effectively preclude any niche operator from the ramp handling market at SIA. We characterise a niche operator in these circumstances as one who identifies and hopes to exploit a market for the supply of limited ramp services to certain airlines that do not require comprehensive services, and that might believe that a slimmed-down niche operator will supply what the airline wants, better and/or more cheaply. Both Mr Halleen and Mr Parry, Ramp Manager at SIA, expressed the view that there is no viable place for a niche operator at SIA, so that presumably there is nothing lost by precluding their selection. However, the Tribunal considers that change and innovation in the operation of this market, as in any market, will often originate through the entry of small niche enterprises. These criteria, if applied in the future, would make it likely that successful ramp handling licensees will all offer more or less the same range of services, and will not compete in respect of the range of services offered.

143 SACL submitted that creating a regime where niche operators can enter the market will not promote competition because that situation did not occur in the pre-tender process regime, and, in any event, the tender process has brought about, and will continue to bring about, a competitive situation. SACL pointed out that the licences given to Qantas, Ansett, Jardine and Ogden do not insulate them from competition as cl 20 of the licences reserves to SACL the right to issue further licences and to authorise air carriers to provide for themselves (self handle) their own ground handling requirements.

144 However, there is no certainty as to how the tender process might be used in the future. It is no answer, in the Tribunal's view, to say that as further licences might be given in the future there will be no promotion of competition as a result of an access declaration. The Tribunal considers that, as a matter of principle, the promotion of competition would be achieved if a broader range of competitors were allowed the opportunity for access to the relevant market. It can be reasonably expected that they would offer different business strategies reflecting different cost structures and methods of doing business.

145 We conclude that the selection criteria at issue are expressed in a form that, even if applied with the greatest goodwill, detachment and flexibility by the evaluating members of the relevant committees, will introduce a bias towards one class of applicant, and against certain other classes of applicant. In the opinion of the Tribunal, their participation in the ramp handling market would be desirable and commercially healthy and would promote competition. The class of applicant favoured by SACL is the class of substantial companies that presently conduct airport services in general, or ramp handling services in particular, at major airports in other countries. That class excludes the smaller niche operator who provides particular services and fails to take account of the needs of smaller airlines who need particular types of services. The smaller niche operators would offer different business strategies which would reflect different cost structures and methods of doing business.

146 It appeared to be implicit in SACL's submissions that smaller operators give rise to a greater risk of safety issues and unsatisfactory levels of services. The evidence does not warrant this conclusion and we consider the issue of safety later in these reasons (pars 210-217). The issue of level of services gives rise to the question – service by reference to whose standards or aspirations? The level or standard of service considered appropriate by SACL's management and operational convenience may not be the same as the level or standard of service required by a smaller airline. The Tribunal accepts that SACL should have the right to have input into who should be licensed to operate at SIA and on what terms. Indeed, it is appropriate for SACL to require adherence to basic or minimum safety, health and operational standards but such standards can be dealt with in licence conditions. These matters are more appropriately addressed at the second stage of the access process, a negotiated or arbitrated agreement for access. By virtue of s 44X of the Act, the Commission is bound to take into account in making a determination "the operation of the facility" and "the economically efficient operation of the facility" and, pursuant to s 44V(2)(c), it is

empowered to specify in its determination the terms and conditions of the third party's access to the service. The Tribunal notes in this context, that in the licences entered into with Jardine and Ogden there were provisions which imposed obligations on Jardine and Ogden to ensure the availability of ramp handling services in accordance with specified safety, security and performance requirements. We would expect that at any arbitrated access dispute the Commission would give great weight to similar obligations if sought by SACL.

147 It is not the Tribunal's role in this matter to express a view as to whether FAC and SACL might have done things differently in the past. We recognise that SACL may be well satisfied with the 1997 tender process as having led to the successful tenderers entering the market, to the introduction of additional operators at SIA who are experienced, proven, and committed to providing efficient, safe, secure and competitive ramp handling services. Indeed, time may show that the immediate public interest has been well served by the focus and expedition of what has been done so far. But that is water under the bridge. In this matter, the Tribunal has to consider the access regime under which future changes of circumstance will be addressed — for example, if one of the four ramp handlers should decide to vacate the business, or if an airline (for example an airline that is not in one of the major airline alliances) wishes to contract a ramp handler at SIA that is not one of the four present operators. In the above analysis of the evidence we have concluded that the selection criteria, as proposed by SACL for application in the future, are flawed in several respects. The practical outcome would encourage unsuitable competitive outcomes in the sense that participants who might enhance the competitive environment might be discouraged or excluded. Put shortly, the result of the tender process is that ramp handlers and ground handlers are selected by SACL, not by the market (airline customers), and not in an open and competitive environment.

148 SACL's submission, in essence, was that as a result of the tender process and its outcome there will be a competitive provision of ramp handling services and that a declaration of the services provided by SACL will not promote competition beyond that which will arise as a result of the tender process. It is true that as a result of the introduction of Jardine and Ogden there will be more competitors at SIA offering ramp handling services to airlines and that, to that extent, there will be an enhanced competitive provision of ramp handling services. But it begs the question to say that therefore a declaration of access to the services will not promote competition in the ramp handling market. We do not accept that there is insufficient physical

space to allow further ramp handling organisations to operate and we consider this aspect later in these reasons. However even if we were to be wrong in this respect we consider that increased access would promote competition in the ramp handling market because of the opportunity which would be given to other ramp handling organisations to offer a wider choice of ramp handling services.

149 In summary, the Tribunal does not find the economic and commercial arguments compelling in favour of the tender process as being the last word on competitive outcomes. The costs and constraints presented by SACL do not justify the second best outcomes that result from the restriction of competition associated with the tender process. The Tribunal, therefore, considers that a future with declaration offers the opportunity for a range of competitive behaviour and outcomes that is superior in depth and variety than available without declaration. The Tribunal considers that this improved competitive outcome is likely to result from the greater transparency and different perspective offered by subjecting any SACL process for controlling access to the services provided by SACL and to the associated market to external perspective and scrutiny. The Tribunal's view on this is influenced by the underlying policy of Pt IIIA of the Act.

150 The Tribunal is satisfied that, notwithstanding the establishment and implication of the tender process in the manner in which it has occurred, increased access to the services provided by SACL would promote competition in the ramp handling market. Putting the matter another way, although the tender procedure is now in place, the Tribunal is of the view that increased access to the service provided by SACL will still promote competition in the ramp handling market.

8.10 Is there limited air-side space and air-side congestion?

151 Much SACL evidence and argument was directed to the submission that certain considerations of practical airport management warrant limiting access to ramp handlers because of:

- the need to allocate and manage the use of limited air-side space,
- the need to control air-side congestion; and
- the management of operational safety.

These are considerations that plainly fall within the airport authority's statutory duty.

152 The issue of the management of operational safety needs to be addressed in the context of whether the Tribunal is satisfied (as is required by s 44H(4)(d)) that access or increased access to the service can be provided without undue risk to human health or safety. We address that issue later in these reasons. The issues of allocation and management of limited air-side space and the need to control air-side congestion appear to arise in the context of whether the Tribunal can be satisfied that access or increased access to the service would promote competition in at least one market other than the market for the service. SACL's argument appears to be that, due to air-side space limitations and actual or potential air-side congestion, there is no room, from a practical point of view, for any more than four ramp handling organisations to carry on their activities. Accordingly, there cannot be any more competition in the market in which those ramp handlers operate because no further ramp handlers can physically participate in that market. It follows, it was said, that there is therefore no point in declaring the services because nothing practical can result of the declaration from a competition point of view.

