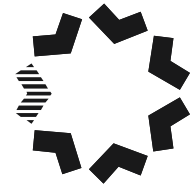


NATIONAL
COMPETITION
COUNCIL



Tasmanian Railway Network

Application for declaration of a
service provided by the
Tasmanian Railway Network



Draft recommendation

10 July 2007

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The National Competition Council

The National Competition Council was established on 6 November 1995 by the *Competition Policy Reform Act 1995* following agreement by the Australian Government and state and territory governments.

It is a federal statutory authority which functions as an independent advisory body for all governments on the implementation of the National Competition Policy reforms. The Council's aim is to 'improve the well being of all Australians through growth, innovation and rising productivity, and by promoting competition that is in the public interest'.

Information on the National Competition Council, its publications and its current work program can be found on the internet at www.ncc.gov.au or by contacting NCC Communications on (03) 9285 7474.

Table of Contents

1	Recommendation	1
	Abbreviations and glossary of terms	3
2	The Application	5
	The application and the applicant	5
	The Service	5
	The Facility	5
	The Service Provider and the Operator	8
	The decision maker	9
3	Background	10
	Purpose and application of Part IIIA	10
	Effect of declaration	10
	Declaration criteria	11
4	Criterion (b) – Uneconomical to develop another facility	13
	Introduction	13
	Discussion	13
	Conclusion	17
5	Criterion (a) – Promotion of competition	18
	Introduction	18
	Recent developments concerning criterion (a)	19
	The Dependent Market(s)	21
	Competition in the Dependent Market	23
	Conclusion	28
6	Criterion (c) – National significance	29
	Discussion	30

	Conclusion	31
7	Criterion (d) – Health and safety	32
	Discussion	32
	Conclusion	33
8	Criterion (e) - Application of an Effective Access Regime	34
	Discussion	34
	Conclusion	34
9	Criterion (f) – Public interest	35
	The Application and submissions	35
	Assessment	36
	Conclusion	37
10	Duration and effect of declaration	38
	Assessment	38
	Discussion	38
	Conclusion on the duration of declaration	39
11	Other issues	40
	Section 44F(3) - Application not in good faith	40
	Section 44F(4) - Alternative facilities	40
12	Compliance with time limits	41
	The Council’s decision making process	41
	The decision of the designated Minister	41
	Appendix A - Part IIIA (extracts), Trade Practices Act 1974	42
	Appendix B - Submissions and references	44

1 Recommendation

- 1.1 On 2 May 2007, the National Competition Council (“the Council”) received an application¹ under Part IIIA of the *Trade Practices Act 1974* (“TPA”) from the Tasmanian Department of Industry, Energy and Resources (“DIER”) Rail Unit for a recommendation to declare for 10 years the following service provided by the facility (“the Tasmanian Railway Network or TRN”) and currently operated and managed by Pacific National:

The use of the rail tracks and associated infrastructure, relating to each of the line segments of the TRN², other than the Melba line, for the purpose of operating a rail service on the Tasmanian network. Operating a rail service includes, without limitation, loading and unloading freight, making up trains, shunting and other activities necessary for the efficient haulage of freight by rail.³ (“Service”)

- 1.2 The Council, via a public notice in the Australian Financial Review, its website and through direct correspondence with parties identified as having a potential interest in the matter, called for public comment on matters arising from the Application. A list of submissions received by the Council is set out in Appendix B.
- 1.3 In making this draft recommendation, the Council has taken into account the Application and Additional Information, the submissions received, information provided during meetings and discussions with specific parties, other information obtained from publicly available sources and the objects of Part IIIA.
- 1.4 The Council’s draft recommendation is that the Service be declared under Part IIIA of the TPA for a period of 10 years.
- 1.5 This is a draft recommendation.
- 1.6 The Council seeks the views of interested parties on any matter raised in the draft recommendation, the Application and Additional Information and will take these into account in preparing its final recommendation. The submission period will end on 3 August 2007.

¹ A copy of the Application and the Additional Information is available at www.ncc.gov.au.

² Described at section 2.2.

³ Section 2.1 of the Application.

- 1.7 Submissions should be made in both hard copy and electronically. Written submissions should be directed to the Executive Director, National Competition Council, GPO Box 250, Melbourne VIC 3001 and emailed to tasrail@ncc.gov.au by no later than **5.00pm, Friday 3 August 2007**.
- 1.8 Unless confidentiality is requested, submissions will be treated as public documents and published on the Council's website. Parties seeking to submit information on a confidential basis must discuss the matter with the Council Secretariat prior to submission.
- 1.9 Any queries should be directed to tasrail@ncc.gov.au or to Natalie Naylor on 03 9285 7474.

Abbreviations and glossary of terms

ACCC	Australian Competition and Consumer Commission
Additional Information	The letter from DIER dated 19 June 2007 providing additional information to the Application
Amending Act	<i>Trade Practices Amendment (National Access Regime) Act 2006</i>
Applicant	Department of Industry, Energy and Resources, Rail Unit (Tasmania)
Application	The application from DIER dated 1 May 2007 and received by the Council on 2 May 2007
Asciano Limited	Asciano Limited ACN 123 658 862
AusLink	National land transport policy
AusLink National Network	A single integrated network of Australia's land transport linkages of strategic national importance
AusLink rail rescue package	The agreed funding package between the Commonwealth (\$78 million) and Tasmanian Governments (\$4 million per annum) for upgrading and maintaining the TRN
Council	National Competition Council
Dependent Market	The market for the provision of rail line-haul services as identified in section 5.20
DIER	Department of Industry, Energy and Resources, Rail Unit (Tasmania)
Facility	TRN
Full Court	The Full Court of the Federal Court of Australia
Gunns	Gunns Limited ACN 009 478 148

Melba line	The railway line of approximately 130 kilometres, running from Burnie to Melba Flats and identified on the map at Figure 1 as the blue line, being the railway line fully owned by Pacific National
Operator	Pacific National (Tasmania) Pty Ltd ACN 079 371 305
Owner	DIER as representative of the Crown in Right of Tasmania
Part IIIA	Part IIIA of the TPA
Pacific National	Pacific National (Tasmania) Pty Ltd ACN 079 371 305
QR	Queensland Rail
RMMD	Rail Management and Maintenance Deed executed by the Crown in Right of Tasmania, Pacific National (Tasmania) Pty Ltd, PN Tas (Operations) Pty Ltd and Pacific National Pty Ltd in 2006
SACL decision	<i>Sydney Airport Corporation Limited v Australian Competition Tribunal</i> [2006] FCAFC 146
Service	The Service for declaration as described in section 2.2
Standard Period	The four month (120 day) period prescribed by s44GA of the TPA
Tasmanian Corridor	The 432 kilometres of rail and 542 kilometres of road in Tasmania which together form part of the AusLink National Network, being the backbone of Tasmania's land transport system
TPA	<i>Trade Practices Act 1974</i> (Cwlth)
Tribunal	Australian Competition Tribunal
TRN	The Tasmanian Railway Network, being the Facility, comprising the Bell Bay line, the Derwent Valley line, the Fingal line, the South line, the North-East line, the Western line and the Zinc Works line as identified in section 2.3 and identified as the red and green lines on the map contained at Figure 1

2 The Application

The application and the applicant

- 2.1 On 2 May 2007 the Tasmanian Department of Industry, Energy and Resources (“DIER”) Rail Unit applied to the National Competition Council (“the Council”) to have a service provided through use of the Tasmanian Railway Network (excluding any part of the Melba line) declared for a period of 10 years under Part IIIA of the *Trade Practices Act 1974* (“TPA”). A declaration of the service would provide third party access seekers with an enforceable right to negotiate access to the declared service and to seek arbitration by the Australian Competition and Consumer Commission (“ACCC”) in the event of an access dispute concerning terms and conditions of access, including access pricing.

