



## **Pacific National Pty Limited**

**Pacific National Supplementary Submission to National  
Competition Council on the Queensland Rail Network**

**16 August 2010**

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## 1. Executive Summary

1. This supplementary submission (**Supplementary Submission**) is made by Pacific National Pty Limited (**Pacific National**) in accordance with the scope for supplementary submissions identified by the National Competition Council (**Council**) on its website. Specifically, this Supplementary Submission addresses:
  - (a) matters arising from decisions made by the Queensland Government in response to consultations on the proposed Queensland Competition Authority and other Legislation Amendment Bill 2010 (Queensland) and Queensland Competition Authority Amendment Regulation 2010 and the Bill now tabled in the Queensland Parliament being the Motor Accident Insurance and Other Legislation Amendment Bill (**Bill**) which identifies proposed amendments to the Queensland Competition Authority Act (**QCA Act**), the Queensland Competition Authority Regulation (**QCA Regulation**) and the Transport Infrastructure Act (**TI Act**);
  - (b) certain matters arising from the reasons for decision of the Australian Competition Tribunal *In the matter of Fortescue Metals Group Limited* [2010] A CompT2 (**Fortescue**), which reasons for decision did not become publicly available until after the close of submissions in this matter, and accordingly, could not have been addressed in Pacific National's Submission of July 2010 (**July Submission**).
2. The proposed amendments to the QCA Act, the QCA Regulations and the TI Act as reflected in the Bill tabled on 6 August 2010 are currently proposed legislation as the Bill has not yet been passed into law. It would clearly be inappropriate for the Council's recommendation to be based on a Bill which was subsequently altered in material respects. Pacific National, however, appreciates the Council's desire to progress this matter as quickly as possible. It should, however, be made clear in any draft recommendation published by the Council that the Council is proceeding on the basis of the Bill as introduced and the views which it expresses may alter in the event that there is some change to the Bill.
3. The Bill addresses a number of issues, some of which were matters which contributed to the Queensland rail access regime not being an effective regime for the purposes of clause 6 of the Competition Principles Agreement (**CPA**). There remain, however, issues which mean that the Queensland rail access regime continues not to be an effective regime for the purposes of s.44G(2)(e) of the TPA. Those issues are as follows:
  - (a) there remains a lack of effective separation between the activities of QR Network Pty Limited and QR National Limited overall. This issue is entirely unaddressed by the Bill. This issue also has flow on implications for the differential access issues identified in the July Submission. These issues go directly to clause 6(4)(a)-(c), (f) and (m) of the CPA but particularly paragraph (m);
  - (b) there are ongoing concerns about the access agreement carve out with continuing uncertainty about the meaning of "unfair differentiation";

- (c) there is a lack of clarity about what is the subject of the declaration and therefore some ongoing uncertainty as to whether clause 6(3) of the CPA is satisfied.

4. These issues address in further details in this submission.

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## 2. Lack of Effective Separation

5. As set out in paragraphs 30 to 36 of the July Submission, clause 6(4)(m) of the CPA requires effective separation between the natural monopoly components of the relevant business and the contestable components of the business. There is nothing in the Bill which addresses this issue.
6. As a result, the concerns identified by Pacific National in case studies 4, 5 and 6 of its July Submission remain significant concerns even if the Bill is passed in its current form.
7. Consistent with Council's request as to the form of supplementary submissions, those matters are not repeated here, the Council is referred to paragraphs 35-45 of the July Submission, the Castalia Report which accompanied Pacific National's application for declaration and the Castalia Report of July 2010.
8. This is a fundamental issue which enables QR National Limited to bundle the provision of its services to a customer in a way which means that a third party access seeker is unable to compete with it. Whilst QR National Limited and QR Network Pty Limited are distinct corporate entities, linking the services which each of them provides to a customer will not breach the third line forcing prohibitions contained in sub-s.46(6) and 46(7) of the TPA because of the express exclusion which is now contained in those sub-sections where the relevant entities are related bodies corporate.

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## 3. Differential Access - cl.6(a)-(c), (f) and (m)

9. Sections 100 and 168C of the QCA Act are proposed to be amended in a similar fashion Section 168C is intended to be amended to provide as follows:

**168C Prohibition on particular treatment of users by access providers**

- (1) *In providing access to a declared service, an access provider must not unfairly differentiate between users of the service in a way that has a material adverse effect on the ability of 1 or more of the users to compete with other users.*

*Note -*

*Provision for enforcing compliance with subsection (1) is made in division 8 (Enforcement for pt 5), particularly section 153 (Orders to enforce prohibitions on hindering access and unfair differentiation).*

- (2) *An access provider does not contravene subsection (1) to the extent the different treatment is expressly required or permitted by-*

(a) *an access code or approved access undertaking for the service; or*

(b) *an access agreement to which the provider is a party; or*

- (c) *an access determination to which the provider is a party.*
  - (3) *However, subsection (2) does not authorise an access provider to do anything-*
    - (a) *under an access agreement or access determination to which the provider is a party if the provider is prevented from doing the thing under section 104 or 125; or*
    - (b) *that is inconsistent with the pricing principles mentioned in section 168A.*
  - (4) *This section applies despite section 102.*
- 10. These provisions now require conduct to be both "unfair differentiation" and to have a material adverse effect on the ability of an access seeker to compete. This is a cumulative requirement rather than being a definition of the circumstances in which unfair differentiation will arise. Accordingly, the concerns expressed at paragraphs 51-53 of the July Submission remain with uncertainty about the meaning of the term "unfair differentiation" and an access seeker effectively pushed back to reliance on ss.104 and 125 of the QCA Act.
- 11. In addition, as identified before the concerns addressed in each of case studies 4 to 6 inclusive remain even with the amendments proposed and these issues go fundamentally to the question of differential access.

