Queensland Government

Submission to the National Competition Council

Application under Part IIIA of the *Trade Practices Act 1974* for a Declaration Recommendation for the Services provided by Queensland Rail's Queensland Coal Rail Network

19 July 2010

Table of Contents

1. Executive Summary

Pacific National Pty Ltd (**Pacific National**)[1], in its application for declaration of Queensland Rail's coal network (**Application for Declaration**), seeks a recommendation by the National Competition Council (**Council**) that the facilities that comprise the Central Queensland Coal Network (**CQCN**) be declared under Part IIIA of the *Trade Practices Act 1974 (Cth)* (**TPA**).

The CQCN is already subject to an access regime principally established under the *Queensland Competition Authority Act 1997 (Qld)* (**QCA Act**). The scope of the State access regime is described in detail in section 2 of this submission (**State Access Regime**).

The intent of the Council of Australian Governments (**COAG**), manifested through the establishment of the Competition Principles Agreement (**CPA**), reflects that State regimes have historically been the primary and preferred way of regulating State infrastructure. Clause 6(2) of the CPA sets out that the third party access regime to be established by Commonwealth legislation was not intended to cover a service provided by means of a facility where the State or Territory in whose jurisdiction the facility was situated has in place an access regime which covers the facility.

This approach was confirmed by the Competition and Infrastructure Reform Agreement (**CIRA**) between the Commonwealth, the States and Territories which continued the fundamental approach that State regimes were to be the primary method of regulating State infrastructure and that to achieve a more consistent approach each State and Territory access regime should be certified.

It was never intended that the generic third party access regime in the TPA would provide a mechanism for forum shopping or gaming by facility owners, access seekers and/or users. The process of certification under Part IIIA provides a method of dealing with this issue.

In this regard, the State Access Regime has been in place for more than a decade and is the most comprehensive and developed rail access regime in Australia. The State Access Regime has been effective in promoting competition within the above-rail industry. The State Access Regime, including the process for developing an access undertaking under the QCA Act, is open, transparent and well understood within the Queensland rail industry.

The CQCN should not be declared under Part IIIA of the TPA for the following reasons:

(a) declaration criterion (a) is not satisfied because:

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[1] Pacific National Pty Ltd is a wholly owned subsidiary of Asciano Limited (**Asciano**).

(i) the existence of the State Access Regime must be taken into account in determining whether access under Part IIIA will result in a material promotion of competition;

(ii) the dependent markets identified in the Application for Declaration are already competitive as can be seen from the fact that Pacific National has entered the market for rail haulage in Queensland and captured more than 17% market share in just over one year[2]. In addition, there are numerous and competitive market participants in the coal mining and tenements market. Finally, the global market for coking coal is competitive, comprising producers from all over the world, and an extensive seaborne trade of coking coal;

(iii) Part IIIA is highly unlikely to be more effective than the State Access Regime in constraining market power, which can be seen from the fact that it is a general negotiate/arbitrate model requiring an arbitration for each issue that arises, whereas the State Access Regime deals in detail with all aspects of access to rail infrastructure, including negotiation timeframes, access agreements, capacity allocation, train control, scheduling of train paths, ring-fencing and cost allocation models; and

(iv) as any promotion of competition cannot be trivial and must be material, it follows that access under Part IIIA would not materially promote competition in any of the identified dependent markets and thus would not satisfy criterion (a);

(b) criterion (b) is not satisfied because the declaration should only apply to facilities which are uneconomical to duplicate, that is, that are natural monopolies. To the extent that some of the facilities listed in the Application for Declaration relate to above rail services it extends to facilities which are economic to duplicate and criterion (b) is therefore not satisfied;

(c) the existing State Access Regime is an effective access regime as it satisfies each of the principles set out in clauses 6(2)-6(5) of the CPA[3] (**Clause 6 Principles**). It

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[2] As discussed at section 4.2 below, Asciano now has about 17% of the Queensland market, but this will increase to 20% when the contract with Anglo American for German Creek comes on stream in 2012 and the company is expected to have approximately 30% by 2015. See Andrew Fraser, "Asciano poaches key QR coal contract", *The Australian*, 16 June 2010.

[3] As amended to 13 April 2007.

follows that as the service is already the subject of an effective access regime and cannot be declared under Part IIIA of the TPA, criterion (e) is not satisfied; and

(d) it is against the public interest to have multiple separate access regimes applying to the one facility as multiple access regimes will result in confusion, increased costs of compliance and potentially inconsistent outcomes and criterion (f) is therefore not satisfied.

As the criteria (a), (b), (e) and (f) necessary to establish declaration are not satisfied, the facilities the subject of the Application for Declaration should not be declared.

2. Background

The Queensland Government has a significant interest in Pacific National's Application for Declaration.

First, the rail infrastructure that is the subject of the Application for Declaration is covered by the State Access Regime comprising:

(a) the QCA Act (including the proposed amendments to the QCA Act set out in the *Queensland Competition Authority and other Legislation Amendment Bill 2010* (Qld)) (**Draft Bill**));

(b) the *Queensland Competition Authority Regulation 2007* (Qld) (**QCA Regulation**) (including the proposed amendments to the QCA Regulation set out in the *Queensland Competition Authority Amendment Regulation 2010* (Qld) (**Draft Regulation**));

(c) the *Transport Infrastructure Act 1994* (Qld) (**TIA**) which deals with the organisational governance arrangements for Queensland Rail (**QR**) (including the proposed amendments set out in the Draft Bill);

(d) the rail safety regime in Queensland which is currently established by the TIA but which will transition to the regime established in the *Transport (Rail Safety) Act 2010* (Qld) (**Rail Safety Act**) once proclaimed later this year; and

(e) QR Network's Access Undertaking as accepted by the Queensland Competition Authority (**QCA**) under the provisions of the QCA Act and amended from time to time (**Access Undertaking**).

In 1997, the Queensland Government passed the QCA Act, which contained a third party access regime which was modelled on Part IIIA of the TPA[4].

Under the State Access Regime, an owner of declared infrastructure may voluntarily submit an access undertaking to the QCA setting out the terms and conditions of access to the declared infrastructure. The QCA also has the power to require an access provider of a declared service to submit an access undertaking[5] and may prepare and impose an access undertaking in certain circumstances[6].

Second, rail transport infrastructure is critical to Queensland's substantial mining industry and is of high importance to the Queensland economy. In the context of the broader State economy, coal mining in Queensland is estimated to contribute over A$26 billion per annum to the economy (equal to approximately 11% of Queensland's Gross Value Added benefit, which calculates broader economic benefits)[7]. Future operation and expansion of the railway network in Queensland will potentially have a significant influence on the development of Queensland's coal industry and, therefore, the overall economic growth of Queensland.

The object of the State Access Regime is to promote the economically efficient and safe operation of, use of and investment in, infrastructure by which services are provided, with the effect of promoting effective competition in upstream or downstream markets[8].

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[4] Part 5 of the QCA Act.

[5] Section 133 of the QCA Act.

[6] Section 141 of the QCA Act.

[7] Queensland Government, *Railing Queensland's Coal*: *A New Era for Queensland's Coal Export Industry*, May 2010 at p.8 citing Coal economic value estimates provided by the Office of Economic and Statistical Research.

[8] This objective is set out in section 69E of the QCA Act and mirrors the object of Part IIIA of the TPA, which is set out in section 44AA(a) of the TPA.