The Service

- 2.2 DIER has sought declaration of the following service provided by the Facility:

The use of the rail tracks and associated infrastructure, relating to each of the line segments of the Tasmanian Railway Network, other than the Melba line, for the purpose of operating a rail service on the Tasmanian network. Operation of a rail service includes, without limitation, loading and unloading freight, making up trains, shunting and other activities necessary for the efficient haulage of freight by rail.⁴ (“Service”)

The Facility

- 2.3 The facility has been described as the Tasmanian Railway Network and comprises:

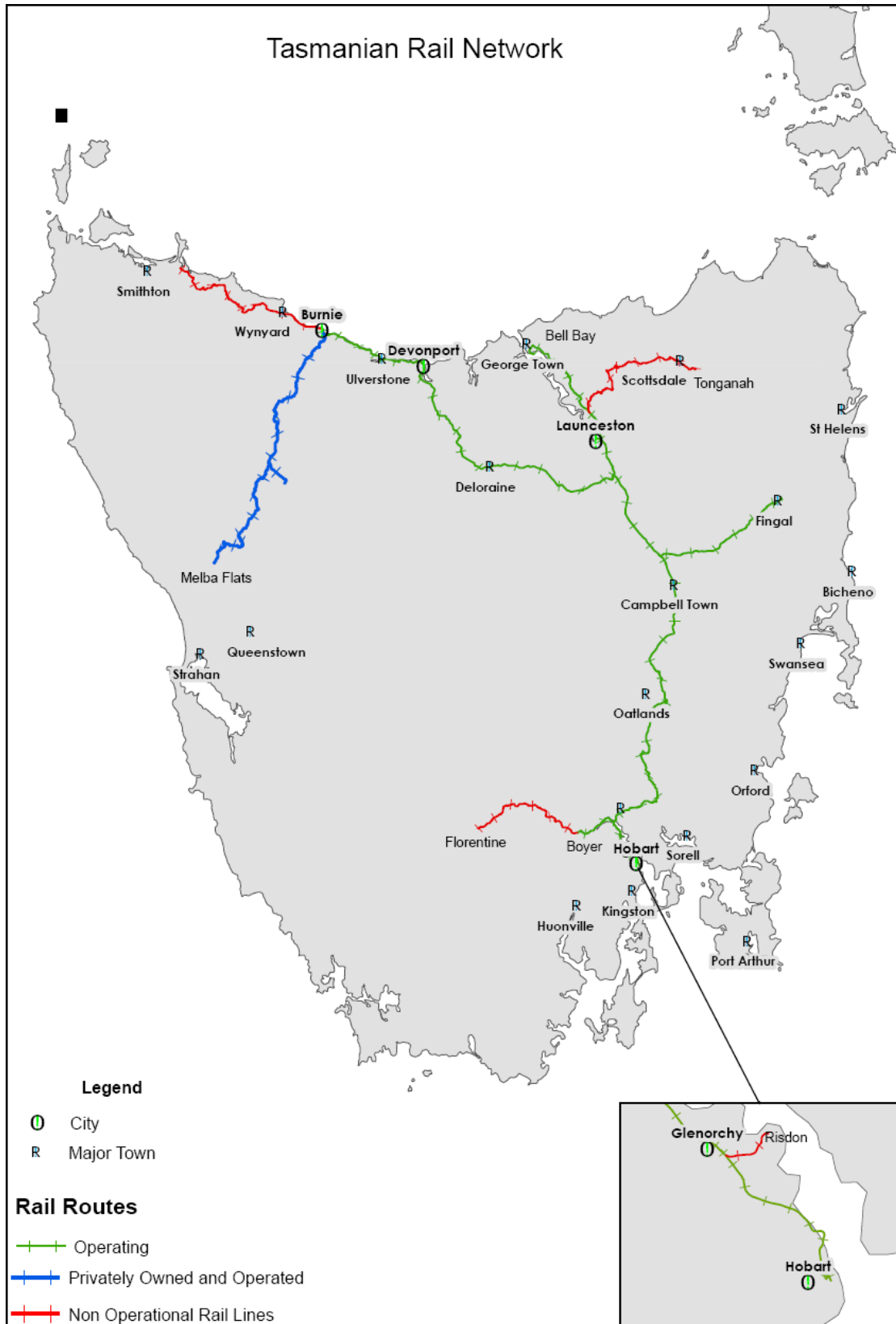
(a) the following railway line⁵ segments:

⁴ Section 2.1 of the Application.

⁵ Narrow gauge.

- (i) the Bell Bay line (being the railway line of approximately 57 kilometres running from the Western Junction to Bell Bay);
 - (ii) the Derwent Valley line (being the railway line of approximately 71 kilometres running from Bridgewater to Maydena);
 - (iii) the Fingal line (being the railway line of approximately 55 kilometres running from Conara Junction to Fingal Coal Washery);
 - (iv) the South line (being the railway line of approximately 199 kilometres running from the Hobart rail yard to Western Junction);
 - (v) the North-East line (being the railway line of approximately 199 kilometres running from Coldwater Creek to Tonganah);
 - (vi) the Western line (being the railway line of approximately 78 kilometres running from Western Junction to Wiltshire); and
 - (vii) the Zinc Works line (being the railway line of approximately 3 kilometres running from Derwent Park to Risdon); and
- (b) the infrastructure that comprises the TRN consisting of rail lines, crossing loops, sleepers ballast, cutting, tunnels, embankments, bridges, culverts, rail tracks and yards on wharves, fastenings, points, poles, pylons, structures and supports, signalling equipment, overhead lines, platforms, railway stations, freight sheds and associated buildings (excluding terminals), workshops, electrical substations, train communications systems plant, machinery and other fixed equipment; and
- (c) the rail terminals at Burnie, Devonport, Launceston and Hobart. (“Facility” or “TRN”)
- 2.4 The Facility does not include the Melba line or the workshops and administration facility at Tamar Junction, Launceston, which are all owned by Pacific National.
- 2.5 The railway lines comprising the TRN, the subject of the Application, are identified as the lines coloured green and red on the map set out below.

Figure 1: Map of the Tasmanian Railway Network



- 2.6 The Council sought clarification of the relevant Facility from the Applicant to confirm that the TRN and the Melba line can be operated independently and to confirm the position with respect to railway lines at the various Tasmanian ports. Additional information was provided by the Applicant to the Council on 26 June 2007.⁶ (“Additional Information”)
- 2.7 The Council confirms that the Applicant’s statements at section 10 of the Application concerning the continuing application of Part IIIA of the TPA to the Melba line are correct. Nothing in the Application or this Draft Recommendation detracts, affects, removes or otherwise limits a party’s rights under Part IIIA with respect to the Melba line.

The Service Provider and the Operator

- 2.8 Section 44B of the TPA defines the “provider” in relation to a service to be “the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service”. The identity of the “provider” will affect who the relevant designated Minister is for an application for declaration,⁷ but otherwise has no bearing on the Council’s assessment of the application in respect of the criteria for declaration in Part IIIA of the TPA.
- 2.9 The Applicant submitted that the provider is the owner of the Facility, being the DIER Rail Unit, a body of the State of Tasmania. The Council notes that in the case of this Application the owner and the operator are different parties and, as such, there could be uncertainty regarding the identity of the “provider” for the purposes of Part IIIA.
- 2.10 The Applicant has engaged Pacific National to operate the Facility on its behalf. The Applicant submitted that in respect of access, Pacific National’s role is limited and the primary matters relating to the policy, principles and terms of access have been determined by the owner, being the State of Tasmania. Accordingly, the Applicant’s view is that, in these circumstances, the provider is DIER.
- 2.11 The TPA is not prescriptive when identifying the “provider” in a situation, such as this, where the Owner and the Operator are different. The Council is of the view that the Applicant’s reasoning as to why the Owner should be regarded as the provider for this particular Application is appropriate in the circumstances. Furthermore, the Council has no information suggesting that the Operator is in any way concerned with the Application made by DIER.

⁶ By letter from DIER dated 19 June 2007.

⁷ Section 44D of the TPA.

- 2.12 Pacific National has recently been involved in a corporate restructure / de-merger. Following the successful takeover of Patrick Corporation by Toll Holdings Limited in 2006, Toll Holdings Limited announced a restructure proposal that created a new listed entity, Asciano Limited that would control the transport infrastructure assets of Pacific National along with Toll Holdings' ports, port operations and stevedoring businesses. The corporate restructure was approved by Toll Holdings' shareholders and Pacific National became a wholly owned subsidiary of Asciano Limited in June 2007. This change in control of Pacific National does not impact on the consideration of the Application.

The decision maker

- 2.13 Since the provider is DIER, a Tasmanian Government department, the designated Minister who will make the decision whether or not to declare the Service, is the Premier of Tasmania, the Hon. Paul Lennon MHA. The Council's recommendation will be made to the designated Minister and will be made public when the designated Minister makes and publishes his decision. The designated Minister's decision may be reviewed (upon application) by the Australian Competition Tribunal ("Tribunal").

3 Background

Purpose and application of Part IIIA

- 3.1 Part IIIA of the TPA was introduced in response to the findings and recommendations of the Hilmer Review (1993) and comprised part of a wider package of microeconomic reforms known as National Competition Policy. Part IIIA provides for regulatory arrangements for access to bottleneck infrastructure where the effect of the bottleneck is to limit competition in dependent markets.
- 3.2 The objects of Part IIIA⁸ are to:
- (a) 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
 - (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.
- 3.3 It is recognised that access regulation (including declaration) is intrusive and hence should only be imposed where it results in net economic benefits. Therefore, if the costs of access are to exceed the benefits, access is unlikely to promote the economically efficient operation and use of that infrastructure and is likely to negate investment in infrastructure. Where this is the case, access should be denied.

