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Commonwealth Minister Certifies Queensland Rail Access Regime

On 20 January 2011 the Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, released his decision to certify the Queensland Rail Access Regime as an effective access regime for a period of 10 years, pursuant to s44N of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The decision is consistent with the Council's final recommendation of 22 November 2010. Copies of the Minister's decision and the Council's final recommendation are available on the Council's website at www.ncc.gov.au.

The Queensland Rail Access Regime applies to the rail transport services provided by the Central Queensland Coal Network (**CQCN**) and to rail transport services provided by infrastructure for which Queensland Rail Limited is the railway manager. These services are declared under the *Queensland Competition Authority Act 1997* (**QCA Act**), effective for 10 years from 8 September 2010.

The Queensland Government introduced a number of amendments to the legislation comprising the Queensland Rail Access Regime, with effect from 8 September 2010. In particular, the amendments enhanced the ring fencing arrangements under the Regime, introduced explicit prohibitions on unfair differentiation by service providers both during negotiations with access seekers and in the provision of access for users of declared services, and strengthened the investigative powers of the Queensland Competition Authority (**QCA**). The amendments also introduced new corporate governance requirements for QR National and its related bodies corporate.

The Council was of the view that these amendments, together with QR Network's access undertaking approved by the QCA on 1 October 2010, addressed concerns raised by access seekers in submissions on the application.

In its final recommendation, the Council concluded that the Queensland Rail Access Regime satisfactorily addresses the principles in clauses 6(2)-6(5) of the Competition Principles Agreement (**CPA**) and the requirement to have regard to the objects of Part IIIA, which are to:

- promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets, and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

As a consequence of the certification of the Queensland Rail Access Regime, the regulation of access to relevant rail transport services is subject to the QCA Act which is administered by the QCA. This means that these services cannot be declared under Part IIIA of the CCA or be the subject of an access undertaking to the Australian Competition and Consumer Commission.

The *Trade Practices Act 1974* (Cth) was renamed the *Competition and Consumer Act 2010* (Cth) with effect from 1 January 2011.

For applications received and recommendations made by the Council prior to this date, the legislation is referred to as the *Trade Practices Act 1974*. The substantive provisions of Part IIIA remain the same under the *Competition and Consumer Act.*

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SA Ports Access Regime – draft recommendation on certification

On 13 January 2011 the Council released its draft recommendation on the application for certification of the South Australian Ports Access Regime. The Council's draft recommendation is that the Regime be certified as effective for a period of 10 years.

The South Australian Ports Access Regime, established under the *Maritime Services (Access) Act 2000* (SA), covers essential maritime services and regulated services provided at proclaimed ports. The currently proclaimed ports are Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard. These ports are operated by Flinders Ports Pty Ltd.

The Council received four submissions in response to the application. While all submissions supported the Regime being certified as effective, some raised concerns regarding the pricing or cost of maritime services, the exclusion of towage services from the operation of the Regime, and the price monitoring arrangements. At present, only essential maritime services are subject to price monitoring (a light-handed form of price regulation) by the Essential Services Commission of South Australia (**ESCOSA**).

To the extent that it could, given the CPA clause 6 principles that govern certification, the Council considered these matters. The CPA clause 6 principles do not require an access regime to provide for price regulation nor require specific services to be subject to price regulation. Accordingly, the Council's view is that the more appropriate forum for considering these matters is ESCOSA's next review of the South Australian Ports Access Regime in 2011-12.

Certification of an access regime does not affect the enforceability or operation of that regime. Certification does, however, remove the potential for a service(s) to be declared under Part IIIA of the CCA and is likely to provide greater certainty to asset owners/service providers and access seekers.

The Council has invited written submissions on the draft recommendation. The closing date for submissions is **5pm on 18 February 2011**. The Council will consider submissions in preparing its final recommendation to the Commonwealth Minister.