3. Services

Pacific National in its Application for Declaration defines the services as the use of:

(a) the Blackwater System, being 994 km of bi-directional narrow gauge railway track which runs from the vicinity of mines proximate to the regions of each of Gregory, Kestrel, Ensham, Minerva, Rolleston, Cook and Curragh to the Port of Gladstone and to coal fired power stations located along that route and the associated infrastructure, including:

(i) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the railway);

(ii) bridges;

(iii) passing loops;

(iv) train control systems, signalling systems and communications systems;

(v) sidings and refuges to park rolling stock;

(vi) roads and other facilities which provide access to the railway line route;

(vii) short-term maintenance services; and

(viii) yards;

(b) the Goonyella System, being 924 km of bi-directional narrow gauge track which runs from the vicinity of mines proximate to the regions of Blair Athol, North Goonyella, Gregory and Hail Creek to the Port of Hay Point and to coal fired power stations located along that route, and the associated infrastructure, including:

(i) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the railway);

(ii) bridges;

(iii) passing loops;

(iv) train control systems, signalling systems and communications systems;

(v) sidings and refuges to park rolling stock including Moranbah freight siding (the road to access the main line freight centre);

(vi) roads and other facilities which provide access to the Goonyella System rail track including Jilalan 4 Road, provisioning shed – leased by Siemens and 2 new Jilalan provisioning roads passing signals 49A/B and 50A/B;

(vii) short-term maintenance services; and

(viii) yards;

(c) the Moura System, being 301 km of single line narrow gauge track which runs from the vicinity of mines in the region of each of Goolara, Koorngoo, Callide Coalfields and Taragoola to the Port of Gladstone and to coal fired power stations located along that route, and the associated infrastructure, including:

(i) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the railway);

(ii) bridges;

(iii) passing loops;

(iv) train control systems, signalling systems and communications systems;

(v) sidings and refuges to park rolling stock;

(vi) roads and other facilities which provide access to the Moura system rail track including Callemondah Road to access commissioning shed / EDI / shed;

(vii) short-term maintenance services; and

(viii) yards; and

(d) the Newlands System, being 203 km of single line narrow gauge track which runs from the vicinity of mines in the region of each of Newlands and McNaughton to the port at Abbot Point and to coal fired power stations located along that route, and the Goonyella to Abbot Point expansion project (**GAPE**) to be constructed from North Goonyella to Newlands connecting the Goonyella and Newlands Systems and the associated infrastructure, including:

(i) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the railway);

(ii) bridges;

(iii) passing loops;

(iv) train control systems, signalling systems and communications systems;

(v) sidings and refuges to park rolling stock;

(vi) roads and other facilities which provide access to the Newlands system rail track;

(vii) short-term maintenance services; and

(viii) yards,

(collectively the **Systems**).

The Systems are used for the purpose of the haulage of coal from mines in the vicinity of each of the respective Systems to the various ports at Gladstone, Hay Point, Abbot Point and to coal fired power stations located along that route (**Services**).

4. Criterion (a) - promotion of competition in dependent markets

Section 44G(2)(a) of the TPA requires that the Council, in considering the Application for Declaration, must be satisfied that access (or increased access) under Part IIIA will promote a material increase in competition in a dependent market.

The Council in its publication "A Guide to Declaration under Part IIIA of the *Trade Practices Act 1974* (Cth)" dated August 2009 (**Declaration Guidelines**) outlines that, in assessing whether criterion (a) is satisfied, the Council:

(a) identifies the relevant dependent (upstream or downstream) market or markets;

(b) considers whether the identified dependent market(s) is separate from the market for the service to which access is sought; and

(c) assesses whether access (or increased access) would be likely to promote a materially more competitive environment in the dependent market(s)[9].

The Application for Declaration identifies three dependent markets in which Pacific National believes that competition will be promoted by access under Part IIIA, being:

(a) the market for the provision of haulage services for coal on narrow gauge rail lines in Queensland (**Rail Haulage Market**);

(b) the market for the development and exploitation of coal mines and tenements in central Queensland in proximity to the Systems (**Coal Mines and Tenements Market**); and

(c) the market for globally traded coking coal (**Global Coking Coal Market**).

Whilst the Queensland Government does not necessarily agree with these precise definitions of potential dependent markets, it has adopted the market definitions as set out by Pacific National for the purpose of this submission to demonstrate that competition will not be materially promoted by access under Part IIIA in these, or any other, markets.

To assess whether access would involve a material promotion of competition the Council has adopted the approach of identifying a "factual" and a "counterfactual" which enables a comparison of the two to determine whether there is a material promotion of competition in the counterfactual. This submission first identifies the appropriate factual and

[9] Declaration Guidelines at [3.4].

counterfactual and then considers each of the markets identified by Pacific National to assess whether access under Part IIIA would involve a material promotion of competition.

4.1 Factual and Counterfactual

In respect of the Application for Declaration, the correct factual is the future state of competition with a legal right to use the service under Part IIIA and the correct counterfactual is the future state of competition without a legal right to use the service under Part IIIA but taking into account the fact that there is a legal right to use the service under Part 5 of the QCA Act.

The Explanatory Memorandum to the *Trade Practices Amendment (Infrastructure Access) Bill 2009* (Cth) reflects a clear statutory intention that the Council and relevant Minister must take into account the existence of a State access regime in considering whether access under Part IIIA would materially promote competition in a dependent market as required by criterion (a) in stating that[10]:

> *"A non-certified state or territory access regime which covers access to the service may still be relevant to the NCC's and designated Minister's consideration of a declaration application in relation to other matters that must be satisfied under subsections 44G(2) and 44H(4). For example, the non-certified access regime may have already facilitated a competitive environment in upstream or downstream markets, so that declaration of the service would not promote competition (and therefore the NCC or the designated Minister would not be satisfied of paragraphs 44G(2)(a) or 44H(4)(a)). Alternatively, it may not be in the public interest to have both national and state or territory access regimes applying to the service (and so the NCC or the designated Minister would not be satisfied of paragraphs 44G(2)(f) or 44H(4)(f))."*

In the decision of *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 (**Sydney Airport Case**), the court discussed the appropriate approach to defining the factual and the counterfactual. The Full Court of the Federal Court heard an application for judicial review of the decision of the Australian Competition Tribunal (**Tribunal**) under Part IIIA of the TPA on appeal from the original application brought by Virgin Blue Airlines Pty Ltd for a declaration of the airside services in connection with the use of facilities at Sydney Airport for a period of five years[11].

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[10] Explanatory Memorandum, *Trade Practices Amendment (Infrastructure Access) Bill 2009* (Cth) at [5.27].

[11] See Application under Part IIIA of the *Trade Practices Act 1974* requesting recommendation that services provided by Sydney Airports Corporation Limited be declared, 1 October 2001.

The Full Court of the Federal Court in the Sydney Airport Case defined the "factual" and "counterfactual" in the following terms[12]:

> *"Virgin is correct in its submission that all s 44H(4)(a) requires is 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."*

In considering the counterfactual (that is the future state of competition in the dependent market without any right or ability to use the service) the Full Court of the Federal Court stated that the current structure and operation of the market was relevant in the following terms[13]:

> "*[It] is not to say that what has happened in relation to the service, how the provider has behaved and the degree to which it can be said that monopolistic behaviour has or has not impeded the efficient operation of the market in question may not be relevant considerations attending the making of the decision… if it can be demonstrated that the service has been provided in a manner that can be described as fair, even-handed and in a way most likely to maximise vigorous competition in the downstream market, that may be a powerful and relevant consideration as to why no declaration should be made. Thus, it may be that a with and without declaration counterfactual (or some aspect of it) can be seen as relevant to the decision at hand.*""

It follows from the above analysis that, whilst the factual and counterfactual scenarios are forward looking, the current structure and operation of the market are highly relevant. In taking into account the structure and operation of the market, it would be necessary to take into account the existence and operation of the State Access Regime. Therefore, in the present circumstances, the correct comparison to make in determining whether access under Part IIIA would materially promote competition is:

(a) the factual of the future with a legal right to access under Part IIIA; and

(b) the counterfactual of the future without a legal right to access under Part IIIA but with a legal right to access under Part 5 of the QCA Act.