Effect of declaration

- 3.4 Declaring the Service is the first step in opening the Service to access by third parties. Declaration of the Service establishes an enforceable right for third parties to negotiate access to the Service on reasonable terms and conditions. In the event that negotiation is unsuccessful then the aggrieved party may notify the ACCC that an access dispute exists and seek to have that access dispute arbitrated by the ACCC. The outcome of any ACCC arbitration is binding on the parties.

⁸ Section 44AA of the TPA.

- 3.5 Declaration has been described as ‘opening the door’ to access. By that, commentators mean that access does not automatically follow declaration, nor does it give rise to free or subsidised access. The law provides that if a reasonable basis for providing access cannot be found then, notwithstanding declaration of the service, access may not be possible and therefore not required.⁹ However, where the declaration criteria and other requirements of Part IIIA are met and the owner can receive an appropriate commercial return on its investment in the facility used to provide the declared service and can be recompensed for the costs incurred in providing the declared service, then access must be provided on a negotiated or arbitrated basis.
- 3.6 Importantly, declaration is one means of seeking access. Declaring the Service does not preclude access occurring via another means if this is both more efficient and achievable.

Declaration criteria

- 3.7 The Council cannot recommend that a service be declared unless it is satisfied that all of the following criteria¹⁰ are met:
- (a) that access (or increased access) to the service would promote a material increase in 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; and

⁹ Sections 44V(3) and 44X of the TPA.

¹⁰ Pursuant to s44G(2) of the TPA (and for the decision to be made by the designated Minister, s44H(4) of the TPA).

- (f) that access (or increased access) to the service would not be contrary to the public interest.
- 3.8 The Council must also consider whether it would be economical for anyone to develop another facility that could provide part of the Service (s44F(4)).
- 3.9 The Council must be affirmatively satisfied that all of the declaration criteria in s44G(2) are met before it can recommend declaration.¹¹ If the Council is not satisfied that one or more of the criteria are met, then it must recommend that the Service not be declared.
- 3.10 Conceptually, the Council considers it logical to begin with subsection 44G(2)(b) (criterion (b)) because that criterion focuses on the issue of the service to which access is sought and the facility providing that service and asks whether the facility exhibits natural monopoly characteristics. Subsection 44G(2)(a) (criterion (a)) is wider in scope because it requires a consideration of industry structure, the related but distinct markets from the market for the service and whether the service provider is able to exercise market power in those related markets.

¹¹ The criteria are mirrored in s44H(4) of the TPA. The designated Minister must be satisfied that all of the criteria are met before he or she can recommend declaration of the Service. Whether it would be economical to develop another facility to provide part of the service is reflected in s44H(2).

4 Criterion (b) – Uneconomical to develop another facility

Section 44G(2)(b) It would be uneconomical for anyone to develop another facility to provide the service

Introduction

- 4.1 Criterion (b) limits declaration to services provided by facilities that cannot be economically duplicated. Such facilities are said to exhibit natural monopoly characteristics. These facilities generally involve large and lumpy capital investments but relatively low operating costs, and significant economies of scale and/or scope.
- 4.2 Criterion (b) is satisfied if, over a relevant range demand for the service for which declaration is sought, it is less costly for a single facility, rather than multiple facilities, to provide the service. In this context the relevant range of demand to be considered focuses on the period for which declaration is sought or is likely.
- 4.3 If the capacity of the existing facility is insufficient to meet foreseeable demand then it is also necessary to consider whether it would be less costly, to the economy as a whole, to expand the facility rather than to construct another facility to meet this demand. If so, criterion (b) is satisfied.

Discussion

Are there alternative facilities which could provide the Service?

- 4.4 The TRN is the only rail system in Tasmania.
- 4.5 South Spur Rail Services submitted that there is scope for a potential alternative facility that would realign the current rail system through the Southern Midlands. The Council considers this proposed alternative is not an alternative facility, but rather would involve a significant upgrade of the existing facility.
- 4.6 The Council has no evidence of other facilities or proposed facilities that could provide the Service.

Foreseeable demand for the Service

- 4.7 Demand for the Service for which declaration is sought is derived from demand for rail line-haul services.
- 4.8 The Applicant has provided commodity data on freight volumes carried in 2002/03, by tonnes carried and net tonne kilometres (see table 1). It has also estimated likely demand for rail line-haul services for 2010 and 2020, in terms of freight volumes per annum and train movements (see table 2).
- 4.9 The Applicant's demand forecasts, which were estimated in 2003, are based on freight volumes carried by the network's then owner (Australian Transport Network), forecasts of contestable freight not carried by rail as at 2002/03 and forecast future industrial development and growth in Tasmania. The forecasts for 2020 are for a date beyond the 10 year period for which declaration is sought. Nevertheless, the Council considers that the forecasts remain relevant to assessing likely foreseeable demand.
- 4.10 The figures also relate to all rail freight in Tasmania not just that carried on the Facility. Ideally freight carried on the Melba line, which is privately owned by Pacific National, should be excluded.

Table 1: Freight Volumes by Commodity 2002/03¹²

<i>Commodity</i>	<i>Tonnes</i>	<i>Net Tonne Kilometres</i>
Cement (bulk)	1,096,563	24,538,448
Containers (intermodal)	768,855	191,345,381
Concentrates (bulk)	321,322	37,279,209
Coal (bulk)	310,314	62,920,094
Newsprint (intermodal)	299,899	117,536,073
Logs (bulk)	208,429	54,809,885
Paper Pulp (intermodal)	99,169	38,695,881
Timber (intermodal)	46,327	9,712,333
Other	54,553	11,664,498
<i>Total</i>	<i>3,205,431</i>	<i>548,501,802</i>

¹² Sourced from the Application, table 2, p.12.

Table 2: Summary of the Applicant’s forecast demand for freight volumes and train movements

	2006	2010	2020
<i>Freight volumes (tonnes per annum (tpa))</i>	5,348,161	5,770,211	6,368,419
<i>Train movements</i>			
<ul style="list-style-type: none"> • <i>Main line¹³</i> 	8	10	12
<ul style="list-style-type: none"> • <i>Section between Railton & Devonport</i> 	15	17	19

4.11 The Applicant stated that the growth in freight volume to-date has been less than it had forecast. The Applicant attributed the difference between current and estimated freight volumes to continued underinvestment in infrastructure and the lack of availability of rolling stock. Indeed, the Applicant stated that current freight volumes are less than those in 2002/03. Several other submissions confirmed the reduction in freight volumes since 2003.

4.12 The Council judges that current demand for the Service is likely to be substantially less than in 2002/03. It considers that current rail freight loadings are likely to be no more than about 2.3 million tonnes per year and annual net tonne kilometres no more than about 400 million. The Council’s judgment of current demand took account of the following: the 2003 data contain rail freight carried on rail lines that are not part of the Facility (i.e. the Melba line); the 2003 data include freight volumes on rail lines that are now non-operational; some of the 2003 data cover commodities (logs, timber, gypsum and fertiliser) that are not currently transported; and containerised freight volumes have fallen since 2003 to a current volume of between 240,000 and 400,000 tonnes.

4.13 The Applicant considered that committed investment in the network would lead to increased future demand. It stated that “with the investment being made in the network by the Federal and Tasmanian Governments, and the investment being made by Pacific National Tasmania in locomotives and rolling stock, freight volumes will increase back to 2003/04 levels¹⁴ and grow beyond that”.

¹³ The number of train movements on the “main line” is a snapshot of the freight traffic in both directions from Western Junction to Burnie. It does not represent the forecast number of train movements on the entire TRN.

¹⁴ The Applicant advised that the 2003/04 levels were the same as the 2002/03 data it provided.

- 4.14 AusLink (2007) stated that “the rail network carries 2.8 million tonnes of freight per year” and that “between 2005 and 2030, projections for growth in the transport task are approximately...123 per cent for freight on the rail network”. Even assuming a base of 2.8 million tonnes freighted in 2005, an increase of 123 per cent would mean that the Applicant’s 2020 freight forecast would not be achieved until 2030. While there are differences between what AusLink and the Applicant referred to as the rail network, and hence the forecasts are not directly comparable, it appears that AusLink has a more conservative view of likely future growth than the Applicant.
- 4.15 No submission took issue with the demand forecasts provided in the Application.
- 4.16 In the Council’s view, the experience to date suggests that the Applicant’s forecasts of demand for rail line-haul services would be at most the upper bound of outcomes. Even if this upper bound is achieved, the Council notes that forecasts of train movements are based on operations over 5 days per week. The Applicant has indicated scope for reducing train congestion by spreading train movements across more days per week resulting in a proportional reduction in daily movements. Such an extended operating week would mean, for example, that the forecast maximum daily number of train movements of 19 between Railton and Devonport might be reduced to 16 for 6 days per week of operations.