153 For reasons to which we shall refer, we are not satisfied that there are such air-side space limitations or such potential air-side congestion issues as would justify the conclusion that there is no room for further ramp handling entrants at SIA in addition to the current incumbents including the two new licensees, Jardine and Ogden. But, in any event, we do not consider that those issues bear upon the question whether access or increased access to the services would promote competition in the relevant market. The fact of other potential entrants having the opportunity to seek access to the services will have a pro-competitive effect on the current participants in the market. No longer will be the incumbent operators be insulated from the threat of competition.

8.11 The allocation and management of limited air-side space

154 The size of any airport is finite and the secure air-side area is smaller than the whole. Insofar as the available air-side land is subject to competing claims as to the manner of its use, it is a proper role for the controlling authority to develop general plans as to how land use is to be allocated, and to expend capital accordingly on the installation of fixed assets. Furthermore, given that fixed assets such as airport facilities are often specialised and have a significant

life, it is proper that airport managers should seek to maintain some stability and continuity in their plans for land allocation and use. On the other hand, changing markets, changing technologies and changing public policy can require re-consideration of land use plans at an airport. An airport authority will frequently need to address aspects of a continuing tension between requirements for change and requirements for stability and commercially efficient use of established assets. The existence of such a tension is common in any commercial enterprise where expensive and durable assets are in place to serve a changing market.

155 Much evidence was offered as to whether the space at SIA is so constrained that the number of ramp handlers must be restricted. Statements and oral evidence from several witnesses appeared in several respects to exhibit sharp disagreement. However closer analysis showed that the apparent contradictions could in some part be reconciled by recognising that distinct elements to the broad issue of space use by ramp handlers, and its management by SACL, could give rise to differing perspectives among knowledgeable and experienced witnesses.

156 The use of air-side space is especially constrained at SIA notably in the congested north-west (international) sector. Management of the use of space close to the aircraft aprons is important, especially those aprons immediately adjacent to the passenger terminals, where not only passengers and their baggage but 80% of air-freight is loaded and unloaded. Moreover, peaks in international aircraft movements also mean that pressures on space close to the passenger aprons vary greatly with the time of day.

157 Ramp handlers operate in air-side space and use it in a number of distinct ways. Each form of use makes particular space demands:

- When ramp handlers move trains of dollies, pulled by tugs, between an aircraft and either the passenger baggage area or a CTO, they generate traffic on the marked traffic-ways and airport roads that lead between the apron and the other air-side areas. This traffic results directly from the servicing of a particular aircraft parked on the apron and the total amount of such traffic will depend on the number of flights to be serviced. It will not depend upon the number of ramp handlers in the market nor on which ramp handler provides the service in any instance.

- When a ramp handler is preparing to load or unload an aircraft, it is customary practice that trains of dollies and other required equipment are “staged”, that is,

assembled close to the aircraft apron, so that loading and unloading can proceed promptly when the aircraft arrives, and the turn-around of the aircraft will not be delayed. The areas used for this purpose are called "staging areas". Delays in an aircraft's arrival can lead to freight being held in a staging area for longer than the expected short period. Again the use of the staging area is related directly to the aircraft movement. It will not depend upon the number of ramp handlers or the identity of the ramp handler in any instance.

- The loading and unloading of an aircraft on the apron, and other ramp handling services such as push back, are performed using specialised equipment provided by the ramp handler. The form of equipment used in servicing a particular aircraft is to some degree specific to that type of aircraft (because of differences of size, etc) but much equipment is used in common for all aircraft types. The ramp handling equipment required for a specific aircraft on the apron is much the same whichever ramp handler is doing the job. Because only one ramp handler attends to each aircraft, the space occupied by equipment in use on each bay of the apron bears no direct relation to the number of ramp handlers operating at the airport.

- Idle ramp handling equipment may not be left on the apron between flights because a different ramp handler may be servicing the next flight at the particular aircraft bay. Equipment not in immediate use is held away from the apron in an accessible air-side storage or staging area from which it can move at the appropriate time to a staging area for its next contracted use. Because some items of ramp handling equipment are slow-moving and are not suited to movement over long distances, equipment storage areas cannot be too distant from the aprons where the equipment will be used. Equipment that is surplus to current demand (or in only very occasional use) will be stored away from the airport. Ramp handlers do not draw on a common pool of equipment but in practice own or lease their own equipment and rarely share or borrow equipment. It follows that the space that needs to be allocated by the airport for equipment storage will expand as the number of ramp handlers increases. However that space cannot be too distant from the aprons.

- Hitherto at SIA, with ramp handling work being performed predominantly by Qantas and Ansett, ramp equipment has commonly been moved from one aircraft directly to

the staging area for the next aircraft use, avoiding movement off the apron back to the equipment storage area. However, the introduction of two more ramp handlers will mean that Qantas and Ansett will service a smaller proportion of aircraft on the aprons and that movements to and from equipment storage areas will increase significantly. Ms Alroe pointed to the related difficulty in the following terms:

> *"A particular design problem at the Airport, both during and after the [present construction work], is that the ground service equipment storage areas are located in a number of small scattered areas which increases the amount of movement at the Airport, in contrast to making one large area available."*

The evidence contains a number of references to Qantas and Ansett leaving ramp handling equipment not in use in temporarily vacant areas close to the aprons, rather than moving the equipment back to a designated equipment storage space. Mr Leach, Managing Director of SPAM, contended that ample space would be available for ramp handlers if only SACL managed the available space properly. In rebuttal, Ms Alroe contended, inter alia, that the space demands of construction in anticipation of Olympic Games traffic made Mr Leach's argument obsolete. However we note that the construction referred to was to be completed after the hearing and that the total space available for ramp equipment storage, for staging and for storage of ULDs will then be some 7,500 square metres greater than before the construction projects began.

- Ramp handling equipment requires maintenance, and it is common at other airports for a ramp handler to lease an air-side area for a workshop. At SIA, provision for every ramp handler to have a separate maintenance facility would make excessive demands on available space. SACL has plans for a single common-use maintenance facility, which would seem to overcome the problem or sufficiently ameliorate it.

158 The above analysis leads us to conclude that two relevant consequences for airport space management would arise if the number of ramp handlers were increased beyond the four already contemplated by SACL:

- increased space requirements air-side for storage of ramp handling equipment
- increased movement of ramp handling equipment on marked traffic-ways to and from designated equipment storage areas.

Otherwise air-side space demands for ramp handling operations relate to the number of flights rather than to the number of ramp handlers.

159 This analysis lends some support to the evidence of Mr Leach and Mr Matheson, International Cargo Services Manager of Ansett, that the number of aircraft movements is the primary consideration in space requirements for ramp handling. However it also appears to be consistent with the apparently conflicting evidence of Mr Rod Parry, Ramp Manager at SIA, a recent appointee to SACL who has extensive relevant experience in Hong Kong and elsewhere. Mr Parry's evidence about the effect of more ramp handlers related particularly to requirements for equipment storage space. He estimated that the minimum equipment needed for a ramp handling operation (which he specified) would occupy 425 square metres if closely parked, and would need 850 square metres of storage area in practice, after allowing due space for manoeuvring cumbersome equipment. This estimate differed markedly from other estimates tendered in evidence. Ms Alroe, SACL's Aviation Services Manager, to whom Mr Parry reports, suggested that the required space for manoeuvring was rather less than Mr Parry assumed and postulated 625 square metres equipment storage area for each ramp handler while adopting the same assumption as to the minimum equipment required.