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[12] Sydney Airport Case at [83].

[13] Sydney Airport Case at [85].

The Council has adopted this approach in past applications for declaration. For example, in the Final Recommendation on the Application for Declaration of Rail Network Services provided by Freight Australia, the Council considered that the existence of a State access regime was to be taken into account in defining the correct counterfactual and also concluded that even if the State access regime was not an "effective" access regime because it did not satisfy the Clause 6 Principles, criterion (a) would not be satisfied if Part IIIA was unlikely to constrain market power more effectively than the State regime[14].

Specifically the Council stated[15]:

> *"In assessing whether declaration of the service would promote competition in a dependent market, the Council compares the current competitive environment (assuming the current environment is a reliable indicator of future conditions) in that market with the environment anticipated after declaration.*
>
> *The market 'with declaration' would have market power constrained by the national regime. The market 'without declaration' would have market power constrained by the Victorian regime. As discussed below at criterion (e), the Council considers that the Victorian regime does not satisfy all the clause 6 principles and could not be recommended for certification as 'effective' at this stage. Notwithstanding, the Victorian regime still must be considered part of the 'without declaration' environment."*

In Freight Australia, the Council went on to consider the difficulty of comparison due to the lack of experience with both the national and Victorian regimes. The Council further developed its counterfactual analysis, highlighting that the provisions of the Victorian Regime lacked "a consideration of competitive neutrality issues, information provision and interface with related services not covered by the regime" whilst also noting that "the national regime contain[ed] no provisions that deal[t] specifically with these issues"[16]. The Council noted, similarly to the current State Access Regime, that the state regime contained provisions to assist negotiations not specifically included in Part IIIA of the TPA[17].

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[14] NCC Final Recommendation, Application for declaration of rail network services provided by Freight Australia, December 2001 (**Freight Australia Recommendation**).

[15] Freight Australia Recommendation at pp. 25-26.

[16] Freight Australia Recommendation at p. 26.

[17] Freight Australia Recommendation at p. 26. Although the Freight Australia Recommendation was made prior to the Sydney Airport Case, the Council has stated it is of the view that in many cases, it is unlikely that the Full Court of the Federal Court's interpretation in the Sydney Airport Case will result in an application satisfying criterion (a) where on the previous factual/counterfactual enquiry it would not have done so. See

The Council concluded that Part IIIA was unlikely to constrain Freight Australia's market power more effectively than the Victorian regime. On this basis, the Council was not satisfied that declaration of the network services would improve the environment for competition in a related market, specifically the bulk freight transport market[18].

In comparing the factual and counterfactual under criterion (a), the Council adopts the approach that if a dependent market is already effectively competitive, access would be unlikely to promote a material increase in competition[19]. As will be discussed in detail below, the existence of the State Access Regime, including the Access Undertaking, results in all of the dependent markets identified by Pacific National being currently competitive.

Finally it should be noted that the words contained in criterion (a), "a material increase", indicate that the change in competition promoted by access must be more than trivial[20]. The Explanatory Memorandum to the *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth) states that the original drafting of criterion (a) did "not sufficiently address the situation where declaration would only result in marginal increases in competition". Accordingly, the change was introduced to ensure that access declarations are only sought where increases in competition are not trivial[21].

4.2 Rail Haulage Market

The Rail Haulage Market is currently effectively competitive and therefore access under Part IIIA will not result in a material promotion of competition.

Paragraph 6.39 of the Application for Declaration sets out a number of key areas where Pacific National's entry has improved the competitive dynamics of the Rail Haulage Market in Queensland. In this regard we further note:

NCC Final Recommendation, Application for declaration of a service provided by the Tasmanian Railway Network dated 14 August 2007 at [5.10].

[18] Freight Australia Recommendation at p. 26.

[19] Declaration Guidelines at [3.43].

[20] The *Trade Practices Amendment (National Access Regime) Act 2006* (Cth), which commenced in October 2006, amended criterion (a) to introduce the requirement that access (or increased access) to the service promote a "material" increase in competition in at least one market (whether or not in Australia), other than the market for the service.

[21] Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth), at p.21. See also Goldsworthy Final Recommendation at [4.4].

(a) Asciano, in its Investor Presentation of 13-14 May 2010, stated that Pacific National currently holds 17% of Queensland's coal haulage market[22]. This market share has been achieved in just over a year since Pacific National started hauling coal in Queensland in April 2009[23]. Asciano also states that it expects Pacific National's EBITDA to exceed $100 million in the financial year 2010/2011[24];

(b) Since the Investor Presentation of 13-14 May 2010, Asciano has announced that:

(i) Pacific National has entered into a new coal haulage agreement with Anglo American Metallurgical Coal Pty Ltd for haulage of coal from its German Creek mine which comes on stream in 2012[25]. This is expected to increase Pacific National's market share to approximately 20%[26]; and

(ii) Pacific National has signed a 10 year take-or-pay contract with Middlemount Coal Pty Ltd for the movement of 3 million tonnes of coal per annum in Queensland commencing 1 January 2012 and that Asciano predicts this contract will generate additional revenue of over $320m[27]; and

(c) Pacific National is aiming to have approximately 30% market share by 2015 and the Investor Presentation notes that there is keen interest from other coal producers in Queensland in contracting with Pacific National[28].

The above matters demonstrate that the Rail Haulage Market is competitive.

The Application for Declaration argues that the material increase in competition will arise from a range of factors including better performance based incentives for the timely delivery of coal to port, better incentives for investment in capital required to ensure there is capacity

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[22] Asciano investor briefing 13-14 May 2010 (**Investor Presentation**) at slide 6 of the section on coal (basis for market share was management estimates).

[23] Asciano Media Release, "Asciano announces new Queensland Coal Customer", 5 May 2009: http://www.asx.com.au/asxpdf/20100513/pdf/31q9s2p9tk7tzc.pdf.

[24] Investor Presentation at slide 10 of the section on coal.

[25] Asciano Media Release, "Asciano secures another 10.9 million tonnes with Anglo American in Queensland", 15 June 2010.

[26] Jennifer Perry, "Asciano grabs QLD coal contract from QR", *Rail Express*, 23 June 2010: http://www.railexpress.com.au/archive/2010/june/june-23-2010/asciano-grabs-775m-qld-coal-contract-from-qr.

[27] Asciano Media Release, "Asciano signs Northern Missing Link haulage contract with Middlemount Coal", 1 July 2010.

[28] Investor Presentation at slide 10 of the section on coal.

to meet future demand, encouraging investment in the most efficient infrastructure and an overall lower quality adjusted price for haulage services.

This argument is inconsistent with the argument also put forward in the Application for Declaration that the correct counterfactual is not a comparison with the terms and conditions on which access is currently available and the terms and conditions that would be available under Part IIIA of the TPA.

There is no evidence to show that the negotiate/arbitrate model under Part IIIA of the TPA will more effectively constrain any market power of QR Network than the State Access Regime nor that it will result in better performance based incentives for timely delivery; or for investment in capital; or will lead to an overall lower price for haulage.

In comparing whether Part IIIA of the TPA will more effectively constrain market power than the current State Access Regime, it should be noted that, unlike the QCA, the ACCC does not have the power to require the owner or operator of a facility to give an access undertaking[29]. Therefore, the comparison to be made is between the negotiate/arbitrate model in Part IIIA of the TPA and the current access undertaking model under the QCA Act.