Current and potential capacity of the Facility

- 4.17 The Applicant provided information on the potential capacity of the Facility in terms of train movements, but not in terms of the freight volumes or net tonne kilometres which it used for its demand forecasts. The estimate of potential capacity is reliant upon the completion of the AusLink rail rescue package, and other improvements anticipated by the Applicant as being necessary as demand for rail line-haul services approaches the 2020 forecast. These include upgrading yards, siding and container unloading facilities at northern ports, reopening of non-operational lines, constructing a new container terminal in the Hobart area and providing several new crossing loops and sidings. The Applicant stated that “a single track mainline on the Tasmanian network could typically be expected to accommodate 20 plus trains per day in two directions”. This estimate was drawn from a confidential report on Tasmania’s freight task that was completed in 2004. The confidential status of this report limits the Council’s ability to test its assumptions and conclusions.
- 4.18 The Applicant’s estimate of capacity of the TRN was not challenged in submissions responding to the Application. South Spur Rail Services commented that the Applicant’s forecasts for some rail freight demand will only be realised if infrastructure funding is allocated to non-operational lines so that these can be re-opened. The potential

capacity of the non-operational lines in the TRN would be significant once opened and would be likely to exceed any line specific demand that develops in the foreseeable future.

- 4.19 The Council accepts that the maximum potential capacity of the TRN could be further increased by increasing the number of operating days per week, or via measures such as looping, double tracking, and by improving associated infrastructure such as major terminals. Such actions do not appear necessary to meet the foreseeable demand, and in the unlikely event that they are, necessary, this would be only for sections like the relatively short (22km) Railton to Devonport component which may experience congestion over the period to 2020.

Costs of facility expansion versus construction of a new facility

- 4.20 Where likely demand outstrips installed capacity, criterion (b) necessitates an assessment of whether it is less costly, from a social perspective, to satisfy demand for the Service via expansion of the existing Facility, or via the construction of another facility. The capacity of the TRN, with the AusLink rail rescue package providing for upgrades and augmentation, appears to be sufficient to meet the foreseeable demand for rail freight services by a substantial margin. Consequently, the Council does not consider that such an assessment is required.

Conclusion

- 4.21 The Council is satisfied that it would be uneconomical to develop another facility to provide the Service.

5 Criterion (a) – Promotion of competition

Section 44G(2)(a) access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service

Introduction

5.1 Criterion (a) requires that, for a service to be declared, access must promote a material increase in competition in at least one market other than the market for the service. The issue is whether access would improve the opportunities and environment for competition such that competitive outcomes are more likely. The assessment is concerned with the process of competition, rather than any particular commercial interests or pursuits of individual competitors.

5.2 In assessing whether criterion (a) is satisfied, the Council must:

- (a) identify the upstream or downstream market(s) in which there may be a promotion of a material increase in competition (the dependent market(s));
- (b) confirm the dependent market(s) is separate from the market for the service to which access is sought;
- (c) determine whether access (or increased access) would promote a more competitive environment in the dependent market(s) thereby promoting a material increase in competition. This requires an assessment of:
 - (i) whether the incumbent provider of rail services has the ability and incentive to exercise market power to adversely affect competition in the dependent market(s); and
 - (ii) whether the structure of the dependent market(s) is such that access (or increased access) would promote a material increase in competition.

Recent developments concerning criterion (a)

- 5.3 Criterion (a) has been the subject of recent judicial consideration and also legislative amendment, both of which have affected the interpretation of the criterion.

The meaning of “access (or increased access)”

- 5.4 In the case of *Sydney Airport Corporation Ltd v Australian Competition Tribunal*¹⁵ (“SACL decision”) the Full Court of the Federal Court of Australia (“Full Court”) considered the meaning of the words “access (or increased access)” in criterion (a). Prior to this decision the approach of the Council, affirmed by the Tribunal, was that the assessment of criterion (a) required a consideration of the future with and the future without declaration.¹⁶ In effect “access” in this context was interpreted as referring to the right to negotiate access to a declared service under Part IIIA. The Full Court rejected this approach. The Full Court found that access should be given its ordinary meaning and, as such, was not synonymous with declaration.

- 5.5 The Full Court held that the appropriate criterion (a) enquiry involves:

*... comparison between access and no access and limited access and increased access.*¹⁷

*... a comparison of the future state of competition in the dependent market with a right or ability to use [the] service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service.*¹⁸

- 5.6 Some commentators are of the view that the Full Court’s decision has ‘lowered the bar’ for criterion (a), effectively making it easier to satisfy and, therefore, easier to achieve declaration.¹⁹
- 5.7 The Council is of the view that the effect of the Full Court’s interpretation must be considered firstly, in the context of the whole of

¹⁵ [2006] FCAFC 146.

¹⁶ Commonly referred to as the factual and the counterfactual.

¹⁷ SACL decision at [81].

¹⁸ SACL decision at [83].

¹⁹ For example, Productivity Commission 2006, *Review of Price Regulation of Airport Services*, Report no. 40, Canberra, pp. XII, 47-55.

criterion (a) and secondly, in the context of all of the declaration criteria in Part IIIA.

- 5.8 Criterion (a) is only satisfied where access would promote a material increase in competition in a dependent market. If a dependent market is already effectively competitive, access would be unlikely to promote a material increase in competition. Similarly access may not materially promote competition where high barriers to entry or other conditions, that are unrelated to the existence of the bottleneck facility, preclude additional competition in a dependent market.
- 5.9 Furthermore, declaration remains applicable only to services provided by a facility that is uneconomic to duplicate and that is of national significance. These criteria significantly limit the range of facilities that might provide services that could be declared irrespective of any change in the 'height of the bar' for meeting criterion (a).
- 5.10 The impact of the Full Court decision will need to be considered in relation to each specific application. At the present time, however, the Council is of the view that in many cases, it is unlikely that the Full Court's interpretation will result in an application satisfying criterion (a) where on the previous factual/counterfactual enquiry it would not have done so.
- 5.11 In any event, the Council notes that in response to the Productivity Commission's inquiry on the price regulation of airport services²⁰ the Australian Government has stated its intention to amend Part IIIA to reinstate its interpretation to that which prevailed prior to the SACL decision.²¹

Trade Practices Amendment (National Access Regime) Act 2006

- 5.12 The Trade Practices Amendment (National Access Regime) Act 2006 ("Amending Act") commenced in October 2006. It amended s44G(4)(a)²² by adding the underlined words:

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market

²⁰ Productivity Commission 2006, *Review of Price Regulation of Airport Services*, Report no. 40, Canberra.

²¹ The Commonwealth Treasurer, Press Release, *Productivity Commission Report – Review of Price Regulation of Airport Services*, no. 032, 2007, Canberra.

²² It also made the same amendment to s44H(4)(a) of the TPA and inserted a new s44AA being the objects of Part IIIA.

(whether or not in Australia), other than the market for the service;

- 5.13 The amendment arose out of recommendations from the Productivity Commission's inquiry into the National Access Regime.²³
- 5.14 The purpose of the amendment is to provide that declaration will only occur where the promotion of competition in a dependent market is non-trivial. The explanatory memorandum to the Amending Act states that the original drafting of criterion (a) did "... not sufficiently address the situation where ... declaration would only result in marginal increases in competition. The change will ensure access declarations are only sought where increases in competition are not trivial."²⁴
- 5.15 The approach of both the Council and the Tribunal to interpreting criterion (a) has always been that the promotion of competition in the dependent market has to be non-trivial. This amendment confirms that approach.
- 5.16 This amendment does not mean that the promotion of competition in the dependent market has to be substantial. The additional words now contained in criterion (a), "a material increase", indicate that the level of competition promoted must be more than trivial, being at a level that could reasonably be expected to have a tangible impact on competition in the dependent market.
- 5.17 The amendments to criterion (a) did not change the concept of "promote" and, as such, it is not necessary to prove that there will be an actual increase in competition, just that access (or increased access) will remove competitive constraints in the dependent market(s), improving the conditions and environment for competition and through such improvement thereby promote an increase in competition in the dependent market(s), which must be material.

