



WA Rail Access Regime certified

On 11 February 2011, the Commonwealth Minister, the Hon David Bradbury MP, released his decision to certify the Western Australian Rail Access Regime as an effective access regime for a period of five years, pursuant to s 44N of the *Competition and Consumer Act 2010 (CCA)*. A copy of the Minister's decision and statement of reasons and the Council's final recommendation are available on the Council's website (www.ncc.gov.au).

The Minister's decision departs from the Council's final recommendation which was that the regime not be certified. However, the Minister's decision on the period of certification concurs with the Council's recommendation on the duration of certification should the Minister decide in favour of certification.

The WA Rail Access Regime covers the railways specified in Schedule 1 of the *Railways (Access) Code (2000) (WA)*, which includes 5000 kilometres of rail track in the south-west of Western Australia, including the urban (predominantly passenger) network and the non-urban freight network. This generally comprises all standard and narrow gauge track and associated infrastructure west of Kalgoorlie. The regime also covers the 280 kilometre railway operated by The Pilbara Infrastructure Pty Ltd that runs from Cloudbreak to Port Hedland. The regime allows for the inclusion of new railways in the future.

In its final recommendation the Council concluded that the WA Rail Access Regime did not provide a framework and guiding principles to encourage a consistent approach to railway access regulation in Western Australia and therefore did not have regard to the second limb of the objects of Part IIIA (s 44AA(b) of the CCA), which provides that:

The objects of this Part are to:

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The Council's final recommendation reversed the position it took in its draft recommendation released in August 2010, where the Council indicated an intention to recommend that the WA Rail Access Regime be certified.

In response to the draft recommendation, the Council received a submission from Roy Hill Infrastructure Pty Ltd (RHI) that raised a number of issues that had not yet been considered. In particular, the RHI submission focussed on the increasing range of different approaches to access regulation of railways in Western Australia.

The Council gave interested parties an opportunity to respond to these new issues by providing an additional opportunity for further submissions to be made. The Council notes that there would be little purpose in preparing draft recommendations and inviting submissions in response if it could not reconsider its draft recommendation.

In his decision to certify the WA Rail Access Regime, the Minister took a different view of the second limb of the objects of Part IIIA. He considered that it required him to consider how the WA Rail Access Regime sits within the framework and guiding principles established by Part IIIA to encourage a consistent approach to access regulation in each industry. The Minister was of the view that the phrase "in each industry" refers to consistency across different industries. The approach adopted by the Council was that consistency in each industry is concerned with consistency within, in this case, the Western Australian rail industry.

The Council considers that both interpretations are open and that, depending on the circumstances of a particular application for certification, either interpretation (or both of them) may be relevant.



Application for the certification of the SA Ports Access Regime

On 10 March 2011 the Council provided its final recommendation to the Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP.

The Minister is required to make a decision within 60 days beginning on the day he receives the Council's final recommendation.

Once the Minister has made his decision, the Council will publish the decision and the Council's final recommendation on its website at www.ncc.gov.au

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Certification of SA Rail Access Regime – draft recommendation

As reported in the February 2011 issue of *Accessible*, the Council received an application under s 44M of the *Trade Practices Act 1974 (TPA)* (since replaced by the CCA) from the Premier of South Australia, Hon Mike Rann MP, for certification of the rail access regime established by the *Railways (Operations and Access) Act 1997 (SA) (Railways Act)*.

The Railways Act regulates access to certain South Australian railway services specified by proclamations of the Governor. Major South Australian intrastate railway services are covered by the regime, excluding Adelaide trams, heritage and tourist rail services, and two railways associated with steel and coal operations (the latter of which is subject to access arrangements under a State lease). Interstate railways in South Australia are covered by an access undertaking under Part IIIA of the CCA given by the Australian Rail Track Corporation.

The Council gave public notice of the application on 10 January 2011 and invited written submissions from interested parties. The Council received submissions from Asciano Limited (**Asciano**) and Genesee & Wyoming Australia Pty Ltd (**GWA**). GWA supported the South Australian Government's application while Asciano submitted that it has a number of concerns regarding the effectiveness of the regime.

On 16 March 2011 the Council released its draft recommendation, which is that the SA Rail Access Regime be certified as effective for a period of five years. The South Australian Government applied for a certification period of

10 years. The Council considered that there is an issue regarding the regime's compliance with the principles for effective access regimes (**clause 6 principles**) set out in clause 6 of the Competition Principles Agreement (**CPA**).