160 Mr Leach disputed the assumed equipment requirement adopted by both Mr Parry and Ms Alroe, pointing out that in practice SPAM operated at SIA with less than 300 square metres of equipment storage space. He said that SPAM used less equipment than the SACL witnesses assumed to be the minimum requirement because SPAM's airline clients did not use B747 freighters, the servicing of which requires an expensive and bulky item of equipment called a main-deck loader. Mr Leach also noted that SACL's assumed minimum list of equipment for a ramp handler included two main-deck loaders, which would allow two B747 freighters to be serviced at once, a requirement that Qantas can satisfy but Ansett cannot. In this regard, the Tribunal notes that neither of the two new ramp handlers proposes to include two main-deck loaders in its equipment. We note also that 80% of air freight in and out of Sydney is carried in passenger aircraft. Mr Willis of IBMS gave evidence that at Brisbane airport a ramp handler is allocated, and is required to lease, 500 square metres of equipment storage space. He considered this area excessive. He said further that his own organisation, by confining its niche business at SIA to the servicing of narrow-bodied

aircraft, has needed relatively fewer items of ramp handling equipment, and uses at the most 100 square metres of equipment storage area at SIA.

161 Mr Parry summed up his view as follows:

> *"The main issue is the way that space is managed and utilised effectively. The concern that I have and it's echoed by a number of overseas airports, is … that the larger number of ramp operators you have in an environment that is constrained puts pressure on that particular environment, on the roads, on the ramps … and the fear is that the larger number of operators increases the risk of accidents happening in a very tightly constrained area* [with] *equipment that … can't be designed to be more manoeuvrable…"*

162 Ms Alroe's position was somewhat different.

> *"… I don't really ever see now a time [when] we'll be able to say okay, this is the space allocated to … x, y, z operation and expect to stay that way for more than maybe an airline scheduling season. It will be an increasingly dynamic operation where we are trying to match the changes in the industry with the available space … We will divide it between the market. The market will then grow and alliance will change and handling arrangements will change, an operator will come to Sydney Airport and then we'll have to re-do it all over again."*

The Tribunal recognises that SIA's confined area requires close management of air-side space use, especially in the short term, but is concerned to distinguish short-term and temporary considerations from longer-term considerations. We conclude that the evidence does not justify, for the reasonably foreseeable future, the proposition that the requirements of ramp handlers for air-side equipment storage space, considered in isolation, are so severe that their number must necessarily be limited, and access for new ramp handlers correspondingly rationed. The conservative assumptions as to equipment storage space requirements adopted by Mr Parry are compatible with the licensing of four ramp handlers offering comprehensive services. Less conservative assumptions as to manoeuvring space requirements and a more moderate view of the equipment required by all ramp handlers would appear to allow a less severe and less arbitrary conclusion.

163 The Tribunal is satisfied that there is a degree of flexibility available to SACL in determining how much space it can allocate for the needs of ramp handlers and that no immediate limitation on space available has been established. Ms Alroe said that SACL did not have a master plan tabled which would make easier the allocation of priorities to the use of available

space. It was apparent from her evidence that the areas available for ground handling and ramp handling services had not been determined finally and that she had a degree of flexibility available to her. Ms Alroe said:

> *"I have a whole series of requirements on me in terms of safety and efficiency which I will, you know, have to incorporate in any decisions we make on how space is allocated. If it's been the strategical, commercial decision of the Corporation to allocate licences it's my job then to try and make that work as best I can within the constraints I've got. I would prefer at this stage to say that, you know, I will deal with the safety and operational efficiency requirements but I do stress that the nature of the site gives me some concern with unlimited growth because it just doesn't have the potential for unlimited growth in these areas."*

Mr Parry's evidence was to similar effect.

164 The Tribunal is therefore satisfied that constraints on the availability of space for use by further ramp handlers are not such as presently to preclude further competitive entry. Space allocation is a matter for SACL at the relevant time having regard to any competing priorities. If a particular space consideration arises at a future time in relation to a particular applicant for access and agreement can be reached, the issue would have to be resolved by the Commission in an arbitrated access dispute. As required by s 44X(1)(f) of the Act, the Commission would have to take into account "the operational and technical requirements necessary for the safe and reliable operation of the facility."

8.12 The air-side congestion issue

165 As we have observed, we are satisfied that the use of space by additional ramp handlers will not result in increased congestion on the apron when aircraft are being serviced as the amount of equipment on the apron is not dependent on the number of ramp handlers but rather on the number of aircraft to be serviced. However congestion would be increased on marked traffic-ways between the aprons, the equipment storage areas and staging areas by the introduction of additional ramp handlers. In considering the significance of this latter conclusion, we note that SACL is, on the evidence, comfortable with the increase in traffic-way congestion that will follow the increase in the number of ramp handlers from two to four. It is not obvious to us, although no evidence was led on the point, how a further increase to five ramp handlers would increase traffic-way congestion to an intolerable or potentially dangerous extent, given that the total number of aircraft to be serviced would not change.

166 Ms Alroe referred in evidence to her further concerns about traffic congestion on airport perimeter roads. Her primary concern appeared to be with the level of congestion on the perimeter road joining the north-east and north-west sectors of the airport, caused by a high volume of traffic serving diverse purposes. Further congestion on the northern perimeter road could arise in future from various causes, including the intended air-side movement of dollies between CTOs on the Northern Lands and aircraft on aprons in the north-west sector. The quantity of such freight to be moved on the northern perimeter road will presumably be related to the level of business done by CTOs on the Northern Lands rather than to the number of ramp handlers. In the view of the Tribunal, consequent congestion constitutes a general issue of perimeter road capacity that SACL will need to address in due course. It does not bear directly on the issues presently before the Tribunal as the amount of traffic generated on airport roads is related more to the number of aircraft to be serviced rather than to the number of ramp handling organisations involved in servicing the aircraft.

167 Congestion in the air-side area is not an absolute consideration in the sense that it is inevitable that if more ramp handlers are given access to the service there will be such congestion as will cause safety and operational issues to occur. For example, Ms Alroe said that if in addition to Qantas, Ansett, Jardine and Ogden an additional ramp handler with 3% to 5% of the ramp handling business at SIA was licensed there would not be a significant increase in traffic on the perimeter road. Ms Alroe acknowledged that congestion on the perimeter road is usually related directly to the amount of aircraft which have landed at any one time.

168 The Tribunal concludes that the fact of air-side road congestion does not, to any significant extent, support the proposition that the number of ramp handlers needs to be limited by SACL.

8.13 The number of ramp handlers that the market might support

169 The total volume of the ramp handling market at SIA is limited by the quantity of baggage and freight to be handled. The available business will be shared by the ramp handlers operating at the airport. The Freight Study recognised that there was a finite market at SIA for freight handling and a volume ceiling dictated to a large extent by passenger aircraft movements.

170 Patently, only a limited number of ramp handling operators can survive commercially at any airport. The commercially sustainable number will vary as the business of the airport expands or contracts, as innovations change the way that ramp handling is performed, or as specialised market niches are identified that change how the market might be shared among competitors. What then is the likely number of ramp handlers that could operate successfully at SIA over the period ahead, assuming that access would be available to any qualified entrant? There were three similar views offered in evidence as to the number of ramp handlers that could operate successfully side by side at SIA in an open access situation:

- The Strategy document submitted as an annexure to the tender process report of the Phase One Committee recommended that there be a minimum of three and a maximum of four licences for the provision of ramp operations. The rationale for the recommended strategy referred to space management, operational safety, sufficient choice for airlines, and "critical market mass for sustainable development".