The Dependent Market(s)

- 5.18 For the purposes of criterion (a), the Council needs to be satisfied that declaration would promote a material increase in competition in "... at least one market ... other than the market for the service". It is important then to demonstrate that the dependent market(s) is separate from the market for the Service for declaration.

²³ Productivity Commission, *Review of the National Access Regime*, Report No.17, AusInfo, Canberra.

²⁴ *Trade Practices Amendment (National Access Regime) Bill 2005*, Explanatory Memorandum at item 16, p.21.

- 5.19 The Applicant submitted that the Service is a necessary input into the downstream market for the provision of rail line-haul services on the TRN. The Applicant also noted that there may be other dependent markets, depending on the purpose(s) for which rail operators might seek access to the Service for declaration. These other markets may include the market for the provision of freight forwarding or logistics services. In addition, the provision of tourist railway services appears to be dependent on access to the TRN. In its submission, Derwent Valley Railway Inc noted that its ability to operate required access to the TRN.

Rail line-haul services market

- 5.20 To satisfy criterion (a), the Council needs to be satisfied that there will be a material increase in competition in at least one dependent market (even if there could be several dependent markets present) and that the dependent market is separate from the market for the Service. The Applicant submitted that the key dependent market is the market for rail line-haul services on the TRN (“the Dependent Market”). The submissions received from Gunns Ltd and South Spur Rail Services supported the Applicant’s claim.
- 5.21 The Council is of the view that the service dimension of the market for rail line-haul services involves the transport of freight (including bulk, commodities and containers) by rail.
- 5.22 The demand for rail line-haul services comes from Tasmanian industry, importers, freight forwarders, and transport or logistics providers.
- 5.23 The Applicant submitted that the functional separation of ‘above-rail’ and ‘below-rail’ services is well recognised. This matter does not appear to be in dispute. The Applicant contended that the Dependent Market involves the provision of above-rail services to freight forwarding businesses and a variety of direct users. The Council agrees.
- 5.24 The Council considers that the market for rail line-haul services is Tasmania wide, although the Council notes that the TRN is primarily focused on the north-south route located on the eastern side of Tasmania and that rail line-haul services may need to be combined with other transport modes to service a broader geography.

Other dependent markets

- 5.25 The Applicant suggested that there may be other dependent markets, including the market for the provision of freight forwarding or logistics services to end customers. The Council is of the view that the

dependent markets may also extend to the market for historic / tourist train services. While the potential exists for there to be other dependent markets, in analysing criterion (a) it is only necessary to show that there has been a material increase in competition in one dependent market. The Council therefore considers that it is appropriate to focus on the impact on competition in the market for rail line-haul services, being the key Dependent Market identified by the Applicant.

The market for the Service

- 5.26 It is unnecessary for the Council to closely define the market for the Service for declaration as the nature of the Council's enquiry rests on the Dependent Market. It is therefore sufficient for the Council's market enquiry to focus on the distinction between the market for the Service and the proposed Dependent Market.
- 5.27 The Council considers that the market for the Service comprises the market in which railway track and associated infrastructure services (track services) are provided in Tasmania. The Applicant contends that these "below-rail" services are distinct from the "above-rail" services provided in the Dependent Market.
- 5.28 The Council is of the view that the assets required to provide track services²⁵ (below-rail) are distinct from those required to provide line-haul services²⁶ (above-rail). Furthermore, in this case, the below rail assets are owned by the Applicant as opposed to the operator, Pacific National, which provides further evidence that there is functional separation between the market for the Service (railway infrastructure) and the market for rail line-haul services.
- 5.29 Thus, the Council concludes that the Dependent Market identified above is separate to the market for the Service.

Competition in the Dependent Market

- 5.30 The third limb of the criterion (a) enquiry considers whether access would promote a material increase in competition in the Dependent Market – the market for rail line-haul services.

²⁵ Including – railway tracks, sidings, switches and signals, scheduling services and track maintenance services.

²⁶ Including – locomotives, rolling stock, fuel facilities, rolling stock and locomotive maintenance services.

The application and submissions

- 5.31 The Applicant submitted that access to the Service is an essential input, necessary to permit effective competition in the downstream market for the provision of rail line-haul services in Tasmania. Accordingly, access to the Service would promote a material increase in above-rail competition.
- 5.32 Submissions were received from Gunns Ltd (“Gunns”), South Spur Rail Services and Queensland Rail (“QR”) in relation to criterion (a). Both Gunns and South Spur Rail Services supported the Applicant in its claim that access would promote a material increase in competition in the market for rail line-haul services, while QR queried whether there would be an increase in competition and whether any such increase would be material.
- 5.33 Gunns is proposing a significant investment to establish a new pulp mill at Bell Bay in northern Tasmania which, assuming all necessary approvals are obtained to enable the project to go ahead, it anticipates will commence operating in late 2009. Historically Gunns used the TRN to transport logs, but it has not used the TRN for this purpose for a number of years. According to Gunns while this is partly attributable to the location of logging catchments, it is also attributable to the “non competitive nature of the current operator” and is not the result of any technical disadvantage of rail over road. Gunns stated that it would be more inclined to use rail for the haulage of logs to the new pulp mill if there was another operator on the TRN. Gunns submitted that were it to use the Service to haul some of the required log supply to the pulp mill, then it would reduce its use of road freight, primarily for its long distance log transport. Furthermore, Gunns submitted that its potential need for log supply to the pulp mill represents new line-haul business that could provide a viable revenue stream for a new entrant to the rail line-haul services market. Gunns estimated that contracts for the supply of its logs could be expected to generate a revenue stream within the range of \$12-16 million, which Gunns claimed would represent a viable base business volume for a possible new entrant.
- 5.34 South Spur Rail Services supported the Applicant’s claim that investment in the TRN, via the AusLink rail rescue package, combined with the arrangements for access and pricing set out in the Rail Management and Maintenance Deed²⁷ (“RMMD”) would result in more efficient pricing, reduced costs to rail customers and increased competition. The reduction in the amount of freight transported on the TRN since 2002/03 was said to highlight the need for investment in the

²⁷ The deed executed by the Crown in Right of Tasmania, Pacific National (Tasmania) Pty Ltd, PN Tas (Operations) Pty Ltd and Pacific National Pty Ltd in 2006.

TRN. South Spur Rail Services was of the view that access will promote competition in the Dependent Market as long as the infrastructure is available and maintained. South Spur Rail Services expressed concern that the asset pricing that had been set related only to the use of the track, and that since Pacific National retained the scope to discriminate on pricing for terminal access this would put any new entrant at a distinct cost disadvantage to the incumbent in the Dependent Market.

- 5.35 QR considered that the past use of the TRN should be regarded as a relevant predictor of likely future use of the TRN and therefore an indicator as to whether access would promote a material increase in competition in the Dependent Market. QR observed that there has been no evidence of past competition in the above rail market, despite the obligation on the then lessee operators to provide reasonable access during the period 1997 – 2005. QR attributed this lack of competition to, in part, the size of the market and pricing constraints of the broader transport market. QR identified barriers to entry to the market for rail line-haul services, being the necessary investment in rolling stock and support facilities and also the contestability of the existing market for rail line-haul services. QR suggested that any entry into the market for rail line-haul services is likely to be for niche services and servicing particular customers and that such entry could not be considered to amount to a material increase in competition.

Assessment

- 5.36 A key issue in the effect of access on competition in the Dependent Market is whether the provider of the Service has the ability and incentive to potentially exercise market power to adversely affect competition in the Dependent Market. In this case, the provider is the incumbent Operator, Pacific National, which is also the sole provider of rail line-haul services in Tasmania.
- 5.37 The Council is of the view that the market for rail line-haul services is not already effectively competitive and that Pacific National has the incentive to exercise its market power to adversely affect competition in the Dependent Market.
- 5.38 Pacific National could be expected to have an incentive to prevent the emergence of new rail line-haul services where this would allow new competitors to enter the market to compete for existing customers' business or potential new business, such as the movement of logs or pulpwood to service Gunns' proposed new pulp mill.
- 5.39 The Council acknowledges that even if the Service is declared, there will continue to be barriers to entry to the market for rail line-haul services. Any new entrant will have to make a significant investment in rolling stock, locomotives and support facilities before it can provide

the requisite service. This means that it could be expected that a new entrant would need to ensure it has a viable business case before it makes the investment necessary to enter the market. However, a new entrant may be an existing operator in another geographic market. If this is the case, there would be scope to transfer at least some of the above rail assets to or from that other geographic market which will serve to reduce the height of the barrier to entry.

