

**SPECIALIZED CONTAINER TRANSPORT
APPLICATIONS FOR DECLARATION
OF SERVICES PROVIDED BY
WESTRAIL:
RECOMMENDATIONS**

21 NOVEMBER 1997

Applications for Declaration under Section 44F
of the *Trade Practices Act 1974*

National Competition Council

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OVERVIEW

Background and Process

Section 44F(1) of the *Trade Practices Act 1974* (Act) provides for any person, to make a written application to the National Competition Council (the Council) asking the Council to recommend under section 44G that a particular service be declared. The Council must recommend to the designated Minister that the service either be declared or not be declared. In making its recommendation, the Council must be satisfied of the matters set out in section 44G and consider section 44F(4) of the Act. The same criteria bind the Minister when deciding whether or not to declare a particular service (see sections 44H(2) and 44H(4)).

On 25 July 1997, the Council received five applications from Specialized Container Transport (SCT) to recommend the declaration of a rail service and freight support services provided in Western Australia. These services are provided by Westrail which is a statutory authority responsible for managing State rail infrastructure in Western Australia.

SCT is seeking declaration of a rail service and freight support services provided by Westrail so that it can continue providing its freight forwarding and distribution service between Melbourne and Perth and commence a freight forwarding and distribution service between Sydney and Perth in 1998. It intends to increase the freight it carries on Westrail track between Kalgoorlie and Perth being on-carriage from Sydney/Melbourne via the transcontinental railway.

The Council adopted a public consultation process in assessing this application and placed advertisements seeking submissions from interested parties. An Issues Paper was released to assist interested parties in preparing submissions. **Three** submissions were received.

Recommendation

The Council's analysis of SCT's applications is set out in the attached Statement of Reasons, which discusses the issues raised in this and previous public consultation processes. Following this analysis, the Council has come to the view that while SCT's rail service application satisfies all relevant criteria contained in the Act, its freight support services applications do not

Accordingly, the Council's recommendation is that the rail service to which SCT seeks access be declared but that the freight support services to which SCT seeks access not be declared.

Recommended Duration of Declaration of the Rail Service

Section 44H(8) of the Act requires that every declaration include an expiry date. The period of declaration is considered by the Council on a case-by-case basis taking into consideration the need to balance business certainty as against technological development or other industry changes.

Balancing these considerations and taking into account the infancy of access arrangements in the rail industry in Australia and the need to review these arrangements, the Council believes that the duration of declaration of the rail service should be 15 years.

**DECISION ON APPLICATIONS BY
SPECIALIZED CONTAINER TRANSPORT
FOR DECLARATION OF A RAIL SERVICE
AND
FREIGHT SUPPORT SERVICES
PROVIDED BY WESTRAIL**

STATEMENT OF REASONS

1. INTRODUCTION

On 25 July 1997, the National Competition Council (the Council) received five applications from Specialized Container Transport (SCT) to recommend the declaration of a rail service and freight support services provided in Western Australia. These services are provided by Westrail, the business name of the Western Australian Government Railways Commission, a statutory authority responsible for managing the State's rail infrastructure. Given Westrail is known in the industry by that name, the Council refers to the Western Australian Government Railways Commission as Westrail throughout this Statement of Reasons.

Access Seeker

SCT currently provides an interstate rail freight forwarding and distribution service from Sydney/Melbourne to Perth. It commenced the Melbourne to Perth service in July 1995 and currently operates two train services between those cities each way per week. SCT has reached an agreement with Rail Access Corporation in New South Wales and will commence a freight service between Sydney and Perth from the middle of 1998. The company began operations in 1974 as a freight forwarder and has warehousing facilities in Sydney, Perth, Brisbane, Melbourne and Adelaide.

SCT is seeking declaration of the Kalgoorlie-Perth rail service, the arriving/departing service, the marshalling/shunting service and fuelling service provided by Westrail so that it can continue to offer its interstate freight forwarding and distribution service. It currently carries freight on Westrail track between Kalgoorlie and Perth continuing on from the transcontinental railway owned by Australian National which traverses South Australia from Victoria and New South Wales into Western Australia. Definitions of the services and grounds for support of the applications were provided in the applications.

Infrastructure Owner

Westrail is a statutory authority established under section 8 of the **Government Railways Act 1904** (WA) and is directly responsible to the Minister for Transport in Western Australia.

Section 13(1) of the Government Railways Act provides that Westrail has the management, maintenance and control of every railway owned by the Western Australian Government. Westrail, therefore, provides freight (mainly bulk freight), passenger and related transport in Western Australia.

Under section 13(2), Westrail has the power to:

- purchase, hold, take on lease, exchange or otherwise acquire, sell, lease or otherwise dispose of, and deal in, real and personal property; and
- enter into, assign and novate contracts, and execute all such instruments,

as may be required for purposes of construction, operation, alteration, improvement, management, maintenance, or control of any railway.

The Act also gives Westrail the power to set charges for the use of the railway or associated services.

Process

The Council is required to assess SCT's applications against criteria under Part IIIA of the *Trade Practices Act 1974* (Act) and to make recommendations to the Western Australian Premier as the designated Minister in accordance with section 44D of the Act. In considering an application for recommendation that a service be declared, the Council must consider section 44F(4) of the Act and be satisfied of the matters listed in section 44G(2).

The Council adopted a public consultation process in assessing these applications and placed advertisements in major newspapers on 8 August 1997 seeking submissions from interested parties by 19 September 1997. An Issues Paper was released to assist interested parties in preparing submissions. **Three** submissions were received, raising issues relevant to the Council's assessment. These issues are considered in the discussion which follows.

Westrail supplied a confidential version and a general release version of its submission. The Council accepted the confidentiality request in respect of commercially sensitive information contained in the confidential version of the submission.

In reaching its decisions the Council also referred to comments and issues raised previously in submissions received in response to other applications for declaration of rail lines including:

- Carpentaria Transport Pty Limited's Application for Declaration of Specified Rail Freight Services provided by Queensland Rail and operated from Brisbane to Mackay, Cairns and Townsville by Queensland Rail (**Carpentaria's QR rail application**);
- Specialized Container Transport's Application for Declaration of a Rail Service provided by Rail Access Corporation and operated from Sydney to Broken Hill in New South Wales (**SCT's RAC rail application**); and
- NSW Minerals Council Ltd's Application for Declaration of a Rail Service provided by Rail Access Corporation and operated in the Hunter Valley region in New South Wales (**Minerals Council's NSW rail application**)

2. THE APPLICATIONS

Section 44F(1) of the Act provides for any person to make a written application to the Council asking the Council to recommend under Section 44G that a particular service be declared. An application must contain the information specified in regulation 6A of the Trade Practices Regulations in order to be an application for the purposes of the Act.

The Council considers that it has received valid applications from SCT. The applications contain the information required by regulation 6A of the Trade Practices Regulations.

Good Faith

Section 44F(3) of the Act states that “the Council may recommend that the service not be declared if the Council thinks that the application was not made in good faith”.

The Council considers that the criterion “not in good faith” is designed to eliminate trivial applications and those applicants who are obviously vexatious or are applying only to put the service provider to the unnecessary expense of responding to an access declaration application. It is clear that these applications would not fall into those categories.

Westrail submitted that SCT already has access to Westrail services and that access to the main line from Kalgoorlie to Perth would continue.

An application to seek declaration of a service where access is already provided is not precluded by the Act. In fact, it is clearly contemplated by section 44G(2)(a) and (f). These provisions refer to “access (or increased access)”.

The Council has no grounds to suggest that the applications have not been made in good faith in accordance with section 44F(3).

Background

Westrail submitted that the real issue between Westrail and SCT is the lengthy and ongoing negotiations that have yet to result in a commercial access agreement. In Westrail’s opinion, it is the lack of a formal agreement that has led SCT “to seek NCC intervention in what should be a commercial negotiation”.¹

SCT states, among other things, that Westrail is impeding the facilitation of SCT’s existing service, is being ‘dilatory’ in negotiating a more formal agreement and is proposing to impose unreasonably high access charges.

In its defence, Westrail states that while negotiations have been slow, it is negotiating in good faith and this is evidenced by it continuing to allow SCT to have access to its services despite the lack of an agreement. Further, Westrail advises that the purpose of its track access pricing policy is to ensure that all interstate freight operators are treated equitably.

Disagreement about terms and conditions of access, including pricing is not relevant to any criterion considered by the Council. The terms and conditions of access are reached in negotiation between the parties and if no agreement can be reached, by arbitration. Any concerns about the market

¹ Westrail submission, p. 10

conduct of either party falls within Part IV of the Act, for which the Australian Competition and Consumer Commission (ACCC) is responsible, not the Council.

In assessing the applications, the Council's concern is only whether the facilities and the services have the necessary characteristics to meet the criteria for declaration.

The Services

A threshold issue for the Council to consider is whether the services to which access is sought come within the meaning of "service" in section 44B of the Act.

Section 44B of the Act defines "service" as:

a service provided by means of a facility and includes:

- (a) the use of an infrastructure facility such as a road or railway line;*
- (b) handling or transporting things such as goods or people;*
- (c) a communications service or similar service;*

but does not include:

- (d) the supply of goods; or*
- (e) the use of intellectual property; or*
- (f) the use of a production process;*

except to the extent that it is an integral but subsidiary part of the service;

In its applications SCT has defined the services to which it seeks access as:

(i) rail service

The service in respect of which declaration is sought is the use of the Westrail railway network and associated infrastructure between Kalgoorlie and the Perth metropolitan area including access to the Forrestfield yard and the branch from the yard to the SCT terminal at Welshpool and access to the proposed Canning Vale terminal of SCT to allow SCT to run freight trains providing a two-way transcontinental service between Sydney, Melbourne and other eastern cities and Perth. This service includes entitlements to train paths that are presently used for SCT trains, other paths that have been tentatively agreed with Westrail and other paths that are acceptable to SCT and the management by Westrail and of the running of all trains on the network to allow expeditious transit by SCT trains.

Where necessary and practicable, the service would include the right to have sidings and/or loading facilities and/or other facilities related to SCT freight trains established on the associated infrastructure and/or connected to the network.

The facility in respect of which declaration is sought is the standard gauge railway between Kalgoorlie and Perth and, where necessary, within the Perth metropolitan area. The facility include the railway network and associated infrastructure and facilities on and related to this.

(ii) arriving/departing service

the arriving and departing services at the Forrestfield yard in respect of SCT freight trains operated on Westrail track and planned to be operated ...;

SCT's trains are 1.8 to 1.9 kilometres long and include some 65 wagons. When a train arrives in Perth it is parked in an arrival road, which is a track that is long enough to accommodate SCT's long trains, and the locomotives are removed. When the train is ready to make its return journey, the locomotives, which have been refuelled, sanded and maintained, are attached to the train in preparation for its departure.