- Mr Rod Parry, SACL's Ramp Manager also mentioned "critical mass" in his written evidence:

  "… there are also commercial issues to be considered. Particularly where there are strong incumbents already in place, new operators need some guarantee of critical mass in order to survive, justify investment and maintain performance standards"

  In oral evidence, he explained the notion of critical mass as referring to a scale of operations required for viability and noted that entrenched competitors at other airports have engaged in predatory pricing to defeat new entrants, requiring remedial action by the airport authority. Mr Parry was asked his opinion on the likely number of ramp handlers that the market at SIA could support on a sustainable basis:

  "I would have to say that I would be looking at probably a two to three year time horizon … My own commercial judgement is that … I would be surprised if more than three or four people were here at the end of three years. … I would say that four was about the prime number, and that's nothing to do with the evaluation process."

- Mr Halleen was asked a similar question. He said:

  "I would have to agree with Mr Parry and say three or four, and I think I would probably err on the side of three."

171 All three opinions were given from a SACL perspective, which envisages that all licensed ramp handlers will offer a comprehensive range of services. The possibility of there being room for a niche operator offering a more limited range of services was rejected by both Mr Parry and Mr Halleen; nor did the Freight Study mention the possibility of niche operators.

172 The significance of the above evidence lies in that it has been the consistent commercial judgement of FAC and SACL executives since the report of the Phase One Committee in April 1997 that the commercially sustainable number of ramp handlers at SIA is either three or four. At the same time, SACL argued before the Tribunal, on grounds of space constraints and operational safety, that there was a need for a procedure to ration access for ramp handlers so that their number does not exceed four. Such a juxtaposition of evidence and submission invites the question as to why restrictions on the number of ramp handlers at SIA, with the associated selection procedures, are needed at all as an alternative to the operation of the market.

173 SACL relies on the evidence that the market will only support four operators at the most for the proposition that increased access to the services will not promote competition. It submitted that with four incumbents no other operator will be able to survive. The Tribunal does not accept this proposition, having regard to the manner in which it has approached the concept of the promotion of competition. The Tribunal considers that the determination of whether any more than four operators can survive should be worked out by market forces and not by edict of SACL. In particular, the Tribunal considers that the determination of the nature and number of ramp handlers should be not be insulated from the airlines. SACL's position was made clear in the following exchange with Mr Halleen, SACL's Freight Manager:

> *"MR SEXTON* [Counsel for SPAM]*: What we are interested in exploring is the level of dissatisfaction of airlines before SACL would contemplate introducing a further operator. Is there any policy about that that's been formulated?---Certainly on a policy it's a little hard an issue. I think we've already addressed it once and that's the subject of the freight study that was one of the major drivers for that and one would assume that that would be a serious task that we would need to continue to watch. First of all we have to watch how the new contenders perform and it's always been in our mind that we may have to consider exercising those rights.*

> *I understand it to be the SACL position that the competitive process has in effect been exhausted by the tender process so that there would be no more competitive advantage if a declaration was made?---Well, we would like to think, I don't mean any disrespect, we would like to think that this might be a better solution to the competitive. That's really been our driver.*
>
> *GOLDBERG J: I'm sorry, a better solution than what?---Than declaration because I think we're really saying that we would like to think that we can achieve the best solution for our client airlines by being very careful about our selection and of who we get to use and share the constrained resources."*

It can be seen that although SACL has no policy against introducing further operators (in addition to the current four) it wants to exclude the more transparent competitive process associated with declaration.

174 In this context it is important to remember the statutory edict (s 44H(4)(a)) that the Tribunal must be satisfied that increased access "would promote competition in at least one [other] market". This criterion or test requires the Tribunal to look to the future with or without declaration. The criterion or test does not allow or require the Tribunal to look at the matter on a before and after basis, that is to say before and after the implementation of the tender process. Although the situation is now better competitively than it was before Jardine and Ogden were selected, the Tribunal considers that an even better situation will apply in the future, that is to say, a situation which allows a wider range of competitors the opportunity to enter the market.

175 Prior to the implementation of the tender process there was a less than satisfactory competitive situation. Although the competitive situation has been improved, it does not follow that declaration of the services would not promote competition in the future. Indeed, the Tribunal has formed a view to the contrary.

176 SACL also submitted that the current licensees were not "durably sheltered from further competition" because the licences give SACL the right, in its absolute discretion, to introduce additional ramp handlers. That may be, but that is not to say that competition will not be promoted if access to the services is given by declaration.

177 We also refer to the SACL submission that, because of the tender process, SACL had taken steps to bring about effective competition in circumstances where the open market failed to bring about effective competition. We take the reference to "effective competition" to be a

reference to the fact that there are now more competitors in the market and a greater range of contractors available to the airlines. However, that submission does not answer the proposition that competition will not continue to be promoted by further access to the services brought about by declaration.

8.14 Sydney Airports Corporation Limited's need to apply performance standards

178 If the rationing of access to the ramp handling market is apparently not justified by the considerations of space, air-side congestion and operational safety to which SACL's evidence and submissions gave particular emphasis, and if an unrestricted market may in any event be able to sustain only the number of ramp handlers that were selected by the tender process, or fewer, what further arguments might be offered in favour of a rationing of access?

179 We are reminded in this context that the 1996 Freight Study's conclusion and recommendation in favour of the tender process did not rest directly on any assumed need to limit access. Rather, it insisted on FAC's need to exercise firm control over parties using its facilities to provide services to airlines. The performance of Qantas and Ansett as a ramp handling duopoly was seen to be so poor as to damage the repute of SIA in the import and export of freight. Mr Halleen noted in his evidence that the goal of the Freight Study was:

> *"… to put* [Sydney Airport] *in control of their freight handling performance and improve the service delivery to the point of consistently rating as one of the most efficient airports for handling in the world"*

and

> *"… to determine the best approach to deliver real and sustainable performance improvement while protecting the safety, security and efficiency of the airport."*

From this perspective, limitations in access to the ramp handling market might be seen as an incidental by-product of action directed to other purposes, in particular the achievement of high performance standards.

180 The Tribunal does not question the imperative for SACL to regulate on-airport conduct so that ramp handling service contractors to airlines operate with due regard for safety, health, security and efficient practice. The problems to which FAC responded in 1997 were not peculiar to SIA, as evidenced by a warning from the UK health and safety authorities in 1998

to airlines operating from Heathrow and Gatwick Airports that ground handling contractors must be more effectively controlled by the airlines. Nor does the Tribunal dispute SACL's right to license users of its facilities so that their operations conform to SACL's generally applicable and proper requirements.

181 However, the Tribunal does not accept that the right of an airport operator to license users of its facilities for such a purpose need be incompatible with a third-party ramp handler's right to access its market in accordance with competition law. The Tribunal concludes that the issue of limiting the number of parties who can attain third-party access to the services provided by SIA and of applying a selection process to that end, on the one hand, and the issue of licensing parties who are granted access on terms that require certain high standards of performance to be met on the other hand, are severable in practice. We have already addressed a similar argument in regard to the operating standards for operational safety and cannot see any reason to adopt a dissimilar view here.

8.15 Barriers to entry

182 In general terms it is fair to say that if barriers to entry are reduced competition will be promoted. The principal barrier to entry presently facing potential entrants to the ramp handling market at SIA is SACL's unchallengeable decision as to who should be allowed access to the relevant services, which decision is now administered through the tender process. If this barrier is removed then an opportunity is created for access.