In fact, the negotiate/arbitrate model is highly unlikely to be more effective than the State Access Regime for reasons including:

(a) Part IIIA of the TPA does not contain any of the detailed provisions of the State Access Regime relating to:

(i) ring-fencing of the below rail operations of QR Network from above rail operations;

(ii) the extensive prohibitions on discrimination in the context of vertical integration;

(iii) the extensive information provision both during the negotiation of access agreements and after;

(iv) the extensive provisions dealing with interface issues;

(v) the provisions relating to interconnection of non-QR Network infrastructure;

(vi) the provisions relating to capacity allocation and train scheduling issues; and

[29] Section 44ZZA of the TPA states that a person who is, or expects to be the provider of a service "may" give a written undertaking to the ACCC in connection with the provision of access to the service.

(vii) the provisions in the Access Undertaking relating to performance incentives; and

(b) in the only arbitration which has been heard by the ACCC under Part IIIA of the TPA in respect of the Sydney Water access dispute, the arbitration took more than 7 months. This process would be unworkable in a scenario where there are numerous users of the network each having to raise an access dispute and go through arbitration every time an issue arises. The unworkability of the negotiate/arbitrate model arises because any arbitration will only bind the access seeker who raises the dispute and not other access seekers (unless they join the arbitration) which may result in confusion as to the exact terms and conditions of access that are available. Whilst the ACCC is likely to adopt a consistent approach to issues, this will not preclude gaming behaviour and may result in complex issues remaining tied up in arbitration for years. This is largely due to the fact that the time taken by the ACCC to arbitrate a dispute and provide a final determination will depend on the nature of the dispute, the complexity of the issue under consideration as well as the conduct of the parties in providing necessary information to the ACCC and to each other in a timely manner throughout the process[30].

The limitations of a negotiate/arbitrate model (without an access undertaking) were acknowledged in the Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* (Cth) which states that, "it is clear that the 'negotiate/arbitrate' model is not producing effective outcomes for industry or consumers"[31]. To the extent that access disputes have been arbitrated individually in the telecommunications industry, the negotiate/arbitrate model has proven to be complex and delay-prone[32]. Rather than encouraging flexible negotiation in this context, the process has been a source of uncertainty and delay for access seekers. Finally, the Explanatory

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[30] ACCC, *Arbitrations - A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, April 2006 at [2.3].

[31] Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* (Cth) at p. 3.

[32] For instance, an arbitration relating to one of the most important declared services, the unbundled local loop service (**ULLS**), which commenced in early 2005 was not finally decided by the ACCC until December 2007, despite the ACCC having made numerous earlier statements on ULLS pricing. See Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* (Cth) at p. 46.

Memorandum states that it appears stakeholders' main areas of concern have been that the negotiate/arbitrate model is "slow, cumbersome and open to gaming"[33].

In summary, the Rail Haulage Market is effectively competitive and Part IIIA is highly unlikely to be more effective than the State Access Regime in constraining market power. Any promotion of competition cannot be trivial and must be material. It follows that access under Part IIIA would not materially promote competition in that market.

4.3 Coal Mines and Tenements Market

The Coal Mines and Tenements Market in Queensland is already highly competitive.

There are numerous market participants in respect of coal mines and tenements in Queensland, including[34]:

(a) BHP Billiton Iron Ore Pty Ltd;

(b) BHP Coal Holdings Pty Limited;

(c) Rio Tinto Iron Ore;

(d) Australian Coal Holdings Pty Limited;

(e) Anglo American Metallurgical Coal Pty Ltd;

(f) Ensham Resources Pty Limited;

(g) Felix Resources Limited;

(h) Jellinbah Group Pty Ltd;

(i) Macarthur Coal Ltd;

(j) Peabody Energy Australia Pty Ltd;

(k) Vale Australia Holdings Pty Ltd;

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[33] Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* (Cth) at p. 46.

[34] This is not an exhaustive list. Note that there are numerous other companies with mining tenements in Queensland such as Bandanna Energy Limited holding key coal exploration permits in Queensland's Bowen and Galilee Basins, Carbon Energy Limited, Coal & Allied Industries Limited and Northern Energy Corporation Limited which produces thermal coal and hard coking coal for both export and domestic markets. Morningstar, *DatAnalysis* at http://datanalysis.morningstar.com.au.

(l) Wesfarmers Curragh Pty Ltd; and

(m) Xstrata Coal Queensland Pty Ltd.

By contrast, the Council in the decision in respect of the Pilbara railways found that the iron ore tenements market was not competitive for the following reasons[35]:

(a) it was unlikely that any but the largest iron ore deposits could sustain the development of the infrastructure, including rail, needed to enable exports;

(b) without third party access to rail infrastructure services, a business's capacity to mine a tenement and export iron ore was dependent on it entering an arrangement with the owner of the proximate rail infrastructure for the sale of ore at the mine or an agreement to establish a joint venture development/marketing arrangement;

(c) iron ore tenements in the Pilbara could not be developed into an iron ore business without access to rail transport; and

(d) a facility owner could seek to ensure that iron ore tenements in the vicinity of the facility were not 'mined out', and that tenement prices were maintained at a low level (due to under-development and in the absence of rail transport being unattractive to other investors).

This is entirely distinguishable from coal mining and coal tenements in Queensland. In Queensland the numerous participants listed above already have access to the rail track under the State Access Regime. The participants currently actively acquire tenements, mine tenements and export coal. Access under Part IIIA of the TPA will have no impact on competition in respect of coal mining, nor the acquisition or sale of mining tenements.

4.4 Global Coking Coal Market

The global coking coal market is also highly competitive.

Queensland coal is exported to 38 countries world-wide and provides a major source of coking coal for Asian and Indian steel mills[36]. In particular, coking coal is supplied to major

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[35] NCC Final Recommendation, Application for declaration of a service provided by the Mt Newman railway line under section 44F(1) of the *Trade Practices Act 1974* dated 23 March 2006 (**Mt Newman Railway Recommendation**) at [7.181]-[7.185]; NCC Final Recommendation, Application for declaration of a service provided by the Goldsworthy Railway under section 44F(1) of the *Trade Practices Act 1974* dated 29 August 2008 (**Goldsworthy Railway Recommendation**) at [4.93]-[4.103]; NCC Final Recommendation, Application for declaration of a service provided by the Hamersley Railway under section 44F(1) of the *Trade Practices Act 1974* dated 29 August 2008 (**Hamersley Railway Recommendation**) at [4.81]-[4.91]; and NCC Final Recommendation, Application for declaration of a service provided by the Robe Railway under section 44F(1) of the *Trade Practices Act 1974* dated 29 August 2008 (**Robe Railway Recommendation**) at [4.67-4.89].

steel makers in Japan, Asia, Europe, the United Kingdom, North Africa, South Africa and America. The positioning of Queensland in the globally traded coking coal market is strong. This is largely due to the highly competitive coking coal market which is facilitated by access to rail haulage services under the State Access Regime. In 2008-09 Queensland exported 31.06 million tonnes of soft coking coal and 82.72 million tonnes of hard coking coal comprising a total of 113.78 million tonnes of coking coal[37]. This accounts for around 71% of Queensland's total coal exports[38]. There are numerous companies exporting coking coal from Queensland including many of the companies listed in section 4.3 above.