(iii) marshalling/shunting service

the marshalling and shunting services in respect of SCT freight trains operated on Westrail track and planned to be operated including such services at the Forrestfield yard and on and between the siding of SCT at Welshpool, the siding of K&S at Welshpool and the Forrestfield yard ...;

Once a train has been parked, shunting locomotives break the wagons into consists, being groups of some 20 wagons which are parked in the classification roads and then moved to SCT's siding for unloading. Occasionally the consist is even smaller with wagons containing goods that require urgent delivery being separated from the others and moved to the siding.

The opposite occurs in preparing a train for departure. The shunting locomotives take the readied wagons from the siding to the classification roads and then placed in the arrival road until the entire train is complete and ready to depart.

(iv) marshalling and shunting access

the use of the Westrail network and associated infrastructure to enable SCT to undertake its own marshalling and shunting activities in respect of SCT freight trains operated on Westrail track and planned to be operated including such activities at the Forrestfield yard and on and between the siding of SCT at Welshpool, the siding of K&S at Welshpool and the Forrestfield yard ...

The marshalling and shunting access will be required if, and when, SCT and Westrail reach agreement on SCT undertaking its own shunting rather than have Westrail provide the Marshalling and Shunting Services. In such an instance, SCT would not require "marshalling and shunting services" but would require "shunting and marshalling access" in lieu to enable it to operate its own shunting locomotives in carrying out its own marshalling and shunting activities.

and

(v) fuelling service

the fuelling services in respect of SCT freight trains operated on Westrail track and planned to be operated including such services at and between Kalgoorlie and the Perth metropolitan area and within the Perth metropolitan area.

Where appropriate the arriving/departing service, marshalling/shunting service, marshalling/shunting access and fuelling service will be referred to collectively as "freight support services".

In relation to SCT's definition of rail service set out above in (i), the Council wishes to clarify that the process of declaration gives a third party an enforceable right to negotiate the terms and conditions of access and a right to arbitration if required. Declaration does not give a third party any right of exclusivity to specific train paths nor does it give a third party any automatic right to establish facilities on, or in connection with, the declared service. Any right by a third party to specific train paths or to establish facilities on, or in connection with, the declared service can be resolved by arbitration.

FreightCorp submitted that the freight support services do not pass the threshold issue of whether they are services for the purposes of section 44B of the Act.

According to FreightCorp, before a freight support service can fall within the ambit of the definition of "service" set out in section 44B, the facility to which it relates must be significant. That is, the facility must be integral to the rail service which is the subject of SCT's rail service application. In FreightCorp's opinion:

In the context of the applications for support services, it could be argued that significance may be determined by the extent that the facilities are necessary to give effect to the service covered in SCT's "main" declaration application for the interstate rail service.²

The Council is required to assess each application it receives on its merits. Each application is assessed independently from all other applications even where the services are linked.

Service is clearly defined as meaning "a service provided by means of a facility" and is defined as such to clarify what a service is for the purposes of Part IIIA. The use of the word "includes" in the definition indicates that the definition is not exhaustive. The definition does not specify that a service only falls within the ambit of the definition set out in section 44B if the facility providing the service is significant. Whether or not a facility is significant for the purposes of Part IIIA of the Act is determined under the section 44G(2) criteria.

The Council, therefore, considers that the rail service and freight support services to which SCT seeks access clearly come within the coverage of section 44B of the Act.

The Facilities

The applications define the facilities necessary to provide -

(i) the rail service as:

the standard gauge railway between Kalgoorlie and Perth and, where necessary, within the Perth metropolitan area. The facility includes the railway network and associated infrastructure and facilities on and related to this.

(ii) the arriving/departing service as:

the standard gauge track within the Forrestfield yard that is used to arrive and depart SCT's freight trains.

(iii) the marshalling/shunting service as:

² FreightCorp submission, p. 5

the standard gauge track in the Perth metropolitan area and fully-maintained and crewed shunting locomotives ... for the selection and movement of blocks of wagons between the Forrestfield yard and SCT's terminal ... and K&S' terminal ...

(iv) the marshalling/shunting access as:

the standard gauge track in the Perth metropolitan area that is necessary for SCT to undertake its own convenient breaking down of SCT's freight trains ... for the selection and movement of blocks of wagons between the Forrestfield yard and SCT's terminal ... and K&S' terminal ...; and

(v) the fuelling service as:

the equipment used by Westrail to fuel SCT's existing and planned trains ...

To summarize, the facilities defined in the freight support services applications, include:

a suitable terminal, shunting locomotives, crewing and a locomotive fuelling station or pad.

Crew as a facility

“Facility” is not defined in Part IIIA nor does the Draft Guide clarify what the Council believes can be considered a facility for the purposes of Part IIIA. However, the wording used in the Draft Guide indicates that the Council expects a facility to be an infrastructure as opposed to a person working the infrastructure.

“The Australian Concise Oxford Dictionary, 2nd edition”, defines facility as being, among other things, “an opportunity, the equipment or resources for doing something”. This definition suggests that a facility is an object or infrastructure as opposed to a person.

In the Council’s opinion, crew is not a facility for the purposes of Part IIIA criteria. The Council, however, acknowledges that the use of the crew is relevant to any agreement reached between parties in the event a service is declared. Refusal by a service provider to allow its crew to work to provide the service, where there is no alternative, would be in breach of section 44ZZ of the Act (Prohibition on hindering access to declared services).

Remaining facilities

The Council notes, therefore, that for the purposes of SCT’s applications, it is considering declaration of services which provide for use of:

rail service application

- standard gauge railway lines between Kalgoorlie and Perth and within metropolitan Perth including the the branch line from the main line to SCT’s siding;
- associated infrastructure and facilities integral to providing access to these lines; and

freight support services applications

- standard gauge railway lines within metropolitan Perth including Forrestfield yard’s rail infrastructure, shunting locomotives, crew and a fuelling station or pad.

In the SCT’s RAC rail application’s ‘Reasons for Decision’ the Council accepted New South Wales’ definition of “rail infrastructure facilities” as indicative of what industry considers to be associated infrastructure facilities. According to section 19A of the *Transport Administration Act (NSW) 1988 Act*, “rail infrastructure facilities”:

- (a) includes railway track, associated track structures, over track structures, cuttings, drainage works, track support earthworks and fences, tunnels, bridges, level crossings, service roads, signalling systems, train control systems, communications systems, overhead power supply systems, power and communication cables, and associated works, buildings, plant, machinery and equipment, and (subject to section 19B(2))*
- (b) does not include any stations, platforms, rolling stock, maintenance facilities, office buildings or housing, freight centres or depots, private sidings and spur lines connected to premises not vested in or owned by Rail Access Corporation.*

For the purposes of SCT's rail service application the Council considers services provided by "rail infrastructure facilities" to be services which are integral to providing access to standard gauge railway line between Kalgoorlie and Perth.

3. EVALUATING THE APPLICATION

The criteria against which the Council must assess the application are contained in section 44F(4) of the Act and sections 44G(1), (2) and (3). Those sections are reproduced below.

“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.*

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 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.”*

According to section 44G(1), where a service provider has provided an access undertaking to the ACCC in relation to a service the subject of an application, the Council cannot recommend declaration of that service. None of the services covered by the applications is the subject of a such an undertaking.

Section 44G(3) requires the Council to consider the relevant principles in the Competition Principles Agreement (CPA) when assessing whether an existing State or Territory Regime is effective. These principles are set out in clauses 6(2) to 6(4) of the CPA. As Western Australia has

not established a regime covering access to the Western Australian Rail Network, the Council is not required to consider the effectiveness of this regime in relation to SCT's declaration applications.

The criteria detailed in sections 44F(4) and 44G(2) of the Act are discussed below.

4. EVALUATION AGAINST SECTION 44 CRITERIA

Criterion (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service

Approach

The purpose of this criterion is to ensure that declaration is only recommended where there are or will be tangible benefits which flow beyond the service to which access is sought. Tangible benefits usually take the form of reduced prices, but can manifest in other ways that result in the cost of the input into a different market product being reduced.

To recommend that an application meets this criterion, the Council must be convinced that the service to which access is sought is not in the same market (in this case, being the "freight-transport" market) as the market in which competition is promoted (being an upstream or downstream market or, in other words, a "different" market). This question has been closely examined by the Council in response to previous rail applications.³

Competition will be promoted in different markets if the improved terms and conditions achieved in the freight-transport market influence the conditions upon which products are available to consumers in the different markets. When looking at how large these increases in competition need to be to satisfy this criterion, the Council has adopted the interpretation of "*would promote competition*" from its "Draft Guide to Part IIIA of the Trade Practices Act" (**Draft Guide**) which states that "*Part IIIA only requires that the action in question (specifically, providing access to an infrastructure service) would promote competition: while a trivial increase in competition would not satisfy this test, access would not need to substantially promote competition*"

Determining if access in the freight-transport market will improve product price, quality and/or availability in different markets requires the following three step approach:

1. **Assess the current level of competitiveness in the freight-transport market** - If the freight-transport market is already a competitive market, introducing Part IIIA processes to it will not increase competition and hence provide an improvement in its conditions that is sufficient to affect the competitiveness of different markets.
2. **Verify that markets in which competition is promoted are different to the freight-transport market** - Ensure that the products affected by access are in different markets, not in the freight-transport market. Access to a freight-transport service would also increase the competitive pressure on any of its substitute services. However, a close substitute would be in the same market and nomination of this product would not meet this criterion.

³ SCT's RAC rail application "Reasons for Decision", Carpentaria's QR rail application "Reasons for Decision" and Mineral Council's RAC rail application "Reasons for Decision".

3. Determine if access benefits are likely to be retained in the conditions upon which products are available in different markets:

- (i) The structure of the different market needs to be examined to see if the benefits flowing from access in the freight-transport market are likely to flow through to the prices and quality of products available in the different markets. The benefits are likely to be passed on if the different market is competitive. If the different market is uncontested, the benefits from access in the freight-transport market are likely to be absorbed by monopoly pricing.
- (ii) If the freight-transport service is an insignificant input into the different product, the benefits from access are unlikely to alter the competitiveness of the different market significantly.

Consideration of Criterion (a)

1. Assess the current level of competitiveness in the freight-transport market

The Council considers that the nature of the freight-transport market is such that people are seeking the movement of goods between two predetermined points. The various modes of transport available for the movement of goods, ie. air, sea, road, rail may present substitution possibilities for transportation.