183 SACL submitted that there were such substantial barriers to entry to the ground handling services market that an access declaration would not promote competition as the barriers to entry would effectively inhibit new entrants. The barriers to entry were said to reside in the need to obtain a critical mass of business in order to survive, the constraints of space at the airport and the constraints of safety at the airport. For reasons set out earlier, the Tribunal does not consider that there are such constraints on space at the airport which would prevent further entrants from entering the market for the supply of ramp handling services. The Tribunal does not consider what SACL called a constraint of safety to be a barrier to entry. Safety concerns are ever prevalent at airports and the evidence shows that no operator, large or small, is immune from incidents impinging upon the safety of persons and property. There is no suggestion in the evidence that either a small operator or potential new entrant will be

confronted with such safety issues or considerations as will preclude or inhibit it from entering the market.

184 The need to obtain a critical mass of business is obviously a matter to be achieved by a new entrant. The Tribunal accepts that in the past, prior to the introduction of the tender process, there was little effective competition in the market for ramp handling services at SIA. Qantas and Ansett controlled most of the market and, apart from SPAM and IBMS, there was no evidence of other entrants into the market. It is said that with the introduction of Jardine and Ogden it will be even more difficult for a potential new entrant to gain market share.

185 Notwithstanding the difficulties that may be involved in a new entrant building up a sufficient critical mass of business to enable its business to be viable, the Tribunal does not consider that such a barrier to entry will inevitably have the result that either there will be no new entrants into the market or that any new entrant will not be able to survive in the long-term due to an inability to build up a sufficient critical mass of business. It is apparent that international air operators have been dissatisfied with the level of service and competition in the past and that there are a range of airline needs which may be satisfied by what have been called the "niche operators". The existence of this particular barrier to entry is, in the Tribunal's view, not such as to make us reject the proposition that an access declaration will promote competition in the ramp handling market. Indeed in the absence of declaration, the evidence before the Tribunal suggests little or no prospect of entry by niche operations.

8.16 Threat of entry

186 SACL submitted that the clauses in the licence agreements which entitled SACL to issue further licences and authorise self-handling preserved the threat of new entry. SACL recognised, according to Ms Alroe, that although the existing airport configuration allowed space for only four ramp handlers, it was possible, if necessary, for one further ground handler to be allowed access to the airport. SACL submitted that although a licensee could not count on SACL never introducing another ramp handler, the same situation was not reached by making an access declaration. SACL's complaint about an access declaration was that if a declaration was made then anyone who negotiated for access, or satisfied the criteria pursuant to a Commission arbitration, could become a ramp handler and space would have to be found irregardless of the allocative inefficiencies involved.

187 If an access declaration is made and a potential entrant cannot negotiate access with SACL, that entrant is entitled to take advantage of the arbitration provisions in Div 3 of Pt IIIA of the Act. In such circumstances the Commission must have regard to the matters specified in ss 44W and 44X of the Act. If an access declaration is otherwise appropriate, it is not a correct approach for the Tribunal to try and anticipate how the Commission might determine an arbitration over access in any given situation. In reaching any determination, the Commission is bound to take into account, *inter alia*, "the operational and technical requirements necessary for the safe and reliable operation of the facility": s 44X(1)(f), and "the economically efficient operation of the facility": s 44X(1)(g), as well as taking into account "any other matters that it thinks are relevant": s 44X(2).

188 The Tribunal agrees with SACL's submission that it is not a question whether you can fit in one or two more operators and leave it to the Commission to work it out. Rather, the issue is whether increased access will promote competition in another market.

189 The Tribunal accordingly finds that competition will be promoted in another market, being the market for ramp handling services, by declaration of the services the subject of the Minister's declaration. It follows that the Tribunal is affirmatively satisfied, for the purposes of s 44H(4)(a), that increased access to those services would promote competition in at least one market other than the market for the services.

9. WOULD IT BE UNECONOMICAL FOR ANYONE TO DEVELOP ANOTHER FACILITY TO PROVIDE THE SERVICES? (s 44H(4)(b))

9.1 What is the relevant facility?

190 It is important to understand, in the terms of s 44H(4)(b), what it is that must be uneconomical for anyone to develop. It is not simply another "facility" but rather "another facility to provide the service"; that is to say, the service provided by the use of aprons and hard stands at SIA to load and unload international aircraft at SIA and the service provided by the use of an area at that airport to store equipment and to transfer freight from the loading and unloading equipment to and from trucks. It should also be noted that s 44H(4)(b) requires satisfaction that it would be uneconomical to develop "another facility" to provide that service. Ms Alroe made it clear that there were considerable space constraints at SIA in relation to further development.

191 Expert evidence before the Tribunal did not challenge the monopolistic nature of SIA as a whole. But, as indicated above, there were sharp differences of view over a number of interrelated issues associated with the definition of facility and economics of developing another facility.

192 A key issue is the minimum bundle of assets required to provide the relevant services subject to declaration. The more comprehensive the definition of the set of physical assets essential for international aircraft to land at SIA, unload and load freight and depart in a safe and cost effective manner, the less likely it is that anyone (even the incumbent infrastructure owner) would find it economical to develop "another facility" within a meaningful time scale. Conversely, the narrower the definition of facility, the lower the investment hurdle and inhibition on development facing the incumbent or a new entrant.

193 A number of alternative definitions of "facility" were canvassed in evidence: the concrete hard stands alone; the passenger and freight aprons adjacent to the international terminal; the combination of the hard stands, aprons and the international terminal together; and the airport as a whole. Arguments for the airport as the relevant facility derived from the highly interconnected or "bundled" nature of international freight and passenger handling operations at the airport.

194 Proponents for a narrower definition, particularly Professor Maddock, emphasised that:

- at some major international airports, new freight handling or terminal facilities were routinely developed by airlines and others who were not the airport infrastructure owner/landlord (Los Angeles was cited as an example);

- SACL had a continuing program of construction of new hard stands, aprons and associated infrastructure.

195 The Tribunal recognises the arguments in principle for defining the facility as narrower than the whole airport. This may be an option at some international airports where:

- on the supply side space, ownership, management and regulatory arrangements may serve to restrict the bottleneck elements of the airport to runways and taxiways; and

- on the demand side, the market size may support specialised freight handling terminals and/or the development of passenger terminals by entities other than the airport owner, such as airlines.

196 From an economic perspective, however, this is clearly not the case at SIA because of the relatively small size of the Australian freight market and its distance from other major markets.

197 Accordingly, we reject the contention that the relevant facility, for the purposes of s 44H(4)(b), is less than, what is in effect the total airport. We do not accept that provision of another facility to provide the service would be satisfied by, for example, a simple extension of the freight aprons. It is evident that the function of ramp handling requires movement to and from several parts of the airport and the movement of aircraft carrying freight into and out of the airport. It follows that the use of the general airport structure is essential to carry on the function of ramp handling.

198 As a practical matter, the evidence before the Tribunal shows the relevant facility in this case includes not only aprons and hard stands but also much of the remaining airport infrastructure. The question to be answered is - how much? The Tribunal considers that this facility particularly embraces:

- all the basic air-side infrastructure at SIA, such as the runways, taxiways and terminals; and

- related land-side facilities integral to the effective functioning of air-side services.

199 All these physical assets are clearly essential to the servicing of international aircraft using SIA for freight services in a safe and commercially sustainable manner. It is also significant that 80% of the air freight which arrives at SIA is carried in passenger aircraft. In order to gain access to the services provided by SIA, namely the use of the aprons and hard stands and other areas for storage of equipment and transfer of freight, it is necessary to gain access to that part of the airport at which international passenger aircraft are parked and passengers disembark and embark. It is not necessary for the Tribunal to define the outer boundaries of the relevant facility, or stipulate whether airport facilities that are marginal to this matter,

such as land-side car parking and retail outlets, are not part of the relevant facility. Such questions are not material to our decision.