The global coking coal market is competitive. In 2008, the coking coal trade on the international market was approximately 262 million tonnes (**Mt**)[39]. The following table of top coal producers highlights a sample of the numerous countries and market participants in the international hard coal trade, (which includes coking coal)[40]:

Country	**Coal (million tonnes (Mt))**
PR China	2761
USA	1007
India	490
Australia	325
Russia	247
Indonesia	246
South Africa	236
Kazakhstan	104
Poland	84
Columbia	79

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[36] Queensland Government, *Railing Queensland's Coal*: *A New Era for Queensland's Coal Export Industry*, May 2010 at p.7.

[37] Queensland Government, *Railing Queensland's Coal*: *A New Era for Queensland's Coal Export Industry*, May 2010 at p.32.

[38] Queensland Government, *Railing Queensland's Coal: A New Era for Queensland's Coal Export Industry*, May 2010 at p.32.

[39] www.iea.org.

[40] World Coal, *Institute Report* (figures are as at September 2009): www.worldcoal.org.

The global market volume for coking coals is approximately 187 Mt[41]. Key producers of coking coal include Canada, USA, Australia and Russia. In addition, as a result of the higher world market prices for coking coal, Mozambique, Indonesia and Colombia are investigating coking coal projects, with significant investment being made by the Brazilian company CVRD in Mozambique[42].

The above demonstrates that any global market for coking coal is already effectively competitive and that access to the CQCN under Part IIIA will not materially promote any further competition in that market.

5. Criterion (b) – uneconomical to develop the facility

The Declaration Guidelines state that an assessment of criterion (b) centres on identifying whether a facility is a "natural monopoly". That is, a facility will be considered uneconomical to develop if it is a natural monopoly, such that a single facility is capable of meeting likely demand at lower cost than two or more facilities[43].

The features of a natural monopoly endorsed by the Tribunal in *Review of Freight Handling at the Sydney International Airport*[44] include:

(a) large economies of scale by virtue of:

  (i) high fixed or capital costs involved in constructing the facility (or start-up costs);

  (ii) low operating costs in respect of the facility; and

  (iii) a declining average cost of a unit of production over the foreseeable demand for the product of the facility;

(b) high sunk costs (that is, costs which cannot be recovered if a firm that enters the market then exits the market); and

(c) the maximum potential capacity of the facility is lower than total market demand (or it is less costly to expand the facility than build a duplicate facility).

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[41] RWE Group, *World market for Hard Coal*, October 2007.

[42] RWE Group, *World market for Hard Coal*, October 2007 at p. 29.

[43] Declaration Guidelines at [4.3].

[44] (2000) ATPR 41-754 at [82].

The below rail aspects of heavy haul railways in the Pilbara railways[45] were considered by the Council to be a natural monopoly such that a single below rail operator was likely to be able to deliver services at lower cost than two or more track operators over a wide range of demand levels. The Tribunal in *Fortescue Metals Group Limited*[46], in endorsing the Council's view, considered that criterion (b) tested whether a facility was a natural monopoly and held that the below rail aspects of the Hamersley, Robe and Goldsworthy railway lines were natural monopolies.

However, the above rail aspects of railways are not considered natural monopolies. The functional separation of "above-rail" and "below-rail" services is well recognised[47] and the Council has distinguished between the provision of below rail infrastructure for which ongoing maintenance costs and other operational costs associated with the railway service are significant, compared to the relatively low capital costs incurred in operating trains and other above rail services that run on the rail infrastructure[48].

The proposed declaration of the CQCN for the purpose of the State Access Regime clearly differentiates between “above-rail” and “below-rail” services by reference to the TIA.

Specifically, "rail transport infrastructure" is defined in the Schedule to the QCA Act by reference to the definition of that phrase in Schedule 6 of the TIA. Schedule 6 of the TIA defines "rail transport infrastructure" as the facilities necessary for operating a railway including:

(a) railway track and works built for the railway, including, for example:

(i) cuttings;

(ii) drainage works;

(iii) excavations;

(iv) land fill;

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[45] See Hamersley Railway Recommendation at [5.3-5.4], Goldsworthy Railway Recommendation at [5.3-5.4]; and Robe Railway Recommendation at [5.3-5.4] and [5.54-5.63].

[46] [2010] ACompT 2 at [18] of the summary decision. The decision was handed down on 30 June 2010. The full decision of the Tribunal is not publicly available, but see the public summary at [19].

[47] See Mt Newman Railway Recommendation at [7.118] where the Council stated that in applying the ‘asset specificity’ test, it was clear that the assets required to provide track services (railway track, sidings, switching gear, signals, scheduling services, rail maintenance services) were distinct from those required to provide haulage services (locomotives, ore cars, fuel facilities, rolling stock maintenance services).

[48] Robe Railway Recommendation at [5.58]; Goldsworthy Railway Recommendation at [5.56]; and Hamersley Railway Recommendation at [5.59].

(v) track support earthworks; and

(b) any of the following things that are associated with the railway's operation:

(i) bridges;

(ii) communication systems;

(iii) machinery and other equipment;

(iv) marshalling yards;

(v) notice boards, notice markers and signs;

(vi) overhead electrical power supply systems;

(vii) over-track structures;

(viii) platforms;

(ix) power and communication cables;

(x) service roads;

(xi) signalling facilities and equipment;

(xii) stations;

(xiii) survey stations, pegs and marks;

(xiv) train operation control facilities;

(xv) tunnels;

(xvi) under-track structures;

(xvii) vehicle parking and set down facilities; and

(xviii) pedestrian facilities,

but not "other rail infrastructure".

"Other rail infrastructure" is excluded from the definition of "rail transport infrastructure" and therefore is not subject to the access regime. It is defined in Schedule 6 of the TIA as:

(a) freight centres or depots;

(b) maintenance depots;

(c) office buildings or housing;

(d) rollingstock or other vehicles that operate on a railway;

(e) workshops; and

(f) any railway track, works or thing that is part of anything mentioned in paragraphs (a) to (e) above.

"Other rail infrastructure" is above rail infrastructure which does not form part of the natural monopoly infrastructure and is, by its nature, economic to duplicate.

It can be said that, in contrast to the definition adopted under the State Access Regime, the Application for Declaration defines the Systems, the subject of the services, broadly, to include a range of assets which relate to the above rail services or which could include above rail services. For example, "yards", "provisioning sheds" and "roads" may all relate to both above rail and below rail services.

This can be distinguished from the State Access Regime which requires that the facilities relate to below rail services.

Division 5, Part 5 of the QCA Act provides a process in the event that an access provider and an access seeker can not agree on an aspect of access to a declared service. This includes whether the service to which access is sought forms part of the declared 'below rail' service.

The Access Undertaking provides a further process for access disputes to declared services to be resolved[49]. In particular, the Access Undertaking provides a mechanism that requires QR Network to review and amend the "line diagrams[50]" as necessary to reflect changes that have been made to the configuration or ownership of the rail network and which are published on QR Network's website[51]. If the QCA, an access seeker or an access holder is reasonably of the opinion that the line diagrams do not indicate those parts of the rail network that are "rail infrastructure" or reflect an unauthorised change to rail

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[49] Clause 2.2 of QR Network's Access Undertaking (2008) (**UT2**) and clause 3.7 of QR Network's Draft Access Undertaking (2010) (**UT3**).

[50] "Line diagrams" refer to the diagrammatical representation the configuration of the rail network and the parts of the rail network which are managed by QR Network, a related operator or a person other than QR Network as defined in clause 10.1 of UT2 and clause 12.1 of UT3.

[51] Clause 2.2(b) of UT2 and clause 3.7.1(b) of UT3.

infrastructure that contravenes the Access Undertaking, the QCA or that access seeker or access holder may request in writing that QR Network review and, if necessary, amend the line diagrams[52]. In this context a contravention of the Access Undertaking includes:

(a) a transfer or assignment of ownership of rail infrastructure by QR Network to a related corporation; or

(b) subject to limited exceptions, a removal of existing rail infrastructure or amendment of the line diagrams to identify any existing rail infrastructure for future removal[53].