Access is sought to the Kalgoorlie-Perth rail service for carriage of goods from Melbourne and Sydney to Perth via the transcontinental railway. Between these points, there is likely to be significant supply-side substitution between freight-transport services for different distances.

The Council takes the view that the geographic spread of the market is determined by the location of the infrastructure and the regions it services. Accordingly, the Council accepts the market in geographic terms as the interstate freight-transport market between Melbourne and Sydney, and Perth, including the provision of freight-transport services along the rail corridor.

The Council is not required by criterion (a) to undertake an assessment of the likely impact of SCT's proposals alone. Rather, the Council is required to make an assessment of the impact of access on competition in different markets. This access is likely to include operators other than SCT. However, the information provided by the applicant as to how it would continue to operate, should declaration be recommended, does provide evidence of the impact of access.

The Council considers that, in the context of SCT's applications, the key factor in defining whether competition would be promoted is the extent to which rail transport is substitutable for transport services provided by other modes (ie air, sea and road). If there is effective competition between modes then access would have very little effect on competition in the freight-transport market.

The Council has examined the issue of whether rail transport is substitutable in detail in response to previous rail applications, therefore, only a summary is provided in this Statement of Reasons.

Air Transport

The Council does not consider air and rail transport to be generally substitutable for each other. Cargo normally carried by air is extremely time sensitive and usually must be transported the same

day or overnight. As noted by the BTCE, competition with air freight services in a typical mainland corridor is usually confined to overnight express road freight services⁴.

The Council believes that, in the context of the interstate freight-transport market, competition between air and rail services would be very limited.

Sea Transport

The BTCE noted that rail and coastal shipping compete for consignments for which cost is a higher priority than transit time. The BTCE cited a study into competition between sea and rail transport commissioned by the National Transport Planning Taskforce in 1994, which investigated the feasibility of use of coastal shipping for transport of *non-bulk* freight. The Council notes that the study investigated several coastal shipping scenarios and found that the routes on which coastal shipping could be competitive with other transport modes included Melbourne-Adelaide-Perth but not Sydney to Perth. The study found that financial viability for a coastal shipping service relies on very long distance haulage, very high load factors and stable rail rates. The Industry Commission (IC) noted in its submission to the Council addressing SCT's RAC rail application that while it is feasible that rail could compete with sea for the transport of certain bulk freight between Sydney and Perth⁵, rail does not generally compete in this market. The Council believes that substitution is theoretically possible between sea and rail transport, however, it would appear to be confined to *non-bulk* freight.

In respect of *non-bulk* freight, the Council notes that the volume of *non-bulk* freight transported by sea between Sydney/Melbourne and Perth is low relative to total freight moved in this market.⁶ Consequently, the Council believes that opportunities for substitution of rail transport by sea transport, for the carriage of *non-bulk* freight, is limited. However, as BTCE has noted⁷, if rail freight rates were to decrease, it is likely that there are increased opportunities for the substitution of sea transport by rail transport for the carriage of non-bulk freight.

The Council has concluded that increased access to the Kalgoorlie-Perth service and freight support services is likely to cause the existing level of competition between rail and sea transport to increase.

Road Transport

The Council notes that the strongest competition to rail along this corridor is road. The BTCE has noted that the segment of the overall freight market for which road and rail compete is much larger than that covered by other modes, and that road and rail are in direct competition for cargo with a balance of time and cost sensitivity.⁸

The BTCE also noted that rail's greater share of the market between Adelaide and Perth compared with road indicates rail's advantage over road transport over long distance.⁹

The ABS data, included in the IC's submission¹⁰, indicate that the majority of freight transported between Sydney/Melbourne and Perth is non-bulk and that rail and road play the major transport

⁴ BTCE, Adequacy of Transport Infrastructure Multimodal, Working Paper 14.6, 1995, p. 30

⁵ Industry Commission submission to the National Competition Council on Specialized Container Transport's [RAC] Declaration Application, May 1997

⁶ Information derived from Australian Bureau of Statistics data provided by the IC in its submission, *ibid*, p. 16

⁷ BTCE, *op cit*, p. 26

⁸ *Ibid*, p. 11

⁹ *Ibid*, p. 27

role on this route. Data are not available for *non-bulk* freight carried intrastate in the Kalgoorlie-Perth corridor but according to SCT, intermediate rail haul distances are not economic and it limits its freight business to long line hauls.¹¹

Notwithstanding that rail clearly faces strong competition from road transport, the IC has commented in its submission that it is feasible that rail is the preferred transport mode for some *non-bulk* freight and that this could provide rail operators with a substantial degree of market power in this segment of the freight market.¹²

Indec Consulting has provided national data applicable to carriage of freight by road and rail which indicate that distance travelled is a factor in considering the propensity for customers to use rail transport over road.¹³ The data provided by Indec indicate the average rail distances are 260 kilometres compared with an average of 92 kilometres for road.

While Professor Ergas recognises the substitutability between road and rail for a range of freight, in his opinion:

*... what is relevant for market definition is whether they are such close substitutes that users of line haul service can with little penalty by way of additional current or capital cost shift from one mode to another. Absent such easy and relatively prompt substitution, the alternative of hauling goods by road will not discipline the market power of a sole supplier of haulage by rail.*¹⁴

Further, Professor Ergas notes that what has been observed historically:

*... is not the prompt substitution which characterises the discipline of competition within an area of close rivalry, that is, within a market; rather, it is a secular trend in which ... the relevant "proportion of freight rail transport to all freight forwarding transport has steadily declined in Australia". From an economic point of view, such a steady decline – which contrasts with experience in more competitive markets such as the United States – simply reflects those long-term changes in patterns of investment and consumption which occur when a monopolist (by raising prices or reducing quality) restricts output and hence induces shifts of resources to other uses.*¹⁵

The Council agrees that there are sufficient constraints on competition that access to these services would result in improved efficiencies and therefore increased competition in the transport of freight.

SCT already has access

Westrail argued that SCT already has access to the Kalgoorlie-Perth line such that competition would not be promoted or circumstances changed with the service being declared. The set of services and facilities over which access is sought are those currently used by SCT. According to Westrail, SCT has not substantiated how the benefits claimed will occur by reason of a formal declaration recommendation.

¹⁰ IC, op cit, p. 16

¹¹ 'Private operators fight for slots on systems' Australian Financial Review, 7 October 1997

¹² IC, op cit, p. 21

¹³ Indec Consulting, submission addressing Carpentaria's QR rail application, p. 6

¹⁴ Ergas, H, Carpentaria Transport's submission to its application for declaration of a rail service in Queensland, 1997, p. 4

¹⁵ Ibid, p. 5. Quotes contained in the citation indicate Ergas citing Indec Consulting.

Declaration of the rail and freight support services would enable not only SCT but other third parties to gain access to those services. The Council accepts the view of Professor Ergas that “*Declaration will promote competition both by altering industry structure and changing market conduct and performance*”¹⁶. Therefore, access would be expected to place additional pressure on both Westrail and SCT to provide the best services possible, both in the freight transport and freight forwarding markets.

2. **Verify that markets in which competition is promoted are different to the freight-transport market**

As noted above, analysis of criteria (a) requires the Council to establish whether the service falls outside the market where competition is promoted.

The Council observes that in SCT’s applications it identified the market for freight transport by road, rail and sea between Sydney/Melbourne and Perth as the market in which competition will be promoted through access to the Kalgoorlie to Perth service and the freight support services. SCT, in all its applications, stated that:

“Access for an SCT freight train on the Sydney/Melbourne-Perth route would promote competition because it would enable SCT’s existing freight train service on this route to continue in competition with the services of National Rail Corporation and TNT. Access for SCT would also promote competition as the SCT service would be an additional service to road and sea services between Sydney/Melbourne and Perth.”

Rail and freight support services are inputs into freight-transport services (that is, the modal transport component of the freight forwarding service). This does not mean, however, that access to the rail and the freight support services is in the same product market as freight forwarding services. Access to the rail and freight support services also may require the customer to provide their own rolling stock and organise the accreditation necessary to become a rail operator and the logistical aspects of moving freight, in other words to provide a freight-transport service. In the case of a freight transport service, the customer purchases all of these aspects of the transport task as a single package. Therefore, the Council considers that access to rail and freight support services and freight transport are in different product markets, and access to rail and freight support services is clearly not substitutable for a freight transport service.

In considering the issue of functional separation, the Council has had regard to tests defined by Ergas to establish whether functional layers constitute separate markets. These tests are:

...whether the layers at issue are in fact separable from an economic point of view. The crucial question here is whether the transactions costs involved in the separate provision of the good or service at the two layers would not be so great to prevent such separate provision from being feasible...

While separability ... is a necessary condition for distinct functional layers to form distinct markets, it is not sufficient. Rather it must also be the case that serving each of these distinct layers requires assets specialised to that layer, so that supply-side substitution (in this instance in the form of movement from one layer to another) is not so immediate as to effectively unify the field of rivalry within which services at the two layers are provided. The specialised assets at issue may be physical assets (ie distinct capital equipment), human

¹⁶ Ibid, p. 5

capital, organisational skills and/or contractual assets more generally (that is, the explicit or implicit contracts required for service to be provided).¹⁷

Submitters to this application did not generally comment on issues of functional market dimension in respect of SCT's applications. However, in its submission responding to SCT's RAC rail application, TNT commented that:

"...SCT operates in at least two functionally distinct markets. The first being the market in which it "operates" a train (the linehaul market) and the second being the market in which it moves goods on a door to door basis for customers (the freight forwarding market)."

TNT further commented:

"SCT operates by obtaining track access and access to above track facilities from rail authorities. It then offers to freight forwarders the service of the movement of goods by rail or rail linehaul. Freight forwarders (including SCT) then package the rail linehaul service with a range of other services, such as pick up and delivery, consolidation of freight, providing or effecting insurance and offer that collection of services to those moving goods."

Therefore the Council believes that access to rail and freight support services and freight transport services are both:

- economically separable as the costs involved in providing the separate services are not so great as to not make it worthwhile; and,
- in different functional markets because the specific assets needed for use of the rail and freight support services also cannot be readily transferred to freight transport or forwarding services.

3. Determine if access benefits are likely to be retained in the conditions upon which products are available in different markets

SCT believes that:

there are several upstream markets in which its service would promote competition. These are the manufacturing market for the goods carried and the primary production or raw materials production market for the raw materials carried. The downstream market is the market in which groceries, other manufactured goods and primary products and other raw materials carried on the freight services are wholesaled or retailed. For example pet food or dairy produce manufactured in Sydney which is carried by a speedy, punctual and price competitive rail service to Perth is given access to the Perth wholesale and retail market for pet food and dairy products.

The freight component of goods in any market is substantial and growing, as there is an increasing trend in manufacturing generally towards larger plants which lower the costs of production but increase the average transport distance of products.

