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Queensland Rail Access Regime & Central Queensland Coal Network

On 14 September 2010 the Council released its draft recommendations on Pacific National's applications under s 44F(1) of the *Trade Practices Act 1974* (**TPA**) for declaration of the services provided by the Central Queensland Coal Rail Network (**CQCN**) and on the Queensland Government's application under s 44M of the TPA for certification of the Queensland Rail Access Regime. Details of Pacific National's declaration applications were provided In the June 2010 issue of *Accessible*. The Council discussed the Queensland Government's certification application in the August 2010 issue.

To recap, the Queensland Rail Access Regime applies to the rail transport services provided by the CQCN, rail transport services provided by infrastructure for which Queensland Rail Limited is the railway manager, and coal handling services at Dalrymple Bay Coal Terminal.

If the Queensland Rail Access Regime is certified as effective, regulation of access to the rail transport services covered by the Regime will be subject to the *Queensland Competition Authority Act 1997* which is administered by the Queensland Competition Authority (**QCA**). If Pacific National's applications for declaration of the services provided by the CQCN were to be successful, those services would be subject to the national third party access regime under Part IIIA of the TPA.

Having considered these applications and the first and supplementary rounds of submissions from interested parties, the Council proposes to recommend to the Commonwealth Treasurer, who is the decision-making Minister for the certification application, that the Queensland Rail Access Regime be certified as an effective access regime for a period of 10 years.

This means that the Council will recommend to the Premier of Queensland, who is the decision-making Minister for the declaration applications, that the rail transport services provided by the CQCN not be declared and therefore not brought under Part IIIA of the TPA.

In the Council's draft recommendation on the certification application, the Council notes that:

- Pacific National (in particular) argues that to be certified as effective, the Queensland Rail Access Regime must be able to prevent QR National from treating its rail operations any differently than those of rival third party rail operators and that, in the context of the proposed privatisation of QR National as a vertically integrated rail operator, the Regime cannot be effective.
- To the contrary, the Queensland Government submits that the issue of whether QR National is vertically integrated is not a matter for the Council and the Queensland Rail Access Regime meets the requirements for certification in the TPA.

In reaching its preliminary view on the certification application, the Council accepts that recent amendments to the Queensland Rail Access Regime have strengthened its operation.

In the Council's view, while the proposed structure and sale of QR National is relevant to the context in which the Council must make its recommendations, the TPA does not allow for the broad approach to considering a certification application that Pacific National suggests.

The Council has concluded in a number of past recommendations that the process of certification does not involve an assessment of whether an access regime is 'optimal'. In the Council's view the TPA requires that it considers only whether an access regime addresses the principles set out in clause 6 of the Competition Principles Agreement and accords with the objects of Part IIIA of the TPA.

The Council's draft recommendations on the certification and declaration applications are available on the website at www.ncc.gov.au

Inside this issue

On this basis the Council has reached a preliminary view that the Regime should be certified as effective.

In relation to the declaration applications made by Pacific National, the Council is required to consider whether the six declaration criteria (a) to (f) in s 44G of the TPA are met.

In the Council's view criteria (a), (b), (c), and (d) are met. These criteria relate to, respectively: access materially promoting competition; the relevant railways being uneconomical to duplicate; national significance and safety.

However, the Council is not satisfied that criteria (e) and (f) are met. Criterion (e) precludes declaration where services are subject to an effective state access regime. Given the Council's conclusion in relation to the Queensland Government's certification application this criterion is not met.

Criterion (f) requires that the Council is satisfied that access is not contrary to the public interest before recommending declaration.

In this case, the Council is concerned that the regulation of third party access to the relevant rail transport services in Queensland may be less effective under the national access regime in Part IIIA of the TPA than under the Queensland Rail Access Regime.

Under the Queensland Rail Access Regime, QR National will be bound by a detailed access undertaking approved by the QCA, whereas if access to the rail transport services provided by the CQCN is declared under Part IIIA the ACCC may have to arbitrate a large number of access disputes on a case by case basis.

The Council is now seeking submissions on its draft recommendations. The closing date for submissions is **5pm on 14 October 2010**. Once the Council has considered these submissions and undertaken further analysis it will provide its final recommendations to the Commonwealth Treasurer and the Premier of Queensland.

Minister's deemed decision not to declare the Herbert River cane railway

On 16 July 2010 the Council provided its final recommendation to the designated Minister that the service provided by the Herbert River cane railway not be declared.

As the Minister did not publish a decision within 60 days, he is deemed to have decided not to declare the service. The Council's final recommendation is available on its website at www.ncc.gov.au.

WA Rail Access Regime – draft recommendation on certification

On 17 August 2010 the Council released its draft recommendation on the Western Australian Government's application under s 44M of the TPA for certification of the Western Australian Rail Access Regime established under the *Railways (Access) Act 1998* and the *Railways (Access) Code 2000* (**Code**). Details of the application were provided in the June 2010 issue of *Accessible*.