If an access seeker is reasonably of the opinion that rail transport infrastructure (as defined under the TIA) that is owned by a QR party forms part of the declared service, then the access seeker may make a request in writing that QR Network obtain ownership of the relevant rail transport infrastructure and amend the line diagrams accordingly[54]. If an access seeker is unhappy with any decision by QR Network in relation to the line diagrams it may refer the issue to the dispute resolution process set out in the Access Undertaking[55]. This dispute resolution process provides that the QCA can ultimately resolve any dispute about whether an item of rail infrastructure forms part of the declared service.

To the extent that the facilities listed in the Application for Declaration may apply to 'above rail services' the Application for Declaration may extend to facilities which are economic to duplicate and criterion (b) is therefore not satisfied.

6. Criterion (e) – effective access regime

Section 44G(2)(e) of the TPA requires the Council to consider whether access to the service is already the subject of an effective access regime. Infrastructure services already covered by an effective access regime cannot be declared under Part IIIA of the TPA. The existing State Access Regime is an effective access regime as it satisfies each of the Clause 6 Principles. Further, any general arguments on the "effectiveness" of the current State Access Regime which do not relate to a Clause 6 Principle are not to be taken into account because of the operation of section 44M(4)(b) and section 44N(2)(b) of the TPA which prohibit any matter other than the Clause 6 Principles and the objects of Part IIIA from being taken into account.

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[52] Clause 2.2(e) of UT2 and clause 3.7.1(d) of UT3.

[53] Clause 2.2(d) of UT2 and clause 3.7.1(c) of UT3.

[54] Clause 2.2(f) of UT2 and clause 3.7.2(a) of UT3.

[55] Clause 2.2(i) of UT2 and clause 3.7.1(f) of UT3.

6.1 Clause 6 Principles

The Application for Declaration confuses the issue of whether the State Access Regime satisfies the Clause 6 Principles and whether Pacific National is satisfied with the operation of the State Access Regime.

Pacific National states in the Application for Declaration that the need for "effective" access for the purpose of criterion (e) does not mean effectiveness for the purpose of section 44M and 44N of the TPA[56]. However, this is contrary to the declaration provisions set out in section 44G(3) of the TPA which state that:

> *"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 must:*
>
> *(a) subject to subsection (5), apply the relevant principles set out in that agreement; and*
>
> *(b) have regard to the objects of this Part; and*
>
> *(c) subject to section 44DA, not consider any other matters."*

In addition, clause 6(3) of the CPA requires the Council to take into account that there are a range of approaches available to a State in the incorporation of each principle and provided the approach is a reasonable approach then the regime is to be taken to have incorporated the principle.

The State Access Regime is an effective access regime for the purposes of criterion (e)[57]. The reasons for this are set out in detail in the Application for Certification lodged by the Premier of Queensland on 17 June 2010. In summary[58]:

Clause 6 Principle	**Satisfaction**
Clauses 6(2) and 6(4)(p): jurisdictional	This principle is satisfied on the basis that the State Access Regime does not extend beyond the jurisdictional boundary of Queensland.

[56] Application for Declaration at [10.3].

[57] For a detailed analysis see the Queensland Government's Application for Certification submitted to the NCC on 17 June 2010 (**Application for Certification**).

[58] The following table contains section references to both the QCA Act (in its current form) and the sections that are proposed to be introduced by the Draft Bill.

issues	
Clause 6(3): significant infrastructure	The services that are the subject of the State Access Regime are clearly defined in the access criteria in Part 5 (particularly under section 76 of the QCA Act). In respect of the CQCN: (a) it is significant infrastructure when its size and importance to the Queensland economy are considered; (b) it is not economically feasible to duplicate; (c) access to the network under the QCA Act promotes competition in dependent markets; and (d) the safe use of the network can be ensured through the rail safety provisions of the TIA and the Rail Safety Act.
Clauses 6(4)(a)-(c): negotiation process	Sections 12(2)(c), 79(2), 81,-83, 89-91, 99-105, 112, 127, 128, 144-146, 163, 205 and 219 of the QCA Act together with Parts 4, 5, 6, 7 and 8 of UT2 and UT3 and Part 10 of UT3 under the State Access Regime provide for the primacy of commercial negotiation and an effective negotiation process through the provision of extensive information to access seekers in respect of the terms and conditions of access including pricing issues, safety requirements, the allocation of capacity, interoperability issues and service quality issues. The relevant provisions also establish independent and transparent regulation and enforcement under the State Access Regime in satisfaction of the clause 6(4)(a)-(c) principles.
Clause 6(4)(d): regular review	Sections 84(4), 88, 89, 92 and 95 of the QCA Act under the State Access Regime provide for the expiry of declarations after a specified period of time and also include a mechanism for the revocation of a declaration where the access criteria are no longer satisfied. If a declaration is revoked or expires then existing contractual rights and obligations are not automatically revoked. Part 5, Division 5, Subdivision 4 provides for the amendment and revocation of access determinations.
Clause 6(4)(e): reasonable endeavours	The State Access Regime explicitly incorporates the requirement of clause 6(4)(e) in section 101 of the QCA Act. This obligation to use reasonable endeavours to accommodate access seekers is supported by extensive provisions in the Access Undertaking dealing with the provision of information to access seekers, timeframes for the provision of information and the protection of confidential information.
Clause 6(4)(f):	Sections 100(2), 102, 104, 125 and 168C of the QCA Act under the State Access Regime explicitly acknowledge that access agreements do not

negotiated access	need to be on the same terms and conditions but also contain prohibitions on unfair discrimination in favour of affiliated entities.
Clause 6(4)(g): independent dispute resolution	Part 5, Division 5 and Part 7 of the QCA Act, in particular, sections 112, 117, 118 and 119 set out the appointment of the QCA as an independent dispute resolution body. Section 214 of the QCA Act provides for the appointment of associate members as arbitrators. There are also provisions in the Access Undertaking allowing for resolution of access disputes by an independent expert. Finally, section 127 of the QCA Act provides transparency by establishing a register of access determinations.
Clause 6(4)(h): binding decisions	Enforcement provisions set out in Part 5, Division 8 of the QCA Act ensure that the parties to an access dispute are bound by an access determination. In particular, sections 120(1)(c), 118, 152, 154 and 158A of the QCA Act encapsulate the principle of binding dispute resolution and judicial review is available for any decision by the QCA and by the Ministers in respect of a declaration.
Clause 6(4)(i): principles for dispute resolution	Sections 69E, 119, 120, 137, 138 and 168A of the QCA Act and the pricing principles in the Access Undertaking encapsulate the principle of dispute resolution that substantially mirror those principles set out in clause 6(4)(i).
Clause 6(4)(j): facility extension	Sections 118, 119 and 137 of the QCA Act encapsulate the principle that requires the owner to extend, or to permit an extension of, the facility that is used to provide a service if necessary subject to: (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility; (ii) the owner's legitimate business interests in the facility being protected; and (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension. The Access Undertaking currently provides for expansions of the network and the QCA is currently considering the obligation to invest in the network consistent with the protections in the QCA Act.
Clause 6(4)(k): material change in circumstances	Part 5, Division 2, Subdivision 5 of the QCA Act provides a mechanism to revoke a declaration which would apply where there is a material change in circumstance. Similarly, Part 5, Division 5, Subdivision 4 provides a mechanism for an access determination to be amended or revoked where there is a material change in circumstance. Part 5, Division 7, Subdivision 2 provides that an Access Undertaking may be amended with the