The Council notes that none of the submitters addressed this point, however, Westrail did state that "[a]s SCT already has access there is no certainty that a declaration will promote further competition"¹⁸.

¹⁷ Ibid

¹⁸ Westrail, op cit, p. 11

The Council considers that it has been agreed that rail freight rates have dropped significantly along those routes to which SCT currently has access. Generally, SCT notes that:

By June 1997, NRC had lowered its prices by 27% to 47% compared to what was proposed at the time of the start-up of SCT's trains (in July 1995). A further 9% reduction has just been implemented, effective 1 July 1997.¹⁹

The reduction in price cited by SCT is consistent with that quoted below by NRC. Further, SCT cited significant improvements in reliability and transit time, which are commensurate with the improvements realised in price.

The Council notes that NRC provided the following comment in its submission, responding to SCT's RAC rail application, on the impact of SCT's and TNT's entry to the Melbourne-Perth freight market:

In 1996, SCT and TNT each commenced running trains between Melbourne and Perth in competition to National Rail. As a direct consequence, freight rates charged to rail customers fell by up to 40%. Such a reduction is unlikely to have occurred without the advent of the new train operators.²⁰

It is also generally agreed, however, that rail has considerable room for improvement. The IC notes that:

the competitiveness of rail in transporting non-bulk freight could increase in future years. The entry of a new operator could contribute to this increase.²¹

The Council considers the freight forwarding market to be a highly competitive market and believes that this is reflected in the level of competition between freight forwarders encouraging users to forward freight by road versus rail versus sea.

According to SCT:

The reduction in east west transport costs following rail competition with NRC has a total benefit to Western Australian consumers of approximately \$60 million already and a further \$30 million this calendar year.

The Council expects such reductions in freight costs to be passed on to consumers by way of reduced prices to household goods and foodstuffs. No evidence has been provided to the Council indicating that the distributors of such products are not competitive.

Accordingly, the Council considers that the benefits deriving from access are likely to be retained in the conditions upon which products are made available in different markets. While the benefits from increased access are unlikely to be significant, the Council believes that the increase in competition in different markets would be more than trivial.

(i) rail service application

The Council observes that the market for carriage of non-bulk goods by rail between Melbourne and Perth via Kalgoorlie is currently serviced by NRC, TNT and SCT. The Council believes that the entry, and threat of entry, of other rail operators has a potential to enhance competitive pressures in

¹⁹ SCT rail service application at 7

²⁰ NRC submission addressing SCT's RAC rail application

²¹ IC, op cit, p. 23

this market, through lower prices and improved quality or new types of services which are likely to be offered by new operators seeking to gain a share in this market.

As evidence of this, the Council notes the capacity for competition between rail freight operators to enhance competitive pressures through lower prices and improved service quality. Increased competition is already being experienced by SCT's and TNT's entry to the Melbourne-Perth rail freight transport market. However, the Council believes that there is room for improvement.

SCT commenced its rail freight service between Melbourne and Perth in July 1995 and currently operates two services each way per week. SCT has advised the Council that it is seeking to increase this to three services per week.

The Council observes that SCT established itself in the Melbourne-Perth rail freight transport market in response to customer demand for transport of goods through use of louvred vans (following NRC's decision to phase out vans and replace them with containers). This group of customers distributes products which are transported more economically in vans than in containers, due to the limitations associated with loading pallets into containers. In responding to this customer need, SCT upgraded its vans to a higher travelling speed than was available when NRC operated a van service, introducing to the market a faster, less expensive and more reliable service than that previously operated by NRC.

SCT has provided the Council with information, on a commercial-in-confidence basis, regarding improvements in price, transit time and reliability of the Melbourne to Perth rail freight service which occurred following commencement of its operations.

NRC has commented that:

Although rail operators already face ... pressures in competition with other modes, the presence of an alternative within the same mode means there is a directly comparable example against which customers can judge performance.²²

Conclusion

The Council considers that this application meets this criterion. The increase in competition, through increased access, is unlikely to be large but it would be more than trivial. The Council agrees that declaration of the service would promote competition in a market other than the market for the service by improving the prospects for entry, innovation and market structure in the freight forwarding market.

The Council has concluded that access to the services provided by Westrail's facilities will result in improved competition within the market for freight forwarding. Increased competition is likely to be reflected in:

- increased cargo volumes, increased efficiencies and lower costs in freight forwarding;
- increased choice of freight forwarders which will encourage improvements in service and potentially lower prices; and
- the potential for new entrants providing a complete transport service, including new entrants to rail transport.

²² NRC, op cit

The increase in competition will not directly affect all aspects of the freight forwarding market. The evidence provided suggests there is already a substantial level of competition in much of the freight forwarding. For most non-bulk freight, it would appear, at this stage in the reform process, that road freight transport places a cap of rail freight rates.

However, the Council is satisfied that the opportunity for increased rail competition to impact on the non-bulk freight market will be enhanced for those segments of this market that see rail as the preferred transport mode. If substantial improvements were made in the efficiency of rail operations, an access regime could enhance competitive pressures in the transport of all non-bulk freight.

(ii) freight support services applications

As noted previously, SCT believes that access to these services would promote competition:

because it would enable SCT's existing freight train service on this route to continue in competition with the services of National Rail Corporation and TNT.

SCT argues that in examining the service provided by it, it is necessary to consider the network as a whole which includes the use of terminals at both ends of the line.

Westrail submitted that access to the freight support services would not promote competition as the services are provided exclusively to SCT. The Council notes that declaration of a service does not result in that service being reserved exclusively to the applicant but enables any third party to gain access to that service. Declaration of a service would require SCT to negotiate the frequency and time of access to that service with Westrail and SCT's access would be subject to the needs of other access seekers.

FreightCorp, in its submission, stated that while increased competition would result from access to the rail service, it would not result from access to the freight support services. According to FreightCorp:

The market for the provision of support services is distinct from that for linehaul rail services. It is perfectly possible for third parties to provide terminal, fuelling and maintenance services without being involved in train operations. There is an obvious relationship between access to interstate tracks and access to general support facilities for the purposes of operating interstate freight trains, but this relationship becomes more tenuous as the physical definition of the particular support facilities become[s] more precise.²³

While it is arguable that third parties, or SCT itself, are able to provide some or all of the freight support services, this does not suggest that the services are substitutable with non-rail freight support services. In the Council's opinion, these services are not substitutable. The ability of third parties to provide some or all of these services, however, does suggest that some or all of these services may be economic to duplicate. This question is examined under criterion (b).

The Council believes that providing access to track only would increase the benefits from access by providing greater scope for innovation in above rail services. The Council also believes that a freight forwarding service, of the kind provided by SCT, could not be provided without additional services such as those provided by the freight support services.

²³ FreightCorp submission, p. 7

In the short term, increased access to the existing freight support services certainly would make entry easier for potential competitors. It is arguable, however, that access to the existing freight support services would not promote competition in the longer term as declaring access could discourage further investment in the facilities that provide those services.

Conclusion

The Council considers that while access to the:

- (i) arriving/departing service;
- (ii) marshalling/shunting service;
- (iii) marshalling/shunting access; and
- (iv) fuelling service

would promote competition in the short term, in the long term competition is likely to be discouraged as investment in the necessary facilities to provide those services declines. The Council recognises that this interpretation of criterion (a) requires detailed analysis. As the freight support services applications do not satisfy criteria (b) and (c), however, the Council does not wish to consider this point in detail at this time. The Council, therefore, is not satisfied that SCT's freight support services applications meet criterion (a).

Criterion (b) that it would be uneconomical for anyone to develop another facility to provide the service

Section 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.

Approach

Criterion (b) requires the Council to determine whether it would be uneconomical for anyone to develop another facility to provide the service as a whole. Section 44F(4) requires the Council to consider whether it would be economical for anyone to develop another facility to provide part of the service. While criterion 44F(4) is discrete from criterion (b), because the analysis required by both criteria is similar, the analysis of criterion 44F(4) follows immediately after that of criterion (b).

In the Draft Guide, the Council stated its expectation that these criteria would limit the scope of access declarations to infrastructure with entrenched monopoly power, and usually infrastructure exhibiting natural monopoly characteristics. These criteria are intended to refer primarily to the services provided by infrastructure services which are not commercially viable to duplicate. In other words, those infrastructure which would make it difficult, if not impossible, to make an economic return on investment if duplicated.

In some instances, contiguous and complementary facilities combine to provide a comprehensive service, that is, if a person cannot access those facilities he or she cannot provide a service.²⁴ In the case of rail, this would encompass facilities such as signalling systems and level crossings.

²⁴ See "Third Party Access in the Water Industry" Tasman Asia Pacific 1997

However, there are also instances where it is economic to duplicate facilities that otherwise appear to be contiguous and complementary.

Criterion 44G(2)(b) requires the Council to consider whether it would be uneconomical for anyone to develop another facility to provide the service as a whole, not just whether it is uneconomical for SCT to duplicate the service. However, the information provided by the applicant as to the magnitude of the costs of duplication has been taken into account by the Council.

The Council recognises that legislative restrictions also may be pertinent in considering applications for declaration where they make it uneconomical, in effect, to build another facility. For example, the economic feasibility of duplicating infrastructure, in some cases, may be questionable due to environmental or planning restrictions.

A similar criterion to subsection 44G(2)(b) is subsection 44F(4). Section 44F(4) provides that 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 that 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”*.

It has been necessary for the Council to determine some guidelines for dividing facilities which provide the service into parts for consideration under section 44F(4).

The Council agrees with the statement by Henry Ergas that:

the key question must be whether it is likely that an actual or potential market participant would find it commercially worthwhile to duplicate the facility in question.²⁵

The Council will identify those features of the facility which make it difficult for anyone to achieve economic returns on their investment. If one of these facilities can be economically duplicated, the Council will determine whether or not that facility is integral to the service. If the Council considers that the facility in question is integral to the service, then the option of recommending declaration remains available to the Council. However, if the Council considers that the facility in question is **not** integral to the service, then the Council will recommend that the service **not** be declared.

It is likely that part of the service will be commercially viable to duplicate when either:

1. the service is provided by several separate facilities; or
2. the service has a number of component parts which could be separated.

Consideration of Criterion (b) and Section 44F(4)

(i) rail service application

In relation to this application, SCT defines the service as *“the use of the Westrail railway network and associated infrastructure between Kalgoorlie and the Perth metropolitan area including access to the Forrestfield yard and the branch from the yard to the SCT terminal at Welshpool and access to the proposed Canning Vale terminal of SCT...”*. In subsequent correspondence, SCT confirmed that it was not seeking access to Forrestfield yard track infrastructure under this application.

