Accessible

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Minister certifies South Australian Rail Access Regime

On 26 July 2011 the Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, released his decision to certify the South Australian Rail Access Regime as an effective access regime under s 44N of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for a period of 10 years. The Minister's decision is consistent with the Council's final recommendation. The Minister's decision and statement of reasons, together with the Council's final recommendation, are available on the Council's website (www.ncc.gov.au).

The South Australian Rail Access Regime applies to the services provided by the majority of intrastate railways in South Australia. The regime is established pursuant to the *Railways (Operations and Access) Act 1997* (SA) (**Railways Act**) and allows for access applications for above and below rail services provided by the railways covered by the regime. It provides a framework for access seekers to negotiate access arrangements with railway owners and operators, and dispute resolution mechanisms to address situations where terms and conditions of access are not agreed.

The Council's draft recommendation was that the South Australian Rail Access Regime should only be certified for five years as it does not provide for access rights to lapse after a defined period unless periodically reviewed and subsequently extended. This is required by the 'clause 6 principles' in the Competition Principles Agreement (**CPA**). Following the draft recommendation, the South Australian Government committed to seek amendments to the Railways Act to introduce a review arrangement. The Council considered that the South Australian Government's commitment was sufficient to allow it to propose a longer certification period of 10 years in its final recommendation.

The Commonwealth Minister agreed with the Council that the regime addressed the principles for effectiveness in clause 6 of the CPA and that certification would promote the objects of Part IIIA of the CCA. In relation to this, the Minister agreed with the Council that the Railways Act when amended would satisfy the CPA review requirement and that a certification period of 10 years was therefore appropriate.

DBCT Access Regime certified

The Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, released his decision to certify the Dalrymple Bay Coal Terminal (**DBCT**) Access Regime as an effective access regime for a period of 10 years on 11 July 2011. The Minister's decision is consistent with the Council's final recommendation. The Minister's decision and statement of reasons, together with the Council's final recommendation, are available on the Council's website.

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.

Council's Gas Guide updated

The Council has updated Parts A and C of its Gas Guide to reflect the renaming of the *Trade Practices Act 1974* (Cth) to the *Competition and Consumer Act 2010* (Cth).

The Council will update Parts B and D of the Guide pending the outcome of the applications for special leave to appeal the decision in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58 to the High Court.

Inside this issue

The DBCT Access Regime principally comprises the *Queensland Competition Authority Act 1997* (Qld) which is also the principal legislation in the Queensland Rail Access Regime. Accordingly, the Council's assessment of the DBCT Access Regime drew significantly on its assessment of the Queensland Rail Access Regime. However, a significant difference between the two regimes is that the DBCT service provider, DBCT Management Pty Ltd, is not a vertically integrated business and does not compete with access seekers.

The reduced scope for competition issues to arise in relation to the services provided by the DBCT may explain why neither of the parties who made submissions on this matter considered that the DBCT Access Regime should not be certified. The Council agreed that the regime met the requirements for certification.

Although it did not argue against certification, Asciano Ltd submitted that the regime should include protection of users' commercial information that may be provided to QR National through QR Network as holder of the lease over the Goonyella rail network, and that certification should lapse if the service provider became vertically integrated in the future.

In its draft recommendation (16 March 2011) and its final recommendation (10 May 2011), the Council considered that the Queensland Rail Access Regime (as it applies to the Goonyella rail network) imposes adequate information protections. The Council also considered that the DBCT Access Regime provides an appropriate level of comfort such that a vertically integrated service provider would be prevented from treating its related businesses more favourably than those of its competitors.

Accordingly, the Council was of the view that the DBCT Access Regime addresses the principles for effectiveness in clause 6 of the CPA and that certification would promote the objects of Part IIIA of the CCA.

Access regulation overseas – EU

In the last issue of *Accessible* the Council published the first of a series of articles on the regulation of third party access to infrastructure services in other countries. That article looked at the US essential facilities doctrine. In this issue, the Council considers the European Union (**EU**).

In the EU, as in the US, access can be sought through sector-specific regimes enacted within EU member states (where applicable). Alternatively, remedies may be sought under the prohibitions on abuse of a dominant market position in Art 102 of the Treaty on the Functioning of the European Union (**TFEU**) or its equivalent in domestic competition law.

Even where a service is subject to a sector-specific access regime, Art 102 may still apply unless the domestic legislation *requires* anticompetitive conduct or *eliminates* any possibility of competitive activity by a firm (*Deutsche Telekom AG v European Commission* Case C-280/08, 14 October 2010, [80]).