- 5.40 There do not appear to be any effective constraints on Pacific National currently exercising its market power. The Council acknowledges that pursuant to the RMMD, Pacific National is obliged to provide access to the Service on the terms and conditions, including the access prices, contained in the RMMD. However, the RMMD also contemplates that the Tasmanian DIER will seek declaration of the TRN in order to facilitate such access. If the Service were not declared the enforcement of these obligations on Pacific National by any third party access seeker would be difficult given the third party's lack of privity of contract in respect of the RMMD.
- 5.41 QR suggested that the size of the market and the pricing of the broader transport market²⁸ act as constraints on the Dependent Market and, therefore by association, the incumbent operator Pacific National. While road and rail may be substitutes in particular segments of the transport market, such as for the carriage of non-bulk freight, the Council considers that the extent of intermodal competition will vary between commodities and across transport corridors or distances. Any competition is therefore insufficient to conclude that road and rail are actual substitutes in the transportation of all types of freight and road is inadequate as a competitive constraint in both the Dependent Market and on Pacific National. Whether the presence of more than one provider in the Dependent Market is sustainable is something that could be expected to be resolved by market forces should access occur following declaration of the Service.
- 5.42 QR also stated that it assumed Pacific National has committed contracts for its current freight traffic which will inhibit competition in the Dependent Market. With respect to existing rail line-haul services on the TRN,²⁹ the Council is aware that Pacific National currently has one long term contract in place and may be negotiating, or intends to negotiate, others. While the presence of long term contracts with customers may pose a disadvantage to a new entrant, the Council is of the view that if the Service is to be declared:

²⁸ By this the Council assumes QR was referring to road freight.

²⁹ As distinct from the Melba line which is wholly owned by Pacific National and in respect of which Pacific National would be expected to have contractual arrangements for rail line-haul services.

- (a) any disadvantage to a potential entrant may be countered with the prospect of new business; and
- (b) the threat of entry into the Dependent Market could be expected to act as a competitive constraint on the incumbent provider.

Promotion of a material increase in competition

5.43 The Council is of the view that there is the potential for new providers to enter into the Dependent Market, for rail line-haul services:

- (a) Gunns indicated its interest in using rail line-haul services for its log supply to the proposed pulp mill; and
- (b) South Spur Rail Services stated that the company's goal is to provide its services throughout Australia, which the Council considers could conceivably include entry into the Dependent Market.

5.44 In concluding that there is the potential for entry into the Dependent Market by new providers, the Council considered the points raised in the submission from QR. The Council is satisfied that there is the prospect of sufficient new business in the market for rail line-haul services for a potential new entrant to establish a sustainable business case warranting entry. It will not necessarily be the case that a new entrant would be forced to compete with the incumbent for the existing business in the Dependent Market. Furthermore the Council is not satisfied that the past experience of no competition that has been associated with no third party access will necessarily continue into the future given the planned infrastructure investments and if access to the Service was facilitated by declaration. In this respect, the Council notes that one of the key differences between the past and the future is that the Tasmanian Government has agreed with Pacific National, the pricing regime for access to the tracks and pricing methodology for access to associated infrastructure, such as terminals.³⁰ If the Service is declared, then this will provide greater certainty to potential new entrants on access pricing and should facilitate any potential new entrant in both assessing and making a business case for entry.

5.45 The Council is satisfied that access to the Service will create or enhance the competitive environment and thereby promote a material increase in competition in the Dependent Market. In particular:

³⁰ Pursuant to the RMMD.

- (a) all rail line-haul services in Tasmania must use the TRN;³¹
- (b) given (a) above, the inability of a potential new provider to gain access to the Service would be a significant barrier to entry to the market for rail line-haul services;
- (c) declaration will remove that barrier to entry, providing for access at independently determined prices to the below-rail infrastructure (i.e. the Service) and, as a consequence, will constrain Pacific National's ability to deny the provision of rail line-haul services or to price such services inefficiently; and
- (d) the availability of arbitration by the ACCC, within Part IIIA, will provide a mechanism for resolution of any access disputes (including disputes where the prices in the RMMD are challenged in a particular case).

Conclusion

- 5.46 The Council considers that access to the Service will promote a material increase in the market for rail line-haul services.
- 5.47 As it is required to, the Council has reached this conclusion on the basis of the interpretation of criterion (a) expounded by the Full Court in the SACL decision.
- 5.48 Nevertheless, given the Australian Government's stated intention to amend Part IIIA to restore the position prior to the SACL decision, without pre-empting such a statutory amendment, the Council notes that it would have reached this conclusion whether it applied the Full Court's line of enquiry or the former factual/counterfactual analysis.

³¹ Unless located on the north-western side of Tasmania, proximate to the Melba line and suitable for export/import from/to the port of Burnie.

6 Criterion (c) – National significance

Section 44G(2)(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.*

6.1 Criterion (c) seeks to ensure that only those facilities that play a significant role in the national economy fall within the scope of Part IIIA. While declaration focuses on access to the service, rather than the facility, criterion (c) relates national significance to the facility providing the service.

6.2 In identifying whether a facility is of national significance, the Council has regard to the following matters specified in s44G(2)(c):

- (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.

6.3 Given the section specifies “or” after each of the specific matters it is clear that criterion (c) will be satisfied if any one of the three benchmarks or factors is met.³²

6.4 Item (ii) of s44G(2)(c) refers to the importance of the facility to constitutional trade or commerce. Section 44B of the TPA defines ‘constitutional trade or commerce’ to mean any of the following:

- (a) trade or commerce among the States;
- (b) trade or commerce between Australia and places outside Australia;

³² *Application by Services Sydney Pty Limited* [2005] 227 ALR 140.

- (c) trade or commerce between a State and a Territory, or between two Territories.

Discussion

Constitutional trade or commerce

6.5 The Applicant submitted that the TRN, being a state rail network that carries freight with an origin or destination outside Tasmania would be important to constitutional trade or commerce. The Applicant identified that the following commodities, currently transported on the TRN, have a destination outside Tasmania:

- (a) cement; and
- (b) newsprint.

6.6 Information provided by the Applicant on the transportation of commodities in 2002/03 indicates that of the nine main commodities transported on the TRN, seven were either imported or exported with an origin or destination either on the Australian mainland or overseas.³³ All of this freight entered or left Tasmania via one of its three northern ports – Burnie, Devonport or Bell Bay – all of which are served by the TRN. Based on the 2002/03 figures for the nine main commodities, around 80 per cent of the freight traffic on the TRN was either import or export traffic. Furthermore, the Applicant submitted that of those main commodities:

- (a) 100 per cent of the cement; and
- (b) 97 per cent of the newsprint;

produced in Tasmania are destined for mainland Australia.³⁴

6.7 The Council notes that, as discussed in relation to criterion (b), the 2002/03 rail volumes provided by the Applicant exceed the current usage of the Facility. The Applicant contended that the 2002/03 rail volumes are a reliable reflection of efficient rail usage. Furthermore, the Applicant stated that it expects that with the AusLink rail rescue package and Pacific National's investment in rolling stock that the 2002/03 rail freight traffic will be restored and that further growth

³³ The Applicant provided details on the top ten main commodities. In this analysis, the Council has ignored the data relating to the transportation of 'concentrates' as this traffic is carried on the Melba line which does not form part of the Application.

³⁴ Application, p.11.

beyond those levels could be expected. Given this, the Council is of the view that the 2002/03 data is a reasonable basis for considering whether the Facility is of national significance.

AusLink National Network – the Tasmanian Corridor

6.8 The TRN is part of the Tasmanian Corridor within the AusLink National Network. The AusLink National Network is a single integrated network of land transport linkages considered to be of strategic national importance. Projects within the AusLink National Network, that are of high national priority, may be funded by the Australian Government along with funding from the relevant States and/or Territories. The AusLink National Network is based on those:

- (a) national and interregional transport corridors;
- (b) links to ports and airports; and
- (c) other rail/road intermodal connections,

that together are of critical importance to national and regional economic growth, development and connectivity.³⁵

6.9 The Hobart – Burnie / Bell Bay Corridor forms part of the AusLink National Network. The Tasmanian Corridor includes the railway from Hobart to Burnie, via Launceston and the railway link to Bell Bay.³⁶ The Australian Government has committed, via the AusLink program, to fund \$78 million towards capital works to upgrade the TRN.

Conclusion

6.10 The Council is satisfied that on the basis of the Facility's importance to constitutional trade and commerce, recognised by both the amount of import/export traffic on the TRN and the inclusion of the TRN in the AusLink Tasmanian Corridor the Facility is nationally significant.

³⁵ AusLink White Paper, p.x.