²⁵ Ergas op cit, p.11

The line from Kalgoorlie goes to Perth and passes through the Forrestfield yard, and past SCT's siding and its proposed Canning Vale terminal, on its way to Kwinana.

The facility includes the main line and the length of the branch line from the main line to SCT's siding.

The Council is of the opinion that the rail service facility to which SCT seeks access is made up of more than one facility. These facilities are:

- the main line from Kalgoorlie through to SCT's proposed Canning Vale terminal; and
- the branch line accessing the SCT siding.

The line from Kalgoorlie to the Forrestfield yard is some 655 kilometres long and a further 15 kilometres from the Forrestfield yard takes the line to Canning Vale. The line to the SCT siding branches off in the Forrestfield yard and is some 4 kilometres in length.

As the service is defined in this case by linking the branch line to the main rail line, it is necessary for this analysis to consider whether it is uneconomic to develop another facility to provide:

- the total service (section 44G(2)(b)); and
- part of the service (section 44F(4)).

Duplication of facilities as a whole (section 44G(2)(b))

SCT states in its rail service application that the development of another facility to provide a rail freight service would entail building a totally new railway network from Kalgoorlie to metropolitan Perth, including the Forrestfield yard, the branch line to its siding and access to Canning Vale. (The main rail line owned by Westrail goes from Kalgoorlie, through the Forrestfield yard, past Canning Vale enroute to Kwinana.) SCT considers that there is ample capacity on the existing Kalgoorlie to Perth route and the metropolitan network and that it would be manifestly uneconomic to develop a totally new railway track. In addition, SCT states the following regarding criterion (b) in support of its application:

- *railway construction and extension is extremely protracted and costly (as the VFT proposal showed and as the current Speedrail and Alice Springs-Darwin railway proposals show);*
- *there is no practice in Australia of competing vertically integrated railways servicing the same centres; and*
- *the development of another railway line could not be financed.*

In its application SCT states that the facilities to which access is sought include:

... the standard gauge railway between Kalgoorlie and Perth and, where necessary, within the Perth metropolitan area. The facility includes the railway network and associated infrastructure and facilities on and related to this.

The Council notes that as the underlying cost structure of a new entrant is likely to be significantly higher than that of the incumbent facility owner, Westrail, investment in a competing facility is unlikely, particularly given that excess capacity and low usage is prevalent in much of Westrail's facility. The Council, therefore, considers that the duplication of the facilities necessary to provide the Kalgoorlie-Perth service is not commercially viable given the nature of the facilities which have 'natural monopoly' features.

Associated with the ‘natural monopoly’ features of the facilities is whether the service experiences excess capacity. The Council has relied upon the BTCE’s 1994 study²⁶ into the adequacy of Australian transport infrastructure in determining whether the Kalgoorlie-Perth service has the capacity to serve potential demand for access to this service. This study considered, among other things, the demands for rail freight transport in major transport corridors, including the Adelaide-Perth corridor, and the available rail capacity in these corridors. The BTCE derived the forecasts, in part, by examining NRC’s “*five year projections and reviewing the long-term impact of route changes ...*”.²⁷ The BTCE noted that the Adelaide-Perth rail corridor has one of the highest growth rates. This was attributed to rail’s advantages over road on high volume and long route distances. In regard to capacity on this line, the BTCE estimated its practical capacity in trains per day and found that the Adelaide-Perth corridor:

*performs well and has adequate capacity. Transit times will become deficient as competitors’ times improve. Improvements in transit time and reliability could be achieved by new rollingstock technology and track/rail quality management. An improved signalling system and longer crossing loops would allow trains to pass without stops.*²⁸

None of the submissions challenged the view that it would be uneconomic to duplicate the facility as a whole or that the service would not have sufficient capacity to absorb increased access.

The Council recognises the track involves substantial fixed costs (many of which are sunk), and relatively low variable costs. (The Council’s ‘Carpentaria QR rail application - Reasons for Decision’ provides details of what costs are involved in constructing a rail line.) The Council accepts the view that the Kalgoorlie-Perth rail line and associated infrastructure facilities are uneconomic to duplicate as a whole for the service.

Duplication of part of the facility (section 44F(4))

In the ‘Reasons for Decision’ provided by the Council in response to Carpentaria’s QR rail application, the Council closely examined the issue of whether the facilities providing the service to which Carpentaria sought a declaration recommendation, were highly integrated. Carpentaria argued that because the facilities “*used to provide the service include all infrastructure necessary to handle and transport the customers’ freight from terminal to terminal ... and encompasses all facilities necessary to provide the Service in a safe, efficient and timely manner*”²⁹, it was not possible to duplicate part of the service.

The Council determined that while the track was not economic to duplicate, the above rail facilities, such as locomotives and wagons, were economic to duplicate. As a consequence, the application did not satisfy section 44F(4).

In contrast, the Council notes that SCT’s rail service application is limited to track infrastructure only. As noted previously, the Council takes the view that associated rail infrastructure facilities, as defined by section 19A of the *Transport Administration Act (NSW) 1988*, are integral to providing the Kalgoorlie-Perth service. The Council considers that these associated rail infrastructure facilities are not separable for the purposes of assessing duplicability, from the tracks associated with the Kalgoorlie-Perth service. These facilities, therefore, raise no issues under section 44F(4) of the Act.

The Council, however, notes that SCT is seeking access to the use of:

²⁶ BTCE, Adequacy of Transport Infrastructure Rail, Working Paper 14.2, 1994.

²⁷ Ibid, pp. 27-28

²⁸ Ibid, p. 43

²⁹ Carpentaria’s QR rail application, p. 5

- the railway line operated by Westrail between Kalgoorlie and Perth up to SCT's proposed terminal at Canning Vale; and
- the branch line accessing SCT terminal's at Welshpool.

Westrail questioned whether the line through the Forrestfield yard to the branch line to SCT's siding at Welshpool were separate facilities that could be economically duplicated.

In Westrail's opinion, access to the Forrestfield yard and to the branch line does not meet the criterion. According to Westrail:

These facilities will be effectively surplus to SCT's requirements when their move to Canning Vale is complete. SCT at its own cost will provide train arrival lines and marshalling facilities at Canning Vale, which is indisputable proof that it is not uneconomical to develop alternative facilities.

Westrail notes that NRC and TNT, on the whole, manage their own train arrival and departure and marshalling needs.

The Council notes that the rail service application does not include the arriving/departing service and marshalling/shunting service. SCT has applied for declaration recommendations in relation to these services through separate freight support services applications. What SCT is seeking to have declared is the service provided by way of the railway line operated by Westrail through, and to, the Forrestfield yard, to SCT's proposed Canning Vale terminal and the length of branch line to SCT's siding at Welshpool.

The Council notes that the railway line from Kalgoorlie to Canning Vale is the main route upon which the rail service is provided. As discussed above (under 'Duplication of facilities as a whole'), the Council recognises the track involves substantial fixed costs and relatively low variable costs and it accepts the view that the Kalgoorlie-Perth rail line and associated infrastructure facilities are uneconomic to duplicate.

In the Council's opinion, however, the branch line leading off from the main line to SCT's siding is a separate facility. Therefore, the Council is required to determine whether this facility is economic to duplicate for the purposes of section 44F(4). If the Council determines that the branch line is economic to duplicate, the Council must then consider whether or not that facility is essential to the rail service.

Branch line

The cost of duplicating a branch line is significantly less than the cost of duplicating a main line. It is also true that many private companies build their own spur lines to enable them to access the main line from their premises.

Circumstances in each case, however, can influence the Council's analysis of what is economic to duplicate. As an example, suppose a third party was unable to access the branch line which led to its private siding and it proposed building its own branch line instead. While carrying out a feasibility study the third party found that the land, over which it anticipated building the line, was in the process of being redeveloped or was subject to restrictive zoning requirements which substantially escalated the cost of duplicating the branch line. This could result in the branch line being uneconomic to duplicate.

Further, the Council is aware that while branch lines are sometimes economic to duplicate, they also can be essential to a rail service. This is particularly so where private establishments, owned by third parties, are located at the end of a branch line which is owned by a service provider. Basically, there can be no rail service if a rail operator cannot access its facility which loads and unloads the train.

Support for this view can be found under Part IIIA of the Act. According to section 44V, the ACCC, in making a determination on access, can require a service provider to extend the facility (at the third party's expense) to facilitate a third party's access. In the case of rail, this may occur where the third party has its establishment situated a few kilometres from the main line and requires a branch line to connect it to the main line. In effect, the service cannot be provided until such time as the third party is connected to the main line.

In relation to SCT's rail service application, the Council considers the branch line to SCT's siding at Welshpool is not only difficult to duplicate but also is integral to the service to which access is sought. SCT's privately owned siding is located at the end of the branch line and the only means of accessing this siding by rail is by way of the branch line. The branch line is on land owned by Westrail (an area known as Welshpool) and land that might be available to duplicate the branch line likewise is owned by Westrail. Westrail advises that it is in the process of rationalising its land holdings which includes redeveloping the Welshpool area. Therefore SCT's prospects of negotiating reasonable access to the land in order for it to duplicate the branch line are limited.

In order for SCT to be able provide its freight forwarding service, it is essential for it to be able to access its siding. For the purposes of section 44F(4), therefore, the Council considers that, in these circumstances, the branch line is not economic to duplicate. However, the Council considers that even if the branch line could be economic to duplicate the Council would not be precluded, under section 44F(4), from recommending declaration. As a point of clarification, the Council would be likely to recommend declaration in these circumstances only because the branch line is integral to the service to which SCT seeks access.

Conclusion

For the reasons set out above, the Council considers that SCT's rail service application meets criteria (b) and 44F(4).

(ii) freight support services applications

In relation to its arriving/departing application, SCT defines the service as the *“arriving and departing services at the Forrestfield yard in respect of SCT freight trains operated on Westrail track and planned to be operated...”*.

In relation to its marshalling/shunting services application, SCT defines the service as the *“marshalling and shunting services in respect of SCT freight trains operated on Westrail track and planned to be operated including such services at the Forrestfield yard and on and between the siding of SCT at Welshpool, the siding of K&S at Welshpool and the Forrestfield yard ...”*.

In relation to its marshalling and shunting access application, SCT defines the service as the *“use of the Westrail network and associated infrastructure to enable SCT to undertake its own marshalling and shunting activities in respect of SCT freight trains operated on Westrail track and planned to be operated including such activities at the Forrestfield yard and on and between the siding of SCT at Welshpool, the siding of K&S at Welshpool and the Forrestfield yard ...”*.