Sector-specific regimes

The manner of sector-specific regulation in the EU can be seen as reflecting the general principle of the EU that it will act only where the action of individual Member States is insufficient (*Treaty of the European Union*, Art 5(3)).

Regulatory regimes for specific sectors, such as transport, energy and telecommunications, are substantively implemented by individual Member States. EU legislation (regulations, directives, decisions, recommendations and opinions) forms a best practice 'framework' setting out the means by which domestic regimes should promote interoperability and facilitate a single competitive market in each regulated industry. Directive 2003/55/EC, for example, establishes third parties' right to non-discriminatory access to transmission and distribution systems and liquefied natural gas facilities and sets out rules as to certain conduct that designated industry participants must or must not engage in. However, the designation of the participants to whom the rules apply remains the preserve of each Member State.

Article 102

The competition rules in the TFEU are enforced by the Directorate-General for Competition of the European Commission (**EC**). The EC has applied principles broadly analogous to the essential facilities doctrine in considering refusals to supply under Art 102 (which was previously Art 82 of the EC Treaty and Art 86 of the EEC Treaty). The EC, in its guidance on enforcement priorities in applying Art 82 (published 24 February 2009) said that it would consider a refusal to supply to be an enforcement priority if the refusal: relates to a product or service objectively necessary for effective competition in a downstream market, is likely to lead to the elimination of effective competition in the downstream market, and is

likely to lead to consumer harm. In *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG* Case C-7/97, 1998 ECR I-07791, the European Court of Justice applied similar principles, although it eschewed use of the expression 'essential facilities'.

The principles applied by the EC and the European Court of Justice bear some resemblance to the core declaration criteria in ss 44G(2) and 44H(4) of the CCA. The key practical difference is that Art 102 operates retrospectively, requiring a plaintiff to establish the anticompetitive conduct before seeking remedies. Part IIIA of the CCA, on the other hand, operates in respect of services that meet the declaration criteria, and the conduct of the facility owner towards the applicant is relevant mainly to the question of whether access is likely to materially promote competition in a dependent market.

In Australia in 1993, the Hilmer Committee recommended the introduction of a national access regime largely because of the difficulty in establishing a breach of s46 of the CCA. Section 46 requires a plaintiff (either a private party or the ACCC) to establish that the respondent has a substantial degree of market power and has taken advantage of that power for one of three anticompetitive purposes. Successful claims under s46 for refusal to deal are very rare.

Under Art 102, on the other hand, plaintiffs have enjoyed more success. This may be attributable in large part to the express prohibitions in Art 102 on: imposing unfair prices and trading conditions; limiting production, markets or technical development; differential pricing that creates competitive disadvantage; and imposing extraneous contractual obligations. Where remedies for anticompetitive refusal to deal are available, the need for a statutory regime such as Part IIIA may not be so great. However, it is worth noting the comments of Waller and Tasch that:

> If the goal is to have a thoughtful regime of open access when that will be beneficial to society, Australia-with its statutory national access regime, supplemented with industry specific rules ..., and the general competition law as a backstop-comes closest to being a potential model (Spencer Webber Waller and William Tasch, 'Harmonizing Essential Facilities' (2010) 76 *Antitrust Law Journal* 741, 763).

Who's who in regulation – NT Utilities Commission

The Northern Territory Utilities Commission was established in 2000 as the independent regulator of the electricity, water and sewerage industries in the Northern Territory. The Commission is constituted by the Utilities Commissioner and two Associate Commissioners and is supported by staff seconded from the Northern Territory Treasury.

The Commission regulates prices charged by government and other businesses for providing certain monopoly services and for providing certain services in regulated industries. It also licenses regulated industry participants and monitors the performance of regulated operators. In addition, the Commission investigates and helps resolve complaints regarding the conduct of licensees and provides information to consumers. When requested, the Commission also provides advice to the Minister on regulatory matters.

In performing its roles, the Commission considers the need to promote competition and fair and efficient markets and to prevent the misuse of monopoly power. The Commission also aims to ensure that consumers' interests are protected regarding the reliability and quality of services and supply, and that consumers benefit from enhanced competition and efficiency. Further, the Commission must have regard to the need to maintain the financial viability of regulated industries and to ensure that infrastructure owners receive an appropriate rate of return on regulated assets.

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