Application for certification of SA Rail Access Regime

On 29 December 2010 the Council received an application under s44M of the *Trade Practices Act 1974* (Cth) (**TPA**) from the Premier of South Australia, Hon Mike Rann MP, for certification of the South Australian Rail Access Regime.

The Regime is established by the *Railways (Operations and Access) Act 1997* (SA) and applies to the majority of intrastate railways in South Australia, with the exception of certain railways such as the Glenelg tramlines, tourist or heritage railways and privately owned rail sidings. The railway services covered by the Regime include those provided by rail track and yards, but exclude freight terminals and private sidings and the services needed to operate these.

The South Australian Rail Access Regime aims to ensure that access to regulated services is provided on fair commercial terms through a negotiate/arbitrate model, with ESCOSA being responsible for ongoing monitoring and control.

The Council has invited written submissions on the application. The closing date for submissions is **5pm on 14 February 2011**. The Council will consider any submissions received in preparing its draft recommendation and will provide a further opportunity for public comment before making its final recommendation to the Commonwealth Minister.

Council provides its final recommendation on the application for certification of the WA Rail Access Regime

On 14 December 2010 the Council provided its final recommendation to the Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, on the application for certification of the WA Rail Access Regime.

The Minister has 60 days to publish his decision. The Council's final recommendation only becomes public once the Minister has published his decision.

Application for certification of DBCT Access Regime

On 16 December 2010, the Council received an application from the Premier of Queensland, the Hon Anna Bligh MP, under s44M of the TPA for the certification of the Dalrymple Bay Coal Terminal (**DBCT**) Access Regime for a period of 10 years.

The DBCT is one of two coal terminals at the Port of Hay Point near Mackay. It is a common-user facility servicing around 18 mines in the Bowen Basin coal fields of Central Queensland. DBCT Management Pty Ltd has leased the DBCT from the Queensland Government for a period of 50 years. The DBCT is operated and maintained by a company (owned by a number of miners which use the DBCT) under a contract with DBCT Management Pty Ltd.

The provision of coal handling services at the DBCT is a declared service under the QCA Act. Part 5 of the QCA Act provides two pathways for provision of access to declared services: the 'negotiate/arbitrate' model and the 'access undertaking' model. Declaration of a service imposes an obligation on service providers to negotiate with access seekers, with recourse to arbitration by the QCA if agreement cannot be reached. Alternatively a service provider may voluntarily submit (or be required by the QCA to submit) an access undertaking setting out the terms and conditions upon which access will be provided. If accepted by the QCA, the undertaking will regulate third party access to the service.

In the case of the DBCT, an access undertaking was initially approved by the QCA in 2006. That undertaking has expired and been replaced by a new undertaking which was approved by the QCA on 23 September 2010. The new undertaking is effective from 1 January 2011 to 30 June 2016.

The Council has invited written submissions on the application. The closing date for submissions is **5pm on 14 February 2011**. The Council will consider any submissions received in preparing its draft recommendation and will provide a further opportunity for public comment before making its final recommendation to the Commonwealth Minister

Who's who in regulation – ESCOSA

The Essential Services Commission of South Australia (**ESCOSA**) was established in 2002 under the *Essential Services Commission Act 2002* (SA) as the independent economic regulator for South Australia. Prior to the formation of ESCOSA some regulatory functions were undertaken by the (former) South Australian Independent Industry Regulator.

ESCOSA is responsible for regulating the gas, electricity, water and sewerage, maritime and rail industries and any other services prescribed from time to time. ESCOSA was previously responsible for licensing entities that export barley overseas, however its regulatory role in the barley industry ceased on 30 June 2010 when the barley export market became fully deregulated.

The objective of ESCOSA is to "protect the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services". In meeting this objective, ESCOSA is required to have regard to the need to: prevent the misuse of monopoly or market power, promote competition and fair market conduct, promote economic efficiency, ensure consumers benefit from competition and efficiency, promote consistent regulation with other jurisdictions, and maintain the financial viability of regulated industries and the incentive for long term investment.

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