Finally, in relation to its fuelling services application, SCT defines the service as the *“fuelling services in respect of SCT freight trains operated on Westrail track and planned to be operated including such services at and between Kalgoorlie and the Perth metropolitan area and within the Perth metropolitan area.”*

SCT states in its applications that the facilities required to provide the freight support services *“entail a suitable terminal, shunting locomotives, crewing and a locomotive fuelling station or*

pad.” SCT acknowledges that it is possible to duplicate these facilities and that it is, in fact, in the process of doing so. However, SCT argues it is not possible “*for anyone to develop another such facility in less time than SCT will take and thus it meets the ‘uneconomic’ test for that period of time.*”

While access to track does include access to those ancillary facilities necessary and inseparable from the use of the track, for example, signalling, it does not include those above rail elements included in the freight support services applications. While there is no disagreement that the main rail track is uneconomic to duplicate, Westrail and FreightCorp in particular do not agree that the freight support services are uneconomic to duplicate.

SCT admits that these facilities, including Forrestfield yard’s rail infrastructure, can be duplicated but argues that it is not economic to duplicate the facilities within the time available to them. According to SCT:

*SCT is seeking to develop a facility at Canning Vale to provide all these services. It commenced this in late 1996. It would not be possible for anyone to develop another such facility in less time than SCT will take and thus it meets the ‘uneconomic’ test for that period of time.*³⁰

Therefore, SCT argues that:

*...as it is impossible to develop the capability **for that period of time** it must follow that it is uneconomic to develop the capability **for that period of time**. It is only **for that period of time** that SCT is seeking the declaration recommendation.*³¹

SCT has requested that the freight support services be declared until the end of 1999 to enable it to complete the duplication of the relevant facilities.

The Council examined whether or not some of the facilities used to provide some of the freight support services were economic to duplicate in Carpentaria’s QR rail application - “Reasons for Decision”. In that application the Council was asked to recommend declaration of a service which was provided by a number of facilities including, among other things, locomotives and terminal facilities. In its analysis the Council decided that facilities such as locomotives and terminals were economic to duplicate.

As SCT argues only that it is uneconomic to duplicate the facilities within the time available to it, the Council will limit its examination of economic to duplicate to the question of timing.

Timing

While Westrail concedes that it may not be possible for SCT to develop alternative facilities in the time available to it, Westrail argues that this time constraint is one “*which SCT has through its own choice left itself with*”.³² Further, in Westrail’s opinion:

*what is economical in such circumstances is, we believe, a business decision that only SCT can make based upon its own long term business strategy.*³³

³⁰ SCT freight support services applications, p. 8

³¹ Ibid, emphasis in original

³² Westrail submission, p. 15

³³ Ibid

SCT, in response, states that the reason its development at Canning Vale has been delayed is due to “the time that is necessary for due process to take place”.³⁴

FreightCorp submits that the policy intent of criterion (b) is to focus on facilities that require substantial upfront investment and where it does not make economic sense to build a second facility. In FreightCorp’s view, the freight support services do not satisfy this standard. Further, FreightCorp argues that the Council should not incorporate time constraints into its analysis of ‘economic to duplicate’. According to FreightCorp:

*Declaration of the freight support services would create a right for any potential operator to negotiate access, not merely SCT. In such a circumstance, declaration may have an unintended policy consequence in that while initial declaration may have been for a fixed short term period designed to accommodate the applicant’s development timescale, the outcome could result in extended declaration through a series of applications. The rationale for this derives from the fact that individual new operators may pursue a similar argument to that of SCT while developing their own facilities.*³⁵

The Council notes there is a potential for access regulation to diminish incentives for businesses to invest in freight support facilities and thus limit, rather than enhance, overall competition and economic efficiency. These are reasons why the criteria for declaration were designed to ensure that they would lead to declaration being applied to large, nationally significant pieces of infrastructure, so that the potential benefits were strong and would outweigh the costs. The Draft Guide notes that:

*A key indicator of natural monopolies is the existence of pervasive “economies of scale”. Economies of scale arise where, as a business increases its output, the average costs of each unit of the output get smaller.*³⁶

The issue of timing has not been included in the Part IIIA criteria. If a service is declared under Part IIIA, it entitles any third party to negotiate access to that service during the period it is declared. While SCT may be working under considerable time constraints, this is a factor which is peculiar to SCT and which may not be the situation for any other third party. However, declaration of such a service, even for a short period of time, would expose that service to a third party seeking access rights even when that party is able to readily duplicate the facility providing the service.

Further, to declare services that can be, by all measurements, economic to duplicate solely because an applicant is experiencing time constraints is likely to discourage investment and innovation by infrastructure owners and potential competitors. It is likely to also introduce uncertainty into the practical application of the Part IIIA regime.

The purpose of establishing Part IIIA was to encourage competition in areas that were restricted, by reason of natural monopolies, to the owners of the infrastructure. In determining whether a facility is economic to duplicate the Council is obliged to address the actual cost of duplication and its economic consequences. Therefore, the Council does not accept SCT’s contention that the test includes whether or not it is economic to duplicate within a specified period of time.

Conclusion

The Council believes that the Westrail facilities used to provide the:

³⁴ SCT’s response to Westrail and FreightCorp’s submissions, p. 3

³⁵ FreightCorp submission, p. 8

³⁶ Draft Guide to Part IIIA of the Trade Practices Act, p. 23

- (i) arriving/departing service;
- (ii) marshalling/shunting service;
- (iii) marshalling/shunting access; and
- (iv) fuelling service

are economic to duplicate. The Council, therefore, considers that SCT's freight support services applications do not meet criterion (b).

Criterion (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.**

Approach

The Council notes that this criterion applies to the facilities in question and not the services to which the applicant is seeking access.

In its Draft Guide the Council referred to this criterion as a "test of materiality". In identifying infrastructure which is nationally significant, the Council will have regard *only* to the three points above, thus placing less important facilities outside the scope of the National access regime.

The Council noted that the size of a facility may indicate its national significance, while in some cases this test may be inconclusive. The Council also noted that "it is possible for nationally significant infrastructure to be situated entirely within the borders of a single State or Territory".

A facility which is important to constitutional trade or commerce will be considered nationally significant. This may be indicated by the monetary value of trade dependent on the infrastructure service or the importance of the service to trade or commerce in related markets.

In addition, the Council stated that it would assess the importance of an infrastructure service to the national economy, particularly by examining the market in which access would promote competition. In considering national significance, it would have regard to the annual sales revenue of businesses in that market and whether providing access would be likely to substantially promote competition.

Consideration of Criterion (c)

In considering whether SCT's applications meet criterion (c), the Council has considered the national significance of the facilities which provide the services to which SCT seeks access. These facilities constitute the standard gauge railway line between Kalgoorlie and Perth, the terminal and its rail infrastructure, shunting locomotives, crew and a locomotive fuelling station or pad.

(i) rail service application

As noted previously, the Council takes the view that the associated rail infrastructure facilities are integral to providing the Kalgoorlie-Perth service. These associated facilities, therefore, are not separable for the purposes of assessing national significance.

In relation to criterion (c), SCT stated the following in its application:

The existing railway Sydney/Melbourne to Perth is of national significance because it forms part of the railway which links the major cities, at the eastern and western extremities of the nation.

The railway carries an estimated 70% of all freight on the east-west corridor.

A transcontinental railway, of which the subject Kalgoorlie-Perth portion forms part, has been of national significance as shown by the Australian government's construction operation and financing of a substantial part of this railway.

Submitters generally agree that the main line from Kalgoorlie to Perth is of national significance.

The Size of the Facility

The Council notes that the Kalgoorlie-Perth line is the sole rail route linking the eastern and western states. The Kalgoorlie-Perth line is approximately 655 kilometres in length and the Council is aware that the estimated cost of duplicating these lines is between \$1.0 and \$1.5 million per kilometre.³⁷ Accordingly, the Council considers the facilities to be nationally significant on the basis of size.

The Importance of the Facility to Constitutional Trade or Commerce

The data included in the IC's submission responding to SCT's RAC rail application suggests that a significant volume of non-bulk freight is transported between Sydney/Melbourne and Perth via the Kalgoorlie-Perth line³⁸. The Council has had regard to this data and the monetary value of interstate trade which it implies is carried interstate from Sydney and Melbourne. Considering this, the Council believes the facilities to be nationally significant on the basis of their importance to commerce between the States.

The Council therefore believes that the Kalgoorlie-Perth line is strategically significant to movements of goods by rail interstate. Consequently, the Council considers these facilities to be nationally significant on the basis of their importance to interstate commerce.

The Importance of the Facility to the National Economy

The Council also notes the strategic significance of the lines, due to their location, and its practical implications for use of the lines for national commerce and trade. As stated previously, the Council considers that the nature of the freight transport market is such that people are seeking the movement of goods between two predetermined points. While the various modes of transport available may present substitution possibilities, rail is the preferred and/or required mode of transport for certain bulk and non-bulk freight.

The Kalgoorlie-Perth line provides a vital link between the important economic centres, many of which depend on rail transport for carriage of the commodities which they produce, in the eastern states and Western Australia.

In the Draft Guide, the Council noted that in assessing the importance of an infrastructure service to the national economy, it would examine the market in which access would promote competition. The Council stated that it would generally consider national significance to be established if:

³⁷ Bugler op cit p. 6

³⁸ IC, op cit.

1. such a market provides substantial annual sales revenue to businesses in it; and
2. providing access would be likely to substantially promote competition.

Having regard to the:

- prospects that access will facilitate entry of other rail freight operators to the market for carriage of non-bulk goods; and
- the probability that entry of other operators would promote competition;

the Council considers the facility to be nationally significant on the basis of its importance to the national economy.

Conclusion

For the reasons set out above, the Council considers that SCT's rail service application meets criterion (c).

(ii) freight support services applications

In relation to criterion (c), SCT stated the following in its applications:

The support services are of national significance because they are essential to, and an integral part of the nationally significant transcontinental railway service operated by SCT.

These facilities which SCT identifies as necessary to enable these services to be provided are a terminal, shunting locomotives and a locomotive fuelling station or pad.

Westrail submits that the facilities which provide the freight support services cannot be regarded as nationally significant because:

the services which support the access to the infrastructure itself are not fundamentally essential infrastructure. These support services are not a natural monopoly.

The Council is of the view that a facility need not meet the "natural monopoly" criterion in order for it to be regarded as nationally significant.

FreightCorp:

is of the opinion that while it is legitimate for the Council to consider the relationship between the services for which declaration is sought and other services for the purposes of criterion (a), in the context of this criterion it is only appropriate to consider the dimensions of the particular facilities providing the services for which declaration is sought. With specific reference to the provision of rail support services, none of the facilities are of national significance by virtue of their size, importance to trade or the national economy.³⁹

The importance of the facilities to freight support services and the rail service is relevant to the Council's assessment of whether the freight support facilities are nationally significant. However, each application is assessed on its merits independently and separately from all other applications even where those services are linked.