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#### **4. Access to necessary infrastructure - clause 6(3)**

- 12. The Bill proposes to change the method by which the relevant facility is identified. Instead of using line diagrams previously published by QR Network, it proposes to identify the systems generically. The difficulty with this approach is that it leaves at large whether key parts of the relevant infrastructure are included. In this situation, there is the potential for significant disputes as to where the matters are included or not. This would be inconsistent with clause 6(3) for the reason stated in paragraphs 72 to 79 of the July Submission.

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#### **5. Implications of Fortescue Tribunal Decision**

- 13. Since Pacific National filed its application for declaration on 19 May 2010, the Australian Competition Tribunal (**Tribunal**) has revisited the application of criterion (a) in light of the Full Federal Court's decision in *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 (**Sydney Airport**). This section identifies aspects of the decision which are relevant to the Council's consideration of this matter and may impact on matters previously put to the Council.

## 5.1 Interpretation of criterion (a)

14. In the Fortescue case, the Tribunal confirmed that criterion (a) is forward looking and involves a comparison of the future state of competition in the relevant market with access to the service and the future state of competition without access.<sup>1</sup>
15. Following the Full Court's decision in Sydney Airport, the Tribunal held that "access" in criterion (a) means access simpliciter ie the right or ability to use the service. It does not mean the right or ability to use the service under Part IIIA, nor does it mean the right or ability to use the service under an alternate access regime.
16. The Tribunal acknowledged that the Full Court's decision had reduced the matters a decision-maker could take into account in determining whether criterion (a) was satisfied, however, it considered that the Full Court did not intend the enquiry under criterion (a) to be entirely theoretical. The Tribunal noted that the Full Court did itself consider some factual matters in making its decision.<sup>2</sup>
17. The Tribunal held that the question of whether or not access will be taken up is an essential consideration in deciding whether criterion (a) is satisfied.<sup>3</sup> However, the mere fact of access itself will not be sufficient to promote a material increase in competition. Instead what matters is the likelihood of access, the sufficiency of access and the likely timing of access. The Tribunal accepted that in assessing the extent to which access would be taken up, it should assumed that access is on reasonable terms and conditions, without speculating about any particular terms that might be imposed by arbitration under Part IIIA.<sup>4</sup>
18. In light of the Tribunal's decision in the Fortescue case, Pacific National submits that the relevant comparison is the future state of competition in the dependent market with a right or ability to use the relevant service and the future state of competition without such a right. There is no basis consistent with the decision of the Full Court or the Tribunal in the Fortescue matter, for making the comparison one "with a legal right to access under Part 5 of the QCA Act"<sup>5</sup>.
19. In considering whether access to the service will promote competition in the dependent market, the Council should consider the likelihood and extent of access being taken up and when. It should assume that access will be available on fair and reasonable terms, but not consider the particular terms which may be available under Part IIIA or otherwise.

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<sup>1</sup> Fortescue at [1048].

<sup>2</sup> Fortescue at [1064].

<sup>3</sup> Fortescue at [1065].

<sup>4</sup> Fortescue at [1066].

<sup>5</sup> Queensland Government Submission to the National Competition Council, 19 July 2010 at p.12

20. The Queensland Government's submission that the Council must compare the future state of competition in a dependent market with a legal right to use the service under Part IIIA with the future state of competition in that market with a legal right to use the service under Part 5 of the QCA Act is inconsistent with both the Full Court's decision in Sydney Airport and the Tribunal's decision in Fortescue and should be disregarded. The Freight Australia recommendation of the Council referred to by the Queensland Government predated the Full Court's decision in Sydney Airport and is inconsistent with both the Sydney Airport case and the Tribunal's decision in the Fortescue case.
21. The position put in Pacific National's application for declaration as to the nature of the relevant inquiry (see paragraphs 6.7 - 6.11) remains correct. The question involves an analysis of the likelihood, sufficiency and timing of access all of which are satisfied in the present case. The rail haulage market is, however, not yet effectively competitive.

## **5.2 Criterion (f) and the Discretion**

22. In Fortescue, the Tribunal accepted that in light of the Full Court's decision in Sydney Airport the only issue to be considered under criterion (f) is the impact on public welfare of the mere fact that a third party has access to the service on reasonable terms and conditions.<sup>6</sup> If there is to be a more detailed inquiry to appreciate the effect on the public welfare of both a declaration and access under Part IIIA, that inquiry is only relevant to the Tribunal's discretion. As a consequence, in considering whether criterion (f) was satisfied the Tribunal made broad assumptions about the nature of access on reasonable terms and conditions, the effect of access being taken up and issues of substitutability.<sup>7</sup>

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## **6. Period of Declaration**

23. There is nothing in the material that Pacific National has seen which extend the proposed period of declaration. In the July Submission Pacific National set out in detail why the proposed period of 5 years was inadequate<sup>8</sup>. The Queensland Government has indicated informally to Pacific National that it proposes to extend the period of declaration to 10 years. However, none of the proposed legislative amendments which Pacific National has seen have yet included this change.
24. By reason of the matters set out in this submission the Queensland regime remains not an effective regime.

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<sup>6</sup> Fortescue at [1164].

<sup>7</sup> Fortescue at [1166].

<sup>8</sup> July Submission at paras 80-82