	approval of the QCA to deal with a material change in circumstances.
Clause 6(4)(l): compensation	The State Access Regime encapsulates this principle in sections 119(2)(a), 119(3) and 138(2)(e) of the QCA Act to provide mechanisms for the consideration and award of compensation if the existing rights of an access provider or user are impeded.
Clause 6(4)(m): hindering access	The provisions of sections 100(2), 104, 105, 125, 126, 153 and 168C of the QCA Act together with provisions in the Access Undertaking prohibit conduct hindering access and contain a number of protections to ensure that QR Network does not unfairly discriminate against competitors of its related company.
Clause 6(4)(n): separate accounting	Sections 137(2)(ea), 159, 162 and 163 of the QCA Act and clauses 3.1-3.3 of the Access Undertaking establish separate accounting arrangements supported by a cost allocation manual approved by the QCA and ring-fencing arrangements to protect confidential information.
Clause 6(4)(o): access to financial information	Sections 181, 185, 186, 187, 200, 205, 206 and 207 of the QCA Act provide for the QCA to obtain all relevant financial information as well as protection for confidential information.
Clause 6(5)(a) and the objects of Part IIIA: promote efficiency and effective competition	The State Access Regime captures the objects of this principle through section 69E of the QCA Act which reflects the language used in clause 6(5)(a) and the corresponding objects clause found in section 44AA(a) of the TPA.
Clause 6(5)(b): pricing should promote efficiency	Sections 120, 138 and 168A of the QCA Act encapsulate this principle by explicitly incorporating the direct wording of clause 6(5)(b) into the State Access Regime.

The Application for Declaration states that there is no certainty about what, if any, regulatory arrangements will apply to the facilities after privatisation[59]. The Queensland Government has made a number of public announcements as to the proposed application of the State Access Regime after the Initial Public Offering (**IPO**)[60]. The exposure drafts of the QCA

[59] Application for Declaration at [10.26 - 10.28].

[60] Hon Andrew Fraser MP, *Railing Queensland's coal: A new era for Queensland's coal export industry*, CEDA Brisbane, May 2010; Queensland Government Media Release, "QR National Limited: about the IPO", 21 May 2010; and Queensland Government Media Release, Hon Andrew Fraser MP, "Queensland to seek

Regulation and the amendments to the QCA Act both deal specifically with the declaration of the CQCN and will apply after the IPO. The Access Undertaking will continue to bind QR Network both before and after IPO as the corporate entity which offered the Access Undertaking will remain the same. Related to this issue, the Application for Declaration states that the State Access Regime is not sufficiently robust to deal with major expected market developments such as the IPO[61]. However, this is clearly incorrect as the Access Undertaking is currently being reviewed by the QCA to deal with issues raised by Pacific National. The QCA has received 14 submissions from 11 stakeholders on the proposed amendments to the Access Undertaking[62]. The QCA is an independent regulator that will take all these submissions into account in making a final decision as to the form of the Access Undertaking to be approved. This process shows that the State Access Regime is robust and flexible enough to deal with market developments.

The Application for Declaration also states that the State Access Regime does not ensure non-discriminatory access for third party train operators. The State Access Regime (including the proposed amendments to the QCA Act) deals with this issue through the following mechanisms:

(a) by prohibiting discrimination between access seekers in negotiating access agreements or amendments to access agreements in circumstances where the access provider is a related access provider[63];

(b) by prohibiting an access provider from engaging in conduct for the purposes of preventing or hindering access under an access agreement to a declared service which applies to unfair discrimination in respect of both price and non-price issues[64];

(c) incorporating the principle that access prices should not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its

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rail access certification", 22 April 2010: http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=69465.

[61] Application for Declaration at [10.29].

[62] http://www.qca.org.au/rail/2010-DAU/QR2010DAU.php.

[63] Section 100(2) of the QCA Act.

[64] Section 104 of the QCA Act. The provisions of section 104 of the QCA Act in respect to access agreements are replicated in section 125 of the QCA Act in respect of access determinations.

downstream operations except to the extent the cost of providing access to other operators is higher[65]; and

(d) an explicit obligation not to unfairly discriminate in respect of the negotiation of access agreements or amendments to access agreements and to require access undertakings to contain any necessary provisions to ensure that there is no unfair discrimination in favour of affiliated entities[66].

6.2 Irrelevant considerations

A number of the issues raised by Pacific National do not directly relate to the Clause 6 Principles and in particular do not deal with the requirement in the CPA to ignore any "decisions" made under the State Access Regime.

For example, attachment 7 to the Application for Declaration[67] is a report by Castalia which considers the economic content of the legal test for considering the “effectiveness” of the State Access Regime[68] (**Castalia Report**). The Castalia Report does not reference any of its statements or findings to any of the Clause 6 Principles but seems to consider the question of whether the regime could be improved generally. To the extent that the statements or findings of the Castalia Report do not relate to the Clause 6 Principles then the Castalia Report is irrelevant to the question of whether the State Access Regime is an effective access regime within the meaning of criterion (e). Specific examples include:

(a) the conclusion that the below rail pricing decisions are less likely to be less efficient than those that generally emerge from a transparent cost of service review[69] process is both irrelevant because it relates to a “decision” made under the State Access Regime and fails to take into account the significant amount of cost data obtained by the QCA and the transparency surrounding the QCA on pricing decisions[70];

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[65] Sections 138A , 168A and 168C of the QCA Act.

[66] Section 168A of the QCA Act. Section 168A includes a specific obligation on QR Network not to differentiate access charges between access seekers or between access seekers and access holders within a relevant market, subject to limited exceptions. The proposed amendments under section 168C of the QCA Act amendments further reinforce that a related access provider must not unfairly discriminate between users of the service in providing access.

[67] Application for Declaration, Attachment 7: Castalia*, Review of the Queensland State Access Regime*.

[68] Castalia Report at p. 1.

[69] Castalia Report at p. 4-5.

[70] QCA, *Draft Decision: QR Network's 2010 DAU: Tariffs and Schedule F*, June 2010. See response to submission from Asciano, *Submission to the Queensland Competition Authority: Response to the QR Network Draft Amending Access Undertaking 2008*, June 2010; Queensland Resources Council, *Addendum*

(b) the conclusion that QR Network can frustrate an access seeker's ability to enter into new contracts by delaying their ability to offer a final set of terms does not seem to take into account the extensive processes in the Access Undertaking in respect of the timetable for negotiations and the ability of the access seeker to raise delay as a dispute issue[71];

(c) the conclusion that QR Network would be able to manipulate the queue for access applications does not seem to take into account the extensive protections in the Access Undertaking which include:

(i) that the order of the queue is established by the time and order in which QR Network receives each access application[72];

(ii) that the order in paragraph (i) above can only be changed in certain limited circumstances[73];

(iii) QR Network is obliged to notify each access seeker in a queue of their initial position in the queue and any changes[74]; and

(iv) any dispute about the position in the queue can be referred to the QCA[75]; and

(d) section 5 of the Castalia Report analyses benchmarks for effective regulation which is completely irrelevant as the TPA has set out what the relevant benchmark is, that is, the Clause 6 Principles. The Council and the designated Minister are precluded by legislation from applying any other benchmark.

In summary the Castalia Report considers issues outside of the Clause 6 Principles and does not seem to analyse the actual scope and operation of the State Access Regime.

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to QRC's Submission in response to QR Network's 2010 Draft Access Undertaking and Schedule F, 7 May 2010.