The Council examined the national significance of a number of facilities while assessing Carpentaria's QR rail application. Accordingly, the Council will draw on the reasoning set out in its

³⁹ FreightCorp submission, pp. 10-11.

Carpentaria QR rail application - “Reasons for Decision” in assessing the freight support services applications.

The Size of the Facilities

The Council is not convinced that facilities such as terminals, shunting locomotives and locomotive fuelling stations or pads can be considered as nationally significant on the basis of their size. While the Forrestfield terminal is a reasonable size, it is not large when compared to terminals in other capital cities. The Council also considers that the sizes of the shunting locomotives and the fuelling stations or pads are not large enough to be considered as nationally significant.

Accordingly, the Council does not believe any of the freight support facilities to be large enough to satisfy this sub-criterion.

The Importance of the Facilities to Constitutional Trade or Commerce

According to SCT, the rail line from Kalgoorlie to Perth carries some 70% of all freight on the east-west corridor. The data included in the IC’s submission responding to SCT’s RAC rail application indicates that as of June 1995, rail carried some 58% of all freight between Sydney and Perth while as of September 1995, rail carried some 45% of all freight between Melbourne and Perth.⁴⁰

It is not clear, however, what percentage of this freight uses the freight support services. That is, it is not clear to what extent the terminal, shunting locomotives and fuelling station or pad facilities contribute to the volume of interstate trade and commerce.

The Council is aware that both NRC and TNT make their own locomotive and fuelling arrangements and that both have their own terminals. However, the Council is also aware that the physical nature of the freight forwarding service provided by SCT differs from those of NRC and TNT and, as a consequence, that SCT’s service requires the use of the facilities required to provide the freight support services. It is possible that potential competitors may provide the same physical kind of freight forwarding service as does SCT and, therefore, require access to the freight support services. It is equally possible that potential competitors may provide a different physical kind of freight forwarding service that does not require access to those services. The only service to which all freight forwarders using rail require access is the rail service.

The Council, therefore, does not consider that the terminal, shunting locomotives and fuelling station or pad are important, in their own right, to constitutional trade or commerce. While they are facilities that do facilitate significant trade and commerce carried over the rail line facility, it is clear that other facilities can provide the same service. In the Council’s opinion, the fact that the facilities can facilitate trade and commerce does not render them nationally significant.

The Importance of the Facilities to the National Economy

The Council is of the view that small facilities can be regarded as nationally significant depending on their importance to the national economy. As stated previously, when assessing the importance of a facility to the national economy, the Council will examine the market in which access would promote competition.

It is not clear what percentage of all freight carried by rail from the eastern states to Perth is carried by SCT. However, it is clear that the introduction of SCT’s service has resulted in a significant reduction in rail freight transport prices and has provided a corresponding benefit to Western

⁴⁰ IC, op cit.

Australian consumers. The Council is aware that SCT's business has increased significantly since its services was first introduced in July 1995.

Obviously SCT's freight forwarding service has contributed to competition in the rail freight market but the Council believes that the contribution to competition in the freight forwarding market is not so substantial. While the freight support services are important to SCT's freight forwarding business, they are not so important to the rail freight market and even less so to the freight forwarding market.

The Council, therefore, does not consider that the terminal, shunting locomotives and fuelling stations or pads can be considered as important, in their own right, to the national economy.

Conclusion

For the reasons set out above, the Council considers that SCT's:

- arriving/departing services application;
- marshalling/shunting services application;
- marshalling/shunting access application; and
- fuelling services application

do not meet criterion (c) on the basis of the importance of the facilities to the national economy.

Criterion (d) that access to the service can be provided without undue risk to human health or safety

Approach

In the Draft Guide, the Council stated that "access should only be impeded by *bona fide* safety considerations". Applicants must provide a description of how access can be provided without compromising system integrity or safe scheduling or posing undue risk to human health or safety. Infrastructure operators who seek to deny access on safety grounds must bear the onus in demonstrating to the Council that access to the service would compromise safety.

Consideration of Criterion (d)

(i) Rail services application

SCT stated in its application that access to the service may be provided by means of an agreement between Westrail and SCT. This agreement would, among other things, specify the times at which SCT trains would use the route and provide specifications for the operations of those trains and related matters. SCT, therefore, considers that there is no undue risk to human health or safety in access to the service being provided.

Only the Highway Safety Action Group of NSW Inc addressed this criterion in its submission. According to the Highway Safety Action Group increasing access to the rail service can only improve human health and safety. Further:

By transferring freight from road to rail there would be significant improvements to environmental aspects due to less emissions from road vehicles.

The Council understands that Western Australia's safety accreditation regime is very similar to those of other states and that the safety accreditation regime requires rail operators to meet legitimate safety standards.

Conclusion

The Council, therefore, considers that access to the Kalgoorlie-Perth service can be provided without undue risk to human health and safety and that SCT's application meets criterion (d).

(ii) Freight support services applications

SCT stated in its applications that access to the freight support services may be provided by means of an agreement between Westrail and SCT. This agreement would, among other things, specify the times at which SCT trains would use the route, the fuelling arrangements, specifications for the operations of SCT's trains, shunting arrangements and related matters. SCT, therefore, considers that there is no undue risk to human health or safety in access to the service being provided.

According to FreightCorp:

Provided that any operator gaining access to the service complies with the requirements of the Western Australian safety accreditation regime, FreightCorp does not consider there are any impediments to declaration.

The Council agrees that Western Australia's safety accreditation regime is likely to apply to the freight support services.

Conclusion

The Council, therefore, considers that access to the:

- arriving/departing service;
- marshalling/shunting service;
- marshalling/shunting access; and
- fuelling service

can be provided without undue risk to human health and safety and that SCT's freight support services applications meet criterion (d).

Criterion (e) that access to the service is not already the subject of an effective access regime

Approach

Infrastructure services covered by "effective" access regimes cannot be declared under the National regime.

The criteria for judging the effectiveness of State and Territory regimes are set out in clauses 6(2)-(4) of the CPA.⁴¹ The Council must assess whether a State or Territory regime is effective at the time it assesses an application for declaration, unless the regime has already been certified.

Westrail submits that there exists an "*effective informal regime, under section 61 of the Government Railways Act ...*". Section 61 of the *Government Railways Act 1904* is set out in Attachment 2.

Section 61 gives Westrail the power to enter into an agreement with a person entitling that person to use a railway, or part thereof, to operate a rail service. This section sets out:

⁴¹ Clauses 6(2) to 6(4) of the Competition Principles Agreement are set out in full in Attachment 1.

- the period for which an agreement can be in place (21 years);
- the conditions to be included in the agreement (at Westrail's discretion); and
- Westrail's powers in relation to property associated with the operation of a rail service.

Section 61 of the Government Railways Act does not incorporate any of the criteria set out under clauses 6(2)-6(4) of the CPA. Therefore, the Council has determined that it cannot be considered as effective for the purposes of criterion (d).

While Western Australia is in the process of developing a rail access regime, the regime has not been formally submitted to the Council for it to consider its effectiveness, although the Council Secretariat has provided Western Australia with informal comments on a preliminary draft. As at 14 November 1997 no legislation in relation to the regime has been passed by Western Australia.

As Western Australia has not established a rail access regime applicable to the Western Australian rail network or associated facilities, the Council need not address this criteria.

Criterion (f) access (or increased access) to the service would not be contrary to the public interest

Approach

In the Draft Guide the Council noted that the term 'public interest' is not defined in the Act and therefore it needs to be assessed on a case-by-case basis.

A key consideration in the Council's assessment of the effect of a declaration on public interest is economic efficiency. However, the Council has stated that it does not consider public interest and economic efficiency to be synonymous. While economic efficiency is an important consideration, other public interest factors are also considered including:

- ecologically sustainable development;
- social welfare and equity considerations;
- transitional issues created by reform programs;
- policies concerning occupational health and safety and industrial relations;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally, or a class of consumers; and
- the competitiveness of Australian businesses.

Consideration of Criterion (f)

This criterion has been expressed in the negative - "not contrary to the public interest" - rather than the positive - "in the public interest". This reflects the fact that criteria (a) to (e) already address a number of positive elements in the public interest. If declaration was judged to be neutral in public interest terms, the Council would recommend declaration if criteria (a) to (e) were satisfied.

While none of the submissions referred to the national arrangements proposed by the states and the Commonwealth, the Council believes it is important that this issue be addressed.

On 10 September 1997 Transport Ministers for the Commonwealth and States signed a Heads of Agreement on Interstate Rail Reform. The provisions of the Heads of Agreement are reproduced in Attachment 3.

Under the Heads of Agreement the parties agreed, among other things, to commence the single management of the interstate track from Albury and Broken Hill to Kalgoorlie by 1 July 1998. Further, the parties agreed to address a number of issues with a view to harmonising the management, accreditation and technical requirements of the rail network across Australia. At the Transport Ministers' meeting in Queenstown, New Zealand on 14 November the Ministers agreed to establish a company, which will be wholly owned by the Commonwealth, by 1 July 1998 to manage access and infrastructure development on the interstate rail network. Western Australia has agreed to lease an unspecified number of train paths to the company.

The Council recognises the need for a consistent and co-ordinated access system for the interstate rail network and encourages the development of a national approach as proposed under both the Heads of Agreement and the 14 November intergovernmental Agreement. However, what number of train paths Western Australia intends to lease to the company, and how access to those lines will be managed, remains unclear.

The Council wishes to emphasise that declaration would be compatible with the proposed future national regime because the introduction of an "effective" national regime would mean that the conditions for declaration would be no longer met. If an "effective" access regime for the interstate rail network was introduced the Council could consider revoking any declaration pursuant to section 44J of the Act.

The Council is of the opinion, therefore, that it is in the public interest to continue to recommend declaration of rail services, being the subject of applications, provided the Part IIIA criteria are satisfied.

(i) rail service application

As the Council has determined that SCT's rail service application meets the tests in criteria (a) to (e) and 44F(4), the Council considers that declaration of the Kalgoorlie-Perth service has a number of positive attributes which are inherently in the public interest. Having considered other public interest factors, referred to above, the views of submitters, and the position adopted by the Council in previous applications, the Council believes that declaration would be positive in terms of public interest.

SCT notes that it is not aware of any evidence or claim that the access sought would be contrary to the public interest and that access to the rail service, in fact, would be in the public interest. To support this view, SCT notes that:

- NR has lowered its prices along that route since SCT commenced its service;
- there would be environmental benefits from removing trucks from Western Australian roads; and
- the most direct east-west rail link would be promoted.