9.2 Does "anyone" in s 44H(4)(b) include the owner of the existing facility?

200 The Tribunal was presented with sharply conflicting views on whether "anyone", in the s 44H(4)(b) test relating to development of another facility, should include SACL:

- On one view, proposed by SACL, Ansett and Professor Maddock, "anyone" should include SACL. Clearly, SACL can, and does, incrementally develop facilities, such as aprons and terminal facilities. Against this evident fact, construing "anyone" to include SACL would cause declaration to fail the s 44H(4)(b) test.

- The other view, supported by Professor Williams and Mr Ergas was that construing "anyone" to include SACL would be to subvert the underlying policy of Pt IIIA which is to facilitate access to bottleneck facilities so as to promote competition in upstream or downstream markets.

As noted in pars 84-89 above, SIA clearly has all the salient characteristics of a bottleneck. Those wishing to compete in the downstream ramp handling market and the CTO market must have access to a large subset of air-side facilities at SIA, facilities over which SACL has total control of both access and capital investment. In the absence of such access, competitive entry is foreclosed by the huge barriers to entry associated with developing the complex bundle of services and facilities necessary to service international aircraft.

201 Against this background, the Tribunal prefers the view that "anyone" does not include SACL, that is to say, the reference in s 44H(4)(b) excludes the provider of the existing facility. This interpretation is more consistent with the underlying policy of Pt IIIA and economic and commercial commonsense. If "anyone" were to include the provider owning or operating the bottleneck facility in issue, a second facility might be developed by the provider without a second competing service being available to prospective users. The bottleneck would persist. We note however that this issue is not material to the declaration in this matter because of the broad definition of "facility" we have adopted (see pars 197-200).

202 Given the Tribunal's findings in relation to the definition of facility, would it be uneconomical for anyone to develop another facility to provide the service? The answer to this question is clearly, "yes". This is because the very powerful economies of scale and scope of SIA discussed above preclude anyone, even the incumbent owner and operator, from developing another facility offering the physical infrastructure and the associated rich inheritance of market attributes at SIA. Any future Sydney West airport, for which SACL has development responsibility, does not qualify as another facility since it is not an effective substitute in an operationally sensible time scale for those seeking access to the services at SIA declared by the Minister. Also it does not qualify in terms of the manner in which we have construed s 44H(4)(b) as it would not provide a service for use at SIA. The criterion for declaration in s 44H(4)(b) is therefore satisfied.

203 As the Tribunal has noted in par 86 SIA as a whole exhibits very strong bottleneck characteristics. From an economic perspective therefore the option to develop another facility is foreclosed because the relatively small size of the Australian freight market would not support the development of another separately-owned airport. The realities are reflected in the Government's decision that SACL will be responsible for the development of Sydney West as a supplement to, rather than a replacement for, SIA.

9.3 What is the meaning of "uneconomical" in s 44H(4)(b)?

204 In the circumstances of this matter, our conclusion that it would be uneconomical for anyone to develop another facility remains true whether "uneconomical" is construed in a private or social cost benefit sense, a matter of contention between the expert witnesses. As with the definition of "anyone", declaration does not turn on this issue. The Tribunal considers, however, that the uneconomical to develop test should be construed in terms of the associated costs and benefits of development for society as a whole. Such an interpretation is consistent with the underlying intent of the legislation, as expressed in the second reading speech of the Competition Policy Reform Bill, which is directed to securing access to "certain essential facilities of national significance". This language and these concepts are repeated in the statute. This language does not suggest that the intention is only to consider a narrow accounting view of "uneconomic" or simply issues of profitability.

205 The issue whether uneconomical is to be construed in a private or social cost benefit sense is closely connected to the question of whether "anyone" should include the owner of the facility providing the service to which access is sought. If "uneconomical" is interpreted in a private sense then the practical effect would often be to frustrate the underlying intent of the Act. This is because economies of scope may allow an incumbent, seeking to deny access to a potential entrant, to develop another facility while raising an insuperable barrier to entry to new players (a defining feature of a bottleneck). The use of the calculus of social cost benefit, however, ameliorates this problem by ensuring the total costs and benefits of developing another facility are brought to account. This view is given added weight by Professor Williams's evidence of the perverse impact, in terms of efficient resource allocation, of adopting the narrow view.

206 The Tribunal is affirmatively satisfied for the purposes of s 44H(4)(b) that it would be uneconomical for anyone to develop another facility to provide the services declared by the Minister.

10. IS THE FACILITY OF NATIONAL SIGNIFICANCE? (s 44H(4)(c))

207 The Tribunal's definition of facility also puts beyond doubt that the facility is of national significance for the purposes of s 44H(4)(c), that is, having regard to:

> *"(i) the size of the facility;*
> *(ii) the importance of the facility to constitutional trade or commerce; or*
> *(iii) the importance of the facility to the national economy"*

208 The evidence before the Tribunal, key elements of which are summarised at par 38 above, make clear the predominant and pervasive role that SIA plays in Australia's commercial links with the rest of the world. In 1997 in-bound and out-bound freight to a value exceeding $21 billion was cleared at SIA. Evidence was given that 50% of the airfreight into and out of Australia goes through SIA and approximately 80% of the airfreight which goes through SIA is carried by passenger aircraft. The Tribunal is affirmatively satisfied that the facility provided by SIA is of national significance for the purpose of s 44H(4)(c).

11. CAN ACCESS TO THE SERVICES BE PROVIDED WITHOUT UNDUE RISK TO HUMAN HEALTH AND SAFETY? (s 44H(4)(d))

11.1 The management of operational safety

209 The risk of accidents on aprons and surrounding areas is properly a matter for concern for all parties, for public policy and particularly for SACL as the statutory controlling authority. It is a matter to be addressed by the Tribunal directly in accordance with s 44H(4)(d) of the Act as the Tribunal has to be satisfied affirmatively that access to the services can be provided without undue risk to human health or safety. Costly and disruptive damage can be done either to aircraft or to equipment and serious risk to passengers and personnel can result if accidents occur involving the use of equipment. Evidence given in confidence by Ms Alroe disclosed the type of safety related incidents that had occurred and could occur, their frequency, and (in two incidents on which detailed evidence was exhibited) their potentially serious dimensions.

210 SPAM submitted that s 44H(4)(d) was satisfied without reference to any evidence concerning safety as, unlike subpars (a) and (f) of s 44H(4), subpar (d) does not apply to "access (or increased access)" but only to "access". Putting the matter another way, it was submitted that the relevant enquiry was not whether increased access could be provided without undue risk to human health or safety but rather whether access could be so provided. It was apparent from the evidence that access to the service had been provided for some considerable time to organisations such as Qantas, Ansett, SPAM and IBMS with the result, according to SPAM, that access to the services was already provided without undue risk to human health or safety.

211 The Tribunal takes the view that although subpar (d) of s 44H(4) does not refer specifically to "increased access" it is still necessary for the Tribunal to be satisfied that access can be provided without undue risk to human health or safety. It does not follow that simply because access to the service is being provided that it must follow that it is being provided without undue risk to human health or safety.

212 SACL submitted that it must have the right to select which ramp handlers should be licensed because unsafe operators would otherwise be permitted to operate. If that were the situation, the test for declaration set out in s 44H(4)(d) would not be satisfied. For reasons to which we shall refer, we are not satisfied that access to the services by ramp handlers not specifically selected by SACL will mean that unsafe operators would be permitted to operate. Indeed, as required by s 44H(4)(d), we are affirmatively satisfied that access to the services can be provided without undue risk to human health or safety.