The Council's proposed recommendation to the Commonwealth Treasurer, who is the decision-making Minister in this matter, is that the Regime be certified as an effective access regime until 31 December 2015. The proposed duration links the period of certification with the next review of the Code by the Economic Regulation Authority of Western Australia.

To recap, the Western Australian Rail Access Regime covers the railways specified in Schedule 1 of the Code which includes 5000 kilometres of rail track in the south-west of Western Australian, including the urban (predominantly passenger) network and the non-urban freight network. This generally comprises all standard and narrow gauge track and associated infrastructure west of Kalgoorlie. The regime also covers the 280 kilometre railway operated by The Pilbara Infrastructure Pty Ltd that runs from Cloudbreak to Port Hedland. The Regime provides for the inclusion of new railways in the future.

If the Western Australian Rail Access Regime is certified as effective it will exclusively regulate access to the below rail services of the railways covered by the Regime. This means that these services cannot be declared under Part IIIA of the TPA or subject to an access undertaking to the Australian Competition and Consumer Commission.

The Council received four submissions in response to the draft recommendation—from BHP Billiton Iron Ore Pty Ltd, the North West Iron Ore Alliance, Roy Hill Infrastructure Pty Ltd and WestNet Rail. The submission from Roy Hill Infrastructure Pty Ltd raised a number of issues that the Council considers it should allow the applicant and other interested parties to respond to before the Council finalises its recommendation. Accordingly, the Council has invited further submissions on the issues raised by Roy Hill Infrastructure. The closing date for submissions is **5pm on 6 October 2010**. Once the Council has considered any submissions and undertaken further analysis it will provide its final recommendation to the Commonwealth Treasurer.

Tribunal's decision on declaration of Pilbara railways – part 2

In the August 2010 issue of *Accessible* the Council discussed the Australian Competition Tribunal's (**Tribunal**) decisions on the Part IIIA declaration matters relating to services provided by four significant iron ore railways in Western Australia's Pilbara region (*In the matter of Fortescue Metals Group Limited* [2010] ACompT 2). In this issue the Council explains the subsequent developments in the matter and some further items of interest in the decision.

Judicial review by the Full Federal Court

On 13 August 2010 Fortescue Metals Group Ltd (**FMG**) applied to the Federal Court for judicial review of the Tribunal's decision not to declare the Hamersley railway service. FMG and Rio Tinto Ltd (**Rio Tinto**) also applied for review of the decision to declare the Robe railway service for 10 years, with FMG seeking restoration of the initial 20 year declaration period and Rio Tinto seeking to have the declaration set aside. These applications will be heard by the Full Court of the Federal Court.

Criterion (d)—health and safety

Criterion (d) was not argued in this matter, however, Rio Tinto and BHP Billiton Iron Ore Pty Ltd (**BHPB**) contended to the Tribunal that access to the services provided by their respective railways would create health and safety costs that are relevant to criterion (f) (public interest). The Tribunal did not consider this to be a significant category of cost for criterion (f). It held that the consideration of such costs was appropriate following declaration in light of a specific access request. In the Council's view, these developments confirm its view that health and safety issues were best addressed in the context of negotiation and arbitration of access terms and that criterion (d) was unnecessary. This further supports the recent repeal of criterion (d) by the *Trade Practices Amendment (Infrastructure Access) Act 2010*.

Definitions of "facility" and "service"

The Tribunal provided important guidance regarding situations where (as is often the case) the bundle of assets defined by an applicant as constituting the "facility" have changed over the period from the application to the time the decision is made (such as by expansion or improvement). It held that where the altered facility provides the same service initially sought to be declared, changes to the assets constituting the facility do not necessarily mean that the service has changed, and are therefore no bar to declaration of that service.

Protected contractual rights

Both Rio Tinto and BHPB argued that declarations should not be made because any access provided to their railway services could not be granted without depriving them of "protected contractual rights" in contravention of s 44W(1)(b) of the TPA. The Tribunal agreed with the Council's and FMG's submissions that this issue is not relevant at the declaration stage, given that s 44W(1)(b) limits the determinations the ACCC may make when arbitrating access disputes concerning declared services, and does not limit the services that may be declared.

Who's who in regulation – ESC

The Essential Services Commission (**ESC**) was established by the *Essential Services Commission Act 2001* (Vic) as Victoria's independent economic regulator of essential services supplied by the gas, electricity, water and sewerage, ports and rail freight industries.

The ESC's objective is to promote the long term interests of Victorian consumers by considering the price, quality and reliability of essential services.

In addition to its regulatory decision-making role, the ESC also provides advice to the Victorian Government on a range of regulatory and other matters such as transport, statutory insurance, accident towing and storage charges.

In 2009, the ESC was given the responsibility for developing a performance monitoring framework for local government in Victoria and released its draft report in March 2010.

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