³⁶ Ibid, pp.46 & 70.

7 Criterion (d) – Health and safety

Section 44G(2)(d) Access to the service can be provided without undue risk to human health or safety

7.1 Criterion (d) requires the Council to be satisfied that access can be provided without undue risk to health or safety. This involves an enquiry into:

- (a) the nature of the potential risks associated with access; and
- (b) whether access can be provided in a manner that removes or minimises those risks, including the potential for access terms to stipulate measures providing a similar standard of safety as currently applies to the facility.

Discussion

Risks associated with access

7.2 The potential risks associated with access derive from having more than one user on the facility. The potential operational risks will include:

- (a) risks associated with or derived from control and coordination of the railway network, including risks relating to scheduling and signalling; and
- (b) risks associated with or derived from the maintenance of rolling stock or above rail assets.

Access to be provided only to accredited rail operators

7.3 The Applicant has advised that access will only be provided to accredited rail operators.³⁷ All railway organisations in Tasmania are required to be accredited in accordance with the Rail Safety Act 1997 (Tas). Accreditation is administered, monitored, reviewed and enforced by DIER's Rail Safety Unit. Accreditation provides assurance

³⁷ Application at 8.4.

that railway organisations have in place the competency, capacity and systems necessary to operate safely.

Terms and conditions of access

- 7.4 Furthermore, the Applicant has noted that any specific safety issues associated with access can be taken into account in arbitration. If safety matters cannot be determined via negotiation, then an access dispute can be notified to the ACCC and can be determined by arbitration.

Single operator

- 7.5 The Applicant has engaged Pacific National to operate the TRN, pursuant to the RMMD. Under the terms of the RMMD, Pacific National is contracted to operate and manage the TRN for 10 years. Having a single operator should minimise or mitigate operational risks associated with multiple users because one party is responsible for control of the TRN and, therefore, the management and coordination of all train pathways including scheduling and signalling. It is reasonable to assume that train paths will be managed by the sole operator to maximise the safety of all users and the efficiency and integrity of the Facility.

Conclusion

- 7.6 The Council sees no reason why the existing accreditation regime, combined with a single operator and the opportunity to negotiate, and arbitrate if necessary, the terms and conditions of access would be inadequate to ensure the safe operation of the Facility and the provision of the Service.

8 Criterion (e) - Application of an Effective Access Regime

Section 44G(2)(e) Access to the service is not already the subject of an effective access regime

8.1 The term “effective access regime” is not defined in the TPA. Part IIIA provides guidance on what constitutes an effective access regime implemented by a State or Territory government. For State and Territory access regimes, clauses 6(2)-(4) of the Competition Principles Agreement (the clause 6 principles) set out the criteria for assessing the effectiveness of a particular access regime (s44G(3)).

Discussion

8.2 The Applicant has advised that access to the Service is not already the subject of an effective access regime.

8.3 The Applicant currently provides for third party access to the TRN through the RMMD. This arrangement contains provisions that require the Operator to grant access to the TRN to other accredited rail operator access seekers. The terms of access are to be no more discriminatory than the terms on which Pacific National’s own rail operations use the TRN, other than as to access fees and charges and subject to the prioritisation of use as set out in the RMMD.

8.4 The Council is of the view that this contractual arrangement does not constitute an effective access regime, nor did the Applicant intend creating an effective access regime through the RMMD. This intent is made clear by the provision in the RMMD requiring the Applicant to seek declaration of the Service provided by the TRN.

Conclusion

8.5 The Council is satisfied that access to the Service is not already the subject of an effective access regime.

9 Criterion (f) – Public interest

Section 44G(2)(f) Access (or increased access) to the service would not be contrary to the public interest

- 9.1 Criterion (f) requires the Council to be satisfied that access to the service would not be contrary to the public interest. The enquiry is whether there are any matters, other than those considered in criteria (a) – (e), which would lead to the conclusion that declaration would be contrary to the public interest.
- 9.2 In considering criterion (f), the Council must be satisfied that the overall costs of declaration do not outweigh the overall benefits. Because criterion (f) is phrased in the negative, to recommend not to declare a service where criteria (a) to (e) have been satisfied would require the Council to be satisfied that the costs of access outweigh the benefits.
- 9.3 The extent of benefits depends on the likely effect on competition in the Dependent Market, already considered pursuant to criterion (a). As the Council has concluded that criterion (a) is satisfied, unless the costs of declaration would be substantial or there is another reason to conclude that access would be contrary to the public interest, there is a presumption that declaration is in the public interest and should be recommended.

The Application and submissions

- 9.4 The Applicant submitted no reasons why declaration of the Service could be considered to be contrary to the public interest. The Applicant stated that declaration of the Service is in the public interest. Declaration was identified as forming part of the arrangements for implementing the AusLink rail rescue package. The AusLink rail rescue package has the objectives of removing/minimising impediments to the investment of public money in rail infrastructure and also to facilitate private investment in above-rail assets, supply chain solutions and the Tasmanian economy. The Applicant submitted that criterion (f) was satisfied.
- 9.5 In submissions to the Council, South Spur Rail Services supported the Applicant's claim that criterion (f) was satisfied. Gunns stated that if its planned pulp mill proceeded and Gunns used rail to transport some of the pulpwood, there would be associated benefits to the community arising from a significant reduction in the volumes of pulpwood transported on roads.

Assessment

- 9.6 As the Council has received no views suggesting that declaration of the Service would be contrary to the public interest and identifying reasons why that would be so, the Council intends to focus only on the issue of whether the costs inevitably associated with declaration could outweigh the benefits of declaration of the Service.

Benefits from declaring the Service

- 9.7 The Council has concluded under criterion (a) that there will be a material increase in competition in the Dependent Market. This will have the benefit of improved economic efficiency having regard to the operation, use of (including pricing) and investment in the Facility.
- 9.8 It can be expected that there will be broader benefits too from the promotion of competition. These are expected to include environmental benefits such as those identified in the submission made by Gunns, including a reduction in pollution. Shifting freight from road to rail will reduce road use and congestion with a flow on effect to an expected decrease in the incidence of road accidents and in the need for road maintenance. The Applicant submitted that if freight was forced onto road from rail, as a consequence of the forced closure of the TRN, there would be:
- (a) additional direct costs of more than \$17 million per annum to the Tasmanian businesses that rely on rail;
 - (b) externality costs³⁸ in excess of \$6 million per annum; and
 - (c) additional road maintenance costs of over \$1 million per annum.
- 9.9 Declaring the Service will support the AusLink rail rescue package and the terms and conditions agreed by the Applicant and Pacific National in the RMMD. This will result in benefits, including rejuvenating the TRN through investment in both above-rail and below-rail assets, encouraging access and maximising the utility and efficiency of the TRN.

³⁸ Identified by the Applicant as accident costs, air pollution, greenhouse gas emissions, noise and water pollution.

Anticipated costs of declaring the Service

- 9.10 The Council has not received any claims concerning the costs associated with declaration of the Service. The Council considers that declaration could be expected to have associated costs, but that such costs could not be regarded as inefficiencies nor are they likely to be of such magnitude that they would outweigh the benefits from declaring the Service.
- 9.11 Pacific National will continue as the Operator of the TRN and incumbent provider in the Dependent Market. If there are efficiencies derived from these roles, they are not expected to be lost as a result of declaration. If the efficiencies are significant, any third party access seeker may find it difficult to compete with Pacific National in the Dependent Market, but this does not provide a reason to recommend against declaration.
- 9.12 It can be expected that there will be costs associated with regulation under Part IIIA. Where an access seeker and Pacific National fail to successfully negotiate the terms and conditions of access to the Service, either party may apply to the ACCC under Part IIIA for arbitration of the access dispute. This will invariably involve costs to both parties to the arbitration (in addition to the ACCC) associated with preparing for and attending the arbitration and implementing any arbitrated outcome. Also, the outcome of arbitration may not be ideal in the sense that it may not replicate a competitive outcome determined by market forces.
- 9.13 The Council notes that the RMMD sets access prices for access to and use of the rail track and that these prices could be considered to be subsidised as they do not account for maintenance and capital costs. While subsidies would ordinarily be considered to give rise to distortive effects in a market, the Council considers that it must be assumed that the Applicant has undertaken the due diligence and accounting necessary to determine the pricing. If there is any dispute as to the quantum, then this can be the subject of an access dispute to be determined by arbitration by the ACCC. Furthermore, these prices will continue to apply throughout the declaration period and as such it is reasonable to assume that they will be applied consistently and in an informed manner without detriment to any party. After the declaration period, if pricing is not reconsidered by the Owner it would be reasonable to assume that the prices could be set by market forces.