[71] See, by way of example, the timetabling provisions in clauses 4.3(a), 4.3(e), 4.3(g) and 4.3(h) of UT2 and UT3.

[72] Clause 7.4.1(d) of UT2 and clause 7.3.4(a) of UT3.

[73] Clause 7.4.1(e) of UT2 and clause 7.3.4(c) of UT3.

[74] Clause 7.4.1(i) of UT2 and clause 7.3.4(h) of UT3.

[75] Clause 7.4.1(m) of UT2 and clause 7.3.4(j) of UT3.

7. Criterion (f) – public interest

The intent of COAG, manifested through the establishment of the CPA, reflects that State regimes have historically been the primary and preferred way of regulating State infrastructure. Clause 6(2) of the CPA sets out that the regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory in whose jurisdiction the facility is situated has in place an access regime which covers the facility.

This approach was confirmed by CIRA which continued the fundamental approach that the State regimes were to be the primary method of regulating State infrastructure and that to achieve a more consistent approach each State and Territory access regime should be certified.

It was never intended that the generic third party access regime in the TPA would provide a mechanism for forum shopping or gaming by facility owners, access seekers and/or users. The process of certification under Part IIIA provides a method of dealing with this issue.

The State Access Regime has been in place for more than a decade and is the most comprehensive and developed rail access regime in Australia. It has been effective in promoting competition within the above-rail industry, as can be seen from the entry and expansion of Pacific National in the above-rail industry. The State Access Regime, including the process for developing an access undertaking through the QCA, is open, transparent and well understood within the sector.

In contrast, as discussed above in section 4 of this submission, the negotiate/arbitrate model under Part IIIA has not demonstrated an ability to respond to disputes in a tailored and flexible manner afforded under the State Access Regime. While there has been only one concluded arbitration under Part IIIA of the TPA[76], there have been no cases which demonstrate that the model is equipped to respond to issues which arise in the context of a significant number of access users, seekers and providers of the infrastructure services. There is also little evidence to suggest that Part IIIA will be able to respond to an evolving, competitive market.

Declaration under the TPA will not extinguish the declaration under the State Access Regime. Therefore, it follows that the access regime under the State Access Regime would

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[76] ACCC, *Access dispute between Services Sydney Pty Ltd and Sydney Water Corporation*: *Arbitration Report*, 19 July 2007.

continue to apply even after any declaration of the CQCN under Part IIIA of the TPA and would continue even after the ACCC has arbitrated any access disputes.

Indeed, Asciano in its submission to the Council on the WA Rail Access Regime indicated that multiple access regimes result in duplication and provide the potential for lack of consistency between regimes which would be both inefficient and counter to the s44AA objective of regulatory consistency[77].

The Council has stated that matters relevant to public interest considerations include impending access regimes or arrangements, national developments, the desirability for consistency across access regimes and relevant historical matters[78].

The existence and operation of multiple access regimes is likely to result in:

(a) inconsistencies that will:

  (i) cause confusion;

  (ii) significantly increase the cost of compliance for both the access provider and access users; and

  (iii) result in investment delays and the potential for regulatory gaming through jurisdictional shopping; and

(b) the potential for regulatory gaming resulting in issues relating to section 109 of the Constitution[79]. This could arise where the State and Commonwealth regimes are inconsistent in their determinations by virtue of arbitration decisions or as between the Access Undertaking and arbitrations.

The regulatory burden and cost resulting from the application of multiple third party access regimes to the facilities is a significant matter to be taken into account under criterion (f). The Tribunal in its decision in *Fortescue Metals Group Limited* [2010] ACompT 2[80] found that criterion (f) was not satisfied in respect of the Mt Newman and Hamersley railway services because the cost of access outweighed the benefit of access. In respect of the

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[77] Asciano Submission to the NCC, Certification of the Western Australian Rail Access Regime, Response to the WA Government Submission to the NCC dated, June 2010 at [30].

[78] Declaration Guidelines at [8.35].

[79] *Commonwealth of Australia Constitution Act.*

[80] The decision was handed down on 30 June 2010. The full decision of the Tribunal is not publicly available, but see the public summary at [19].

application of multiple and inconsistent access regimes to the Queensland rail network, the additional regulatory burden and costs are likely to be significant. Therefore, criterion (f) is not satisfied on this basis.

The Council acknowledges that declaration of a service does not provide the access seeker with an automatic right to use that service. Rather, it is merely a first step which gives access seekers the right to negotiate for access[81]. As discussed in section 4 of this submission it is highly unlikely that the negotiate/arbitrate model will be more effective to constrain market power than the current State Access Regime.

The application of multiple access regimes is also inconsistent with the objectives of Part IIIA of the TPA, as set out in section 44AA, which states that one of the objectives of the National Access Regime is regulatory consistency. The Council is obliged to take this objective into account in making a decision in respect of the Application for Declaration.

In summary, it is against the public interest to have multiple separate access regimes applying to the one facility.

[81] Declaration Guidelines at [1.8].

8. Abbreviations

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
Access Undertaking	QR Network's Access Undertaking as accepted by the QCA under the provisions of the QCA Act and as amended from time to time
Application for Certification	Queensland Government's Application for Certification submitted to the NCC on 17 June 2010
Application for Declaration	The Application under Part IIIA of the *Trade Practices Act 1974* for a Declaration Recommendation for the Services provided by Queensland Rail's Queensland Coal Rail Network submitted by Pacific National on 18 May 2010
Castalia Report	The report by Castalia in Attachment 7 to the Application for Declaration
CIRA	Competition and Infrastructure Reform Agreement dated 10 February 2006 (as amended to 13 April 2007)
Clause 6 Principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement
COAG	Council of Australian Governments
Coal Mines and Tenements Market	The market for the development and exploitation of coal mines and tenements in central Queensland in proximity to the Systems defined in section 4 of this submission
Council	National Competition Council
CPA	Competition Principles Agreement dated 11 April 1995 (as amended to 13 April 2007)
CQCN	Central Queensland Coal Network
Declaration Guidelines	A Guide to Declaration under Part IIIA of the *Trade Practices Act 1974* (Cth) dated August 2009
Draft Bill	*Queensland Competition Authority and Other Legislation Amendment Bill 2010* (Qld)
Draft Regulation	*Queensland Competition Authority Amendment Regulation 2010* (Qld)
GAPE	Goonyella to Abbot Point expansion project (also known as the Northern Missing Link)
Global Coking Coal Market	The market for globally traded coking coal s defined in section 4 of this submission
Mt	Million tonnes
National Access Regime	The access regime set out in Part IIIA of the TPA
IPO	Initial Public Offering

Part IIIA	Part IIIA of the TPA
QCA	Queensland Competition Authority
QCA Act	*Queensland Competition Authority Act 1997* (Qld)
QCA Regulation	*Queensland Competition Authority Regulation 2007* (Qld)
QR	Queensland Rail
Rail Haulage Market	The market for the provision of haulage services for coal on narrow gauge rail lines in Queensland as defined in section 4 of this submission
Rail Safety Act	*Transport (Rail Safety) Act 2010* (Qld)
State Access Regime	The Queensland rail access regime as described in section 2 of this submission
Systems	The Blackwater System, the Goonyella System, the Moura System and the Newlands Systems collectively as described in paragraph 3 of this submission on the Application for Declaration
TIA	*Transport Infrastructure Act 1994* (Qld)
TPA	*Trade Practices Act 1974* (Cth)
TPA Regulations	*Trade Practices Regulations 1974* (Cth)
Tribunal	Australian Competition Tribunal
UT2	QR Network's Access Undertaking (2008)
UT3	QR Network's Draft Access Undertaking (2010)