Accordingly, the Council considers that there are no public interest grounds in relation to SCT's rail service application which would preclude the Council recommending that the Kalgoorlie-Perth be declared.

(ii) freight support services applications

The Council has considered the various public interest arguments for declaration of the services as outlined in SCT's applications and submissions from interested parties. Since the applications do not satisfy criteria (a) to (e), the Council provides this discussion for information only.

Similarly to its rail application SCT, in its freight support services applications, is of the view that access would be in the public interest. In SCT's opinion, as Forrestfield yard is the only terminal available in the Perth metropolitan area for full length trains:

It is essential that Forrestfield be maintained and accessible to train operators, at least until other terminals are available, such as the one we are developing at Canning Vale.

Further,

Perth needs a full length train terminal additional to that of NRC so that it will attract train operators that will compete with NRC.

The Council considers that it addressed these issues in its examination of criteria (a), (b) and (c).

Westrail submits that declaration of the freight support services would be contrary to the public interest. Westrail advises that it is in the process of redeveloping the Forrestfield and Welshpool complex. Westrail raises a number of issues, which are also relevant to the rail service application:

The portion of the Forrestfield yard which SCT and other train operators have access to for the arrival and departure of trains is known as the 'long arrival roads'. There are three of these and Westrail's immediate redevelopment plans provide for these long arrival roads to remain available for train operations. SCT will be able to continue to use these facilities.

However SCT require exclusive access to two of the Forrestfield classification roads, as well as spur lines from Forrestfield which provide exclusive access to SCT's Welshpool siding. It is these facilities and the associated services which will cease as a result of Westrail's Forrestfield redevelopment. We understand that from SCT's point of view the long arrival roads are of little value without these other facilities. However it is important to note that Westrail is not closing off a facility that will prevent other train operators from establishing train operations in competition with NRC or TNT.

The Council is aware that declaration could impact on Westrail's proposed redevelopment of the Forrestfield and Welshpool complex. Any impact, however, need not be significant. The terms and conditions upon which access is agreed would include the interests of Westrail and its proposed redevelopment. In the event the parties went to arbitration, the arbitrator, including the ACCC, likewise would take the the interests of both parties into consideration in reaching a decision.

The Council does not believe this is a matter for it to consider in its assessment of the applications.

Westrail also argues that:

Declaration in this context will interfere with the orderly movement towards a State Access Code. It is in the public interest that access agreements be negotiated within the framework of the existing access regime, which in the near future will be based on the proposed Access Code.

The Council does not agree that the declaration of a service would interfere with the development of an access regime. In the event an effective state access regime is introduced, it is likely that the conditions giving rising to declaration would not longer exist and the Council would consider recommending the declaration be revoked pursuant to section 44J of the Act.

According to FreightCorp:

the very fact that SCT is developing its own facilities to provide the services is indicative of that fact that the company is seeking short term access to what are, in effect, relatively unimportant services in national terms provided by readily duplicable facilities.

FreightCorp also notes that:

*A declaration recommendation in respect of the freight support services would send negative signals to infrastructure owners and those considering investing in facilities. If an enforceable right to negotiate access to services was made on the basis that it was inefficient or not possible to duplicate the services **in the short term**, there would develop in access seekers an unreasonable expectation that temporal arguments can be used to adjust the potential declarability of a service.*

The Council considers it addressed the issue of timing in its analysis under criteria (a), (b) and (c). These criteria are designed to ensure that only those facilities the regime was intended to cover meet the conditions of declaration.

The Council is not persuaded that there are any additional arguments that declaration of the freight support services would be against this public interest criterion. However, as these applications failed to satisfy the Council that they meet criteria (a), (b) and (c), the Council considers there is no need to extensively examine whether they satisfy criterion (f).

RECOMMENDATION

The Council has come to the view that SCT's rail service application satisfies all the criteria contained in section 44F(4) of the Act and sections 44G(1), (2) and (3). Accordingly the Council recommends that the Kalgoorlie-Perth rail service, including the branch line between the main line and SCT's siding, be declared.

However, the Council considers that SCT's:

- arriving/departing service application;
- marshalling/shunting service application;
- marshalling/shunting access application; and
- fuelling service application,

do **not** satisfy criteria (a), (b) and (c) as required under Part IIIA. Accordingly, the Council recommends that the freight support services **not** be declared.

5. DURATION OF RAIL SERVICE DECLARATION

Section 44H(8) of the Act requires that every declaration include an expiry date. In the draft guide the Council indicated that it would adopt a flexible approach in recommending a declaration period.

SCT, in its rail service application, has requested a minimum period of declaration of 20 years. SCT stated in its application that the declaration is sought for this period given the:

... commercial nature of SCT's business, the investment required to be made in the business and goodwill and the continuity of service required to be provided by SCT to its customers.

The period of declaration is considered by the Council on a case-by-case basis. Relevant considerations include the need to balance the benefits of long-term certainty for businesses against the potential for technological development, reform initiatives, or other industry changes which could undermine the grounds for declaration.

In considering the period for declaration, the Council has been mindful of the degree of certainty required by users of the service with respect to, for example, investment in related infrastructure such as rolling stock and terminals. The Council also has had regard to future market evolution which may have implications for the monopoly characteristics presently associated with the service. Specifically, the Council considers that access regulation applicable to a particular service should be reviewed periodically.

Balancing these considerations, the Council believes that the duration of declaration should be 15 years. The Council considers that this time period takes into account the infancy of access arrangements in the rail industry in Australia and the need to review these arrangements over a reasonable period of time. This period also provides a suitable length of time for consideration of changes in the market for transport services given the dynamics associated with this industry. The Council notes that a declaration period of 15 years provides a greater level of certainty about rail access rights than currently enjoyed by those companies that currently have access to the service.

The Council also notes that declaration of the Kalgoorlie-Perth service could be reconsidered at the end of the 15 year period. As access seekers are able to negotiate contracts which extend beyond the period of declaration, the period of certainty for individuals can be extended, while still allowing the application of the Access Regime to be reviewed.

As noted above under public interest, declaration of the service will not have the effect of overruling the proposed future national regime for rail infrastructure, nor an “effective” Western Australian Rail Access Regime. The introduction of an “effective” access regime will mean that the conditions for declaration are no longer met. If an “effective” access regime is introduced, the Council will consider revoking declaration of the Kaloorlie-Perth service under section 44J of the Act.

ATTACHMENT 1

THE COMPETITION PRINCIPLES AGREEMENT (EXTRACT)

Access to services provided by means of significant infrastructure facilities

- 6(2) 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 Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:
- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or
 - (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.
- (3) For a State or Territory access regime to conform to the principles set out in this clause, it should:
- (a) apply to services provided by means of significant infrastructure facilities where:
 - (i) it would not be economically feasible to duplicate the facility;
 - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and
 - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and
 - (b) incorporate the principles referred to in subclause (4).
- (4) A State or Territory access regime should incorporate the following principles:
- (a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.
 - (b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.
 - (c) Any right to negotiate access should provide for an enforcement process.
 - (d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.
 - (e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.
 - (f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.
 - (g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.
 - (h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.
 - (i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:
 - (i) the owner's legitimate business interests and investment in the facility;
 - (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
 - (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
 - (iv) the interests of all persons holding contracts for use of the facility;
 - (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

- (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
 - (vii) the economically efficient operation of the facility; and
 - (viii) the benefit to the public from having competitive markets.
- (j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be 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.
- (k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.
- (l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.
- (m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.
- (n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.
- (o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.
- (p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

ATTACHMENT 2**SECTION 61 OF THE GOVERNMENT RAILWAYS ACT 1904****Use of railways by other rail service operators**

- (1) The Commission may, with the approval of the Minister, enter into an agreement under which another person is entitled to use a railway or portion of a railway for the purpose of operating a rail service.
- (2) The agreement is to be for a period not exceeding 21 years, but this subsection does not prevent a further agreement from being entered into when the agreement comes to an end.
- (3) The agreement may include such conditions as the Commission thinks fit and, without limiting the other kinds of conditions that may be included, it may include conditions as to -
 - (a) payments of money;
 - (b) maintenance or, improvements to be made to, the railway;
 - (c) termination of any right given by the agreement, without any entitlement to compensation, upon the breach of a condition of the agreement or if the Minister considers it to be in the public interest.
- (4) For the purpose connected with the operation of a rail service in accordance with the agreement, the Commission may, with the approval of the Minister, dispose of, or lease or otherwise grant rights to use, real or personal property.
- (5) This section applies despite anything else in this Act or any other enactment.

ATTACHMENT 3

**HEADS OF AGREEMENT BETWEEN THE COMMONWEALTH
AND THE STATES OF NEW SOUTH WALES, VICTORIA,
QUEENSLAND, WESTERN AUSTRALIA AND SOUTH AUSTRALIA
ON INTERSTATE RAIL REFORM**

THIS AGREEMENT is made on the 10th day of September 1997

BETWEEN
THE COMMONWEALTH OF AUSTRALIA
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF WESTERN AUSTRALIA
THE STATE OF SOUTH AUSTRALIA
(THE PARTIES)

1. The Parties agree:
 - (a) that there is a clear and urgent need to reform interstate rail;
 - (b) that the most urgent need is for the interstate rail network to be operated as a single network, including for investment and access;
 - (c) to the commencement of single management of the interstate track from Albury and Broken Hill to Kalgoorlie by 1 July 1998;
 - (d) to develop a plan for the extension of this network to Perth;
 - (e) to develop a plan for the provision of a dedicated freight track(s) through Sydney; and
 - (f) to settle the means of achieving these by 14 November 1997.
2. The parties will immediately commence an investigation of all relevant matters, including:
 - (a) the provision of track access as a single service to rail operators;
 - (b) the financial arrangements for investment in, and maintenance of, rail track;
 - (c) competitive neutrality issues affecting road, rail and sea transport; and
 - (d) the organisational arrangements required to achieve these objectives and harmonisation of technical standards.
3. The aim of these rail reforms will be to maximise benefits to the transport industry including inter and intrastate rail operators, and the community.

ABBREVIATIONS

Abbreviation	Full Name
ACCC	Australian Competition and Consumer Commission
Act	Trade Practices Act 1974
BTCE	Bureau of Transport and Communications Economics
CPA	Competition Principles Agreement
IC	Industry Commission
NRC	National Rail Corporation
RAC	Rail Access Corporation
SCT	Specialized Container Transport
the Council	National Competition Council

THE COUNCIL'S PUBLIC CONSULTATION PROCESS: SUBMISSIONS RECEIVED

Highway Safety Action Group

Westrail

Freightcorp

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