Conclusion

- 9.14 The Council considers that the benefits of declaration outweigh any costs flowing from declaration and that access is not contrary to the public interest.

10 Duration and effect of declaration

- 10.1 Section 44H(8) requires that every declaration specify an expiry date. The Council considers that declaration should apply for a sufficient period to be able to influence the pattern of competition in relevant upstream or downstream markets. Against these considerations must be balanced the potential for technological development, reform initiatives (such as changes in legislation governing access to the Service) and market evolution. At the end of a period of access, the need for regulation can be reviewed.

Assessment

- 10.2 The Applicant has sought a declaration period of 10 years which aligns with the term of the RMMD.
- 10.3 South Spur Rail Services raised several concerns with a declaration period of 10 years, being:
- (a) uncertainty over potential cost increases at the end of the declaration period, and that this may hinder commitment and investment particularly during years 6 to 10;
 - (b) a temptation by the Owner to decrease or stop infrastructure maintenance, and to increase access charges to offset some infrastructure maintenance costs; and
 - (c) the possibility of non-discriminatory access fees charged by the Operator being increased at the end of the declaration period, affecting third party access seeker competitiveness.

Discussion

- 10.4 The Council notes the Applicant's preference to align the duration of declaration with that of the term of the RMMD with the Operator. Indeed, the end of the term will be a significant milestone, and there exist some uncertainties beyond 10 years, including with respect to the arrangements for operation of the TRN, infrastructure development, funding and any future subsidisation of access to below-rail services. For these reasons the Council is of the view that there is benefit in setting a duration that would allow for review at the expiry of the RMMD and the Auslink rail rescue package.

- 10.5 The Council needs to balance this against providing a period of time sufficient to influence the pattern of competition in the Dependent Market. Given the significant investment necessary for any third party access seeker to provide a rail line-haul service, it is likely such investments and the haulage contracts to justify such investments would require a considerable time horizon of third party access rights to the Services.
- 10.6 With regard to the concerns raised by South Spur Rail Services, the Council notes that uncertainty over potential cost increases will remain regardless of the length of the declaration period. These potential cost increases, including fees to offset maintenance costs, pertain to a Tasmanian Government policy decision to subsidise access seekers in respect of the maintenance and depreciation costs of the TRN. The Tasmanian Government can decide at any point beyond the term of the RMMD, independent of declaration, to change the access pricing mechanisms and charge these costs to any access seeker. The other concerns of South Spur Rail Services, being reduced or discontinued infrastructure maintenance as well as increases in non-discriminatory access fees, could be raised as part of any access arbitration during the declaration period.
- 10.7 On balance, the Council considers a duration of 10 years would be an appropriate time horizon to allow for entry into, and for which to develop competition in, the Dependent Market. No other duration has been proposed by interested parties.

Conclusion on the duration of declaration

- 10.8 The Council recommends a 10 year duration of declaration.

11 Other issues

11.1 The Council has a residual discretion not to recommend declaration of the Service even though all of the criteria set out in section 44G(2) are satisfied. This residual discretion includes consideration of the matters set out in sections 44F(3) and 44F(4) of the TPA.

Section 44F(3) - Application not in good faith

11.2 Section 44F(3) provides that the Council may recommend that the Service not be declared if the Council thinks the application was not made in good faith. The subsection does not limit the grounds on which the Council may decide to recommend that the Service not be declared.

11.3 No submission received by the Council argued that Application for declaration had not been made in good faith. Indeed, the Application was expressly contemplated by the Applicant and Pacific National in the RMMD. The Council has no reason to conclude that the Application had not been made in good faith and as such, it does not exercise its residual discretion under section 44F(3).

Section 44F(4) - Alternative facilities

11.4 Section 44F(4) requires the Council to consider whether it would be economical for anyone to develop another facility that could provide part of the Service. This issue is related to but distinct from the consideration of whether it would be uneconomical to duplicate the Facility necessitated by criterion (b).

11.5 The issue in the case of this Application is whether it would be economical for anyone to develop another facility to provide part of the Service provided by the TRN. The Council has already concluded that the Facility is uneconomical to duplicate and satisfies criterion (b). The Council did not receive any submissions suggesting that it would be economical to develop another facility to provide part of the Service. Drawing on its analysis of criterion (b), the Council is of the view that since there will be sufficient capacity to meet the foreseeable demand for the Service, it would not be economical for another facility to be developed to provide part of the Service. Accordingly, section 44F(4) is not satisfied in respect of the Application.

12 Compliance with time limits

The Council's decision making process

- 12.1 The Amending Act inserted a new section 44GA into Part IIIA of the TPA. Pursuant to s44GA the Council must use its best endeavours to make a recommendation on an application for declaration within a standard period of 4 months (approximately 120 days) beginning on the day it received the application ("Standard Period"). Extensions are available to this Standard Period, however, the Council undertakes to make its recommendation within the Standard Period unless an application is particularly complex or gives rise to particular issues which make compliance with the Standard Period impossible.
- 12.2 The Council's Application Template provides an indicative timeline for the process the Council will adopt in considering an application. In respect of this Application the Council notes the following key dates:

2 May 2007	Application received
8 June 2007	Initial submission period ended
10 July 2007	Draft Recommendation released
3 August 2007	Second submission period will end

This draft recommendation is being released on day 69.

- 12.3 The Council anticipates that its final recommendation will be provided to the designated Minister by the end of August 2007, which will be within the Standard Period. In accordance with standard practice, the Council's final recommendation will be made public at the time the designated Minister publishes his decision.

The decision of the designated Minister

- 12.4 The Council notes that there has been no change to the timeframe within which the designated Minister will make a decision on an application for declaration. Pursuant to s44H(9) the designated Minister must make a decision on an application for declaration within 60 days of receiving the Council's final recommendation. If the designated Minister does not publish his or her decision under s44HA within those 60 days, he is she is taken to have decided not to declare the Service.

Appendix A - Part IIIA (extracts), Trade Practices Act 1974

Section 44F: Person may request recommendation

- 44F(1) [Written application to Council] The designated Minister, or any other person, may make a written application to the Council asking the Council to recommend under section 44G that a particular service be declared.
- 44F(2) [Council must act] After receiving the application, the Council:
- (a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and
 - (b) must recommend to the designated Minister:
 - (i) that the service be declared; or
 - (ii) that the service not be declared.
- 44F(3) [Application not in good faith] If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.
- 44F(4) [Consideration of alternative facilities] In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.
- 44F(5) [Withdrawal of applications] The applicant may withdraw the application at any time before the Council makes a recommendation relating to it.

Section 44G: Limits on the Council recommending declaration of a service

- 44G(1) [Access undertakings] The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under section 44ZZA.
- 44G(2) [Council to be satisfied of matters] The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:
- (a) that access (or increased access) to the service would promote a material increase in 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.

44G(3) [Effective access regimes] In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Council:

- (a) must apply the relevant principles set out in that agreement; and
- (b) must not consider any other matters.

44G(4) [Council to follow Minister's decision] If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the Council must follow that decision, unless the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or the relevant principles set out in the Competition Principles Agreement.

Appendix B - Submissions and references

Application

DIER, *Application for declaration of the Tasmanian Railway Network*, 1 May 2007

DIER letter containing additional information, dated 19 June 2007

Submissions

Submissions made in response to the Application

Submission No.	Submitting party
1	South Spur Rail Services
2	TasPorts
3	Impact Fertilisers Pty Ltd
4	Derwent Valley Railway Inc.
5	Gunns Limited
6	Queensland Rail

References

Department of Transport & Regional Services, *AusLink Tasmanian Corridor Strategy* (draft strategy for public comment), http://www.auslink.gov.au/publications/reports/pdf/Tasmanian_Corridor_Strategy.pdf, accessed 21 June 2007.

Department of Transport & Regional Services, *AusLink: Building our National Transport Future*, White Paper, 2004, Canberra (ISBN 0-9751940-4-6).

Rail Management and Maintenance Deed (undated).

Productivity Commission, *Review of the National Access Regime*, Report No.17, AusInfo, Canberra.

Productivity Commission 2006, *Road and Rail Freight Infrastructure Pricing*, Report no. 41, Canberra, December.

Productivity Commission 2006, *Tasmanian Freight Subsidy Arrangements*, Report no. 39, Canberra, December.

Legislation

Trade Practices Amendment (National Access Regime) Bill 2005, Explanatory Memorandum.

Trade Practices (National Access Regime) Act 2006 (Cwlth).

Cases

Application by Services Sydney Pty Limited [2005] 227 ALR 140.

Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146.