213 SACL submitted that small ramp handlers were *ipso facto* likely to be unsafe. It submitted that the likelihood of risky behaviour and a lack of concern for safety might be properly attributed to small ramp operators by analogy with what it claimed to be the experience of the Australian aviation industry with small, financially struggling airline operators. It was said the training of air-side personnel would not be as thorough. Presumably it would follow from this argument that a well-constructed selection process would exclude such dangerous applicants for access. However, it emerged from Ms Alroe's confidential evidence of the general record, and of two specific incidents that were detailed, that no conclusion could be drawn that would in any way support a contention that the two small ramp handlers at SIA had operated less safely than the two large ramp handlers which are associated with major airlines. In short, SACL's argument was contradicted by documented SIA experience. The occurrence of safety related incidents was not shown to be related to the size, financial position or experience of a particular operator.

214 The Tribunal has concluded that the obligation on a ramp handler to satisfy strict operational safety requirements, and the right for SACL to apply appropriate and enforceable sanctions on any operator who breaches those requirements, should be provided for, and presumably will be, in any terms and conditions under which a ramp handler is licensed to operate at an Australian airport. We note that in the licences granted to Jardine and Ogden there is an obligation on the licensee to comply with extensive and comprehensive safety and security obligations. Failure to comply with those obligations is a ground for termination of the licence. That the airport authority might not have enforced proper safety standards in the past, relying on the contracting airline to do so, is not relevant to this matter, except to demonstrate that abdication of the administration of the airport's safety function to an airline is not prudent policy. It is the view of the Tribunal that the provisions of Pt IIIA of the Act, if applied at SIA, would in practice see the terms and conditions of access for any ramp handler — whether they are agreed by negotiation or determined by independent arbitration — include enforceable provisions as to operational safety.

215 Given these conclusions, we do not see that an argument related to operational safety justifies SACL's submission that the rationing of third party access to the ramp handling market is necessary or that the introduction of further ramp handlers will bring about an undue risk to human health or safety at the airport.

216 The Tribunal is therefore affirmatively satisfied that access to the services declared by the Minister can be provided without undue risk to human health or safety.

12. IS ACCESS TO THE SERVICES ALREADY THE SUBJECT OF AN EFFECTIVE ACCESS REGIME? (s 44H(4)(e))

217 The Tribunal is affirmatively satisfied that access to the services declared by the Minister is not already the subject of an effective access regime: s 44H(2)(e). The expression "effective access regime" is not defined in the Act but it is apparent from s 44H(5) that it is a reference to a regime for access to a service or a proposed service established by a State or Territory that is a party to the Competition Principles Agreement which the Commonwealth Minister has decided is an effective access regime for the service or proposed services: ss 44M and 44N. It was not submitted to the Tribunal that any such regime had been established and the Tribunal knows of no such regime.

13. WOULD ACCESS OR INCREASED ACCESS TO THE SERVICES BE CONTRARY TO THE PUBLIC INTEREST? (s 44H(4)(f))

218 SACL submitted that declaration for service would be contrary to the public interest for the following reasons:

- It would be contrary to the public interest to increase the risk of accidents in circumstances where any competitive benefits arriving from a declaration from access would be marginal at best over and above what SACL has itself introduced.

- Accidents and congestion not only affect safety but also affect efficiency of airport passenger and freight operations including departure times and arrival/delivery times. It was submitted that it is contrary to the public interest to compromise efficiency in circumstances where any competitive benefits arising from access will be marginal at best over and above what SACL has itself introduced.

- The Tribunal should not allow the Commission to perform the role performed by SACL. It was submitted that if access is declared then what was called "the second stage" of Pt IIIA of the Act comes into play. As a consequence, if applicants cannot successfully negotiate access with SACL the Commission will arbitrate the terms of access. It was submitted that a very real issue for arbitration would be the issue of

safety and that SACL is the organisation best equipped, and is authorised by statute, to carry out the difficult balancing of all the functions involved of managing the airport, balancing the competing demands for the scarce space and balancing the critical functioning of ensuring safety and efficiency with respect to all operations at the airport.

- SACL relied upon the submissions it had made that declaration would not promote competition. However, the Tribunal has rejected these submissions.

219 The Tribunal is affirmatively satisfied that access or increased access to the services would not be contrary to the public interest. For the reasons we have already set out in some detail, the Tribunal is satisfied that declaration of the services will promote competition in the ramp handling market. The Tribunal is of the view that it is in the public interest that competition be promoted in this market for the reasons to which we have already referred.

220 The Tribunal has already explained why it has reached the conclusion that access to the services can be provided without undue risk to health or safety. It follows that a declaration of the services will not increase the risk of accidents at the SIA. The Tribunal has also explained why it has reached the conclusion that declaration will not bring about further congestion at SIA or any increased incidents of accidents. Accordingly, it rejects the submission that a declaration of access would affect the efficiency of airport passenger and freight operations including departure times and arrival/delivery times.

221 The Tribunal rejects categorically the submission that as a matter of discretion it should not allow the Commission to perform the role that is currently performed by SACL. The Tribunal is not allowing the Commission to do anything. Part IIIA of the Act sets out the statutory scheme which provides a role for the Council, the Minister, the Tribunal, the Commission and the Federal Court of Australia. It is part of the statutory scheme, where in certain circumstances an applicant cannot gain access to a service, that a process can be commenced which may result in the Commission arbitrating an access dispute. At that stage, the provider of the service has full opportunity to make such submissions it wishes to the Commission as it is a party to the arbitration of the access dispute: s 44U. As we have noted earlier, in making a determination in any such arbitrated access dispute the Commission must take into account the matters set out in s 44X(1). These matters include, *inter alia*, the

interests of all persons who have right to use the service, the operational and technical requirements necessary for the safe and reliable operation of the facility and the economically efficient operation of the facility. The Tribunal also points out that if the owner of the facility was an organisation different from the provider of the service it would have the opportunity to apply to the Commission to be made a party to the arbitration: s 44U(c).

14. RESIDUAL DISCRETION

222 SACL submitted that even if the Tribunal was satisfied of the matters specified in s 44H(4) of the Act it nevertheless had a residual discretion to decline to make a declaration and that in the circumstances it should exercise that discretion against declaration.

223 The Tribunal is prepared to accept that the statutory scheme is such that it does have a residual discretion. However, when one has regard to the nature and content of the specific matters in respect of which the Tribunal must be satisfied pursuant to s 44H(4) of the Act, that discretion is extremely limited. The matters therein specified cover such a range of considerations that the Tribunal considers there is little room left for an exercise of discretion if it be satisfied of all the matters set out in s 44H(4).

224 Ansett submitted that satisfaction of the matters set out in s 44H(4) is necessary to attract the power to make a declaration but not sufficient to require an exercise. So put, the submission says nothing more than that the Tribunal has a residual discretion which we are prepared to accept.

225 SACL submitted that an access declaration should not be made having regard to the safety and efficiency concerns to which it has referred. The Tribunal has already rejected the submission that there will be an increased risk of accidents and that safety considerations dictate a rejection of declaration. The Tribunal's reasoning in this respect applies equally to its rejection of the submission that it should exercise its discretion against declaration.

226 SACL, supported by Ansett, submitted that as a matter of discretion the Tribunal should not allow the Commission to perform the role that is currently performed by SACL. The Tribunal has already rejected that submission as being a matter to take into account in

determining whether access or increased access to the service would not be contrary to the public interest. Our reasoning applies equally to any exercise of the residual discretion.