The Council is required by s 44M(3)(a) of the CCA to have regard to the clause 6 principles in deciding what recommendation to make. Clause 6(4)(d) of the CPA specifies that effective access regimes should incorporate the principle that rights to negotiate access should lapse after a defined period unless reviewed and subsequently extended. Under the SA Rail Access Regime rights to negotiate access to services proclaimed under the Railways Act continue in perpetuity. The only mechanism to revoke coverage under the Railways Act is a subsequent proclamation by the Governor. Furthermore, there is no requirement in the Railways Act for the services regulated under it to be reviewed.

In its draft recommendation the Council indicated that if the South Australian Government formalised arrangements in the SA Rail Access Regime to address this issue, the Council would likely recommend a 10 year certification period in its final recommendation.

The Council has invited written submissions on its draft recommendation. The closing date for submissions is **5pm on Monday 18 April 2011**.

After considering any submissions received the Council will prepare its final recommendation to the Commonwealth Minister, the Parliamentary Secretary to the Treasurer, Hon David Bradbury MP, for his decision.



Council moving to new offices

From Friday 15 April 2011 the Council will be located at 200 Queen St, Melbourne (the corner of Queen and Little Bourke Streets). The Council is sub-leasing part of the office space occupied by the Melbourne Office of the Australian Government Solicitor.

The Council's offices will be on level 18. Our reception and address for deliveries will be on level 21, where we will share reception with the Australian Government Solicitor.

The Council's postal address (GPO Box 250, Melbourne, Victoria, 3001) will stay the same, as will our email addresses.

Our telephone numbers will however be changing. From 15 April, the Council's switchboard number will be (03) 9981 1600. Our fax number will be (03) 9981 1650. Direct dial numbers for Council staff members will be listed on our website at www.ncc.gov.au.

Certification of DBCT Access Regime – draft recommendation

On 16 March 2011, the Council released its draft recommendation on the application from the Premier of Queensland, the Hon Anna Bligh MP, under s44M of the (then) TPA for the certification of the Dalrymple Bay Coal Terminal (DBCT) Access Regime. The Council's preliminary view is that the DBCT Access Regime should be certified as effective for a period of 10 years.

The DBCT is a common-user facility at the Port of Hay Point near Mackay, servicing around 18 mines in the Bowen Basin coal fields of Central Queensland. The provision of coal handling services at the DBCT is a declared service under the *Queensland Competition Authority Act 1997*.

Prior to preparing its draft recommendation, the Council invited interested parties to make submissions on the application. Submissions were received from Asciano and DBCT Management Pty Ltd. Asciano, through its subsidiary Pacific National, provides rail haulage services on the Goonyella rail network serving the DBCT. DBCT Management Pty Ltd holds a 50 year lease (with a 49 year option) of the DBCT from the Queensland Government and contracts with Dalrymple Bay Coal Terminal Pty Ltd, a company owned by a number of miners using the DBCT, for the day to day operation and maintenance of the DBCT.

Although neither submission argued that the regime should not be certified, Asciano submitted that improvements could be made to the regime. It argued that the regime could be improved in terms of safeguarding information provided to the rail network operator (a subsidiary of which competes with Pacific National) and providing incentives for improving coal chain coordination. Asciano also submitted that any certification of the regime should terminate in the event that the DBCT and the Goonyella rail network become commonly owned.

While the Council has had regard to these submissions, its preliminary view is that the DBCT Access Regime satisfies the clause 6 principles and that certification would be consistent with the objects of Part IIIA of the CCA.

The Council has invited interested parties to make submissions on the draft recommendation by **5pm on 18 April 2011**. The Council will take account of any submissions received before making its final recommendation to the Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, for his decision.

Who's who in regulation – QCA

The Queensland Competition Authority (QCA) was established by the *Queensland Competition Authority Act 1997* as the independent economic regulator for Queensland.

The QCA's three main responsibilities are to ensure that: significant government enterprises that compete with the private sector do so fairly (competitive neutrality); government-owned monopolies and privately-owned water monopolies do not abuse their market power (monopoly prices oversight); and essential infrastructure services are available to other users (third party access).

These responsibilities relate to key elements of the intergovernmental Competition Principles Agreement.

The QCA works within the industries for gas, electricity, rail, ports and water. The QCA also has a number of responsibilities regarding the implementation of competition reform. The Premier and Treasurer of Queensland can direct the QCA to report to them on any matter relevant to the implementation of competition policy.



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