227 SACL submitted that "a very real issue" for any arbitration will be the issue of safety and that it is best equipped to balance the critical function of ensuring safety and efficiency with respect to all operations at the airport. Ansett submitted that the Commission's experience and expertise in relation to competition issues does not qualify it to make, or to supervise, decisions concerning operations in an area of such serious risk to human life and property. However, as we have already pointed out, SACL will be a party to any access dispute arbitrated by the Commission which is bound to take into account the matters to which we have referred earlier, such as the interests of all persons who have rights to use the service, the operational and technical requirements necessary for the safe and reliable operation of the facility and the economically efficient operation of the facility. No doubt, in any arbitrated access dispute, SACL would make available to the Commission such information and submissions as it regarded as being relevant to safety considerations and risks to human health or safety.

228 We do not consider that it is for the Tribunal, in the circumstances of this case, to conclude that it is inappropriate that the Commission should be given what Ansett called "this control" over the terms and conditions of who can operate on SIA's aprons, hard stands, transfer and storage areas. It is part of the statutory scheme that the Commission has such a role. Ansett submitted that:

> *"It is wrong to assume that declaration merely 'opens the door' and does not affect actual access."*

That submission is correct in the sense that without declaration, and in the absence of agreement, an applicant for access to a service is precluded from obtaining access. However, the submission fails to take into account the detailed provisions for the determination and arbitration of access disputes found in Div 3 of Pt IIIA of the Act. The Tribunal accepts that once a declaration is made, if an applicant wishes to obtain access to the service, SACL will either have to reach an agreement on access with the applicant or, if the applicant insists, have the matter determined in an arbitration by the Commission. However, the potential for such procedure and an outcome favourable to an applicant is no reason, in the Tribunal's

view, for it to exercise its discretion against declaration of the service. It is the statutory scheme that such a process occur.

229 From time to time, in the course of the hearing, some of the economists called as expert witnesses made it clear that they were unhappy with the process for declaration of services provided in Pt IIIA of the Act. For example, Professor Maddock said:

> *"It's not clear to me that it's good public policy for us to be declaring facilities to which a number of players already have access. Having the fifth, sixth or 51st or whatever person try to use the declaration process to get access to a facility which is already subject to significant access I don't think is very good public policy."*

It is not for the Tribunal to challenge or criticise the policy which lies behind particular legislative provisions. Section 44H(4) specifically requires the Tribunal to be satisfied affirmatively that "increased access" would promote competition in a market other than the market for the service and that "increased access" to the service would not be contrary to the public interest. In the light of these statutory provisions the Tribunal considers that existing access to a service is no bar to a consideration whether a declaration should be made in respect of that service.

230 SACL submitted that the imposition of a requirement that it deal with operators that it reasonably considers that it should not have to deal with for reasons including safety and operational concerns, which would include lack of financial viability, would lead to inefficiencies. It was said that, as a matter of discretion, the Tribunal should not impose such a requirement upon SACL. What SACL appeared to be submitting was that any owner or operator of a infrastructure bottleneck facility or service should have the right to determine, without interference, who should have access to that service. The policy of Pt IIIA is precisely that the owner or operator of such an infrastructure bottleneck service or facility is not to have that right if the criteria specified in s 44H(4) of the Act are satisfied and the Commission determines in an arbitrated access dispute that a particular person is to have such access. Part IIIA of the Act ensures that the concerns of organisations such as SACL are addressed both by the Council, the Minister, the Tribunal and the Commission.

231 SACL submitted that having regard to the successful program of freight reforms at SIA there is no satisfactory reason now to change radically the parameters of the market within which

the reforms are about to be accomplished. It was submitted that it would be preferable to monitor the performance of the market following the introduction of a new regime and then to determine whether SACL's objectives have been fulfilled. However, for the reasons to which we have already referred, the Tribunal is not satisfied that the freight reforms should be left untouched and that access to the services should not be declared.

232 SACL submitted that a declaration in circumstances where it has undertaken a lengthy and considered process to consider the optimum number of ramp handlers in SIA will bring about economic inefficiency. SACL pointed, for example, to the allocation of space, which, if required to accommodate additional ramp handlers, could not be used for purposes which SACL considered to have a higher priority. The Tribunal has already, in these reasons, explained why it considers that there is the opportunity for space for further ramp handlers. Of course, any particular consideration in relation to any particular ramp handler can be addressed by the Commission in any arbitration of an access dispute when it considers, in accordance with s 44X(1), the legitimate business interests of SACL, the interests of all persons who have rights to use the service, the operational and technical requirements necessary for the safe and reliable operation of the facility and the economically efficient operation of the facility.

233 Ansett submitted that there was no evidence that SACL had sought to extract monopoly rents or had otherwise misused its control over access to the relevant aprons, hard stands and storage areas. For present purposes, the Tribunal accepts this submission but this is no reason for it to exercise its discretion against declaration. As already noted, the operation of Pt IIIA of the Act is not limited to circumstances where the provider of a service has sought to extract monopoly rents or has misused its control over access to the relevant service.

234 Ansett also submitted that without declaration the presence of four strong competitors is likely to provide much more effective competition in ramp handling than is common in airports overseas. We have already referred to the EU directive in relation to what should occur overseas and, although the presence of four strong competitors may provide effective competition, we have already given our reasons for concluding that increased access to the service would nevertheless promote competition in the ramp handling market. Accordingly we see no reason for exercising our discretion against the declaration simply because the

current ramp handlers may provide more effective competition than is common in airports overseas.

15. CONCLUSION

235 The Tribunal therefore concludes that it should declare the services which were the subject of declaration by the Minister. At the hearing, concern was expressed by some parties as to the form of the declaration which had been made by the Minister. SACL was concerned that the form of the declaration made by the Minister might permit CTO organisations to drive trucks into the air-side area and load aircraft directly from the trucks. The Tribunal does not intend that such access to the air-side area should occur. It has obvious safety and security implications.

236 SPAM submitted that the declaration made by the Minister should be varied to make it clear that access was to be given to the service provided by the use of the areas adjacent to parked aircraft. To that end, it submitted that where the Minister's declaration stated "the use of the freight aprons and "hard stands" it should be made clear that the term "freight" qualifies only "aprons" and not "hard stands". Alternatively, it submitted that either the term "freight" should be deleted or the term "and passenger" added after it.

237 The form of the declaration by the Tribunal takes into account the concerns of SACL and SPAM and makes it clear that access is to be given to the services provided for the use of:

- those areas adjacent to parked aircraft needed for the purpose of the loading and unloading of freight from and onto loading/unloading equipment;

- those areas needed for the transfer of freight from trucks to loading equipment to and from unloading equipment to trucks; and

- those areas needed for the storage of loading/unloading equipment.

16. PERIOD OF DECLARATION

238 The Minister's declaration provided that it would be effective from 1 August 1997 to 31 July 2002, that is, for five years. We have weighed a number of considerations in finding, on re-consideration, that the declaration should also be effective for five years.

239 It is evident that the declaration should apply for a sufficient period to have effect or potential effect on the pattern of competition in ramp handling services at SIA. It is relevant in this context that the ramp handling licences to Jardine and Ogden and associated sub-leases of certain airport areas, effected by SACL since the Minister's declaration, have a term of five years from 1 June 1999. The relevant deeds include an option for a further licence term and it is desirable that this declaration should be in effect when the options for extended licences are being considered. We note also that Ansett and Qantas were excluded from the second stage of the 1997 tender process subject to their entering into ramp handling licence deeds on the same basis as the new licensees. It is also desirable that would-be additional ramp handlers should be able to pursue access to the services provided by SIA during the entire term of the initial licence period granted to Jardine and Ogden.

I certify that the preceding two hundred and thirty-nine (239) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Goldberg, Dr B Aldrich and Mr M Waller.

Associate:

Dated: 1 March 2000

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