TREASURER

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- 1 AUG 1997

Mr Graeme Samuel
President
National Competition Council
GPO Box 250B
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Dear Mr Samuel

Thank you for your letter of 12 May 1997 informing me of the Council's recommendation regarding the application by the Victorian Government for certification under the *Trade Practices Act 1974* (the Act) of the Victorian Access Regime for Commercial Shipping Channels.

In accordance with s44N of the Act, I have considered the NCC's recommendation and decided to certify the regime as effective.

The certification will be effective from the date of my letter to Premier Kennett informing him of my decision (copy attached) and will cease to have effect after five years.

A copy of my statement of reasons for this decision are attached for your information.

Yours sincerely

Costello.

PETER COSTELLO

TREASURER'S STATEMENT OF REASONS

Sub section 44N(2) of the *Trade Practices Act 1974* (the Act) stipulates that in deciding whether or not an access regime is an effective access regime I must apply the relevant principles set out in the Competition Principles Agreement (CPA) (ie clauses 6(2) to 6(4)), and must not consider any other matters.

Clause 6(2) of the CPA states that the regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory 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.

Victorian shipping channels are of specific relevance to Victorian ports. Market power in the provision of the services provided by the channels does not extend beyond Victoria's jurisdictional boundary. I therefore agree with the NCC's conclusion and supporting reasons that the Victorian regime not be considered ineffective for the purposes of clause 6(2) of the CPA.

The service is provided by means of significant infrastructure facilities (clause 6(3)(a)).

Victorian shipping channels are essential to the movement by ship of goods into and out of Victoria. I therefore agree with the NCC's conclusion and supporting reasons that the channels are significant infrastructure facilities.

It would not be economically feasible to duplicate the service (clause 6(3)(a)(i)).

There are significant fixed costs associated with establishing a shipping channel and, given existing excess capacity, it would not be economically feasible to create competing channels. I therefore agree with the NCC's conclusion and supporting reasons that the service provided by the channels to the ports of Melbourne, Geelong, Portland and Hastings would not be economically feasible to duplicate.

Access to the service is necessary to permit effective competition in a downstream market (clause 6(3)(a)(ii)).

Access to the service provided by means of Victorian shipping channels is essential to participation in the market for shipping goods to and from Victoria. I therefore agree with the NCC's conclusion and supporting reasons that ineffective access to the service could harm competition in the Victorian shipping market (a downstream market).

Appropriate safety requirements are in place to ensure safe use of the facility by the person seeking access (clause 6(3)(a)(iii)).

I note and support the NCC's assessment that the provisions of the *Port Services Act (Victoria) 1995* (PSA) and the *Marine Act (Victoria) 1988* address the safe operation of ships in Victorian waters.

Clause 6(4) identifies a number of principles (6(4)(a)-(p)) to which an effective State or Territory access regime must adhere.

I agree with the NCC's conclusion and supporting reasons that the PSA access regime satisfies the criteria set out in clause 6(4) of the CPA.

Under the Victorian Regime, a channel operator must use all reasonable endeavours to meet the requirements of a person seeking access to prescribed channels (section 59(1) and 59(2)(a)-(b) of the PSA). Further, the Office of the Regulator-General (ORG) becomes involved if a channel operator does not make a formal proposal within 30 days, or if commercial negotiation does not lead to any agreement between the two parties (section 60(1)-(2) of the PSA). Following resolution of a dispute by the ORG, a determination made by it under Part 3 of the ORG Act is legally enforceable under section 35 of the ORG Act. I therefore agree with the NCC's conclusion and supporting reasons that the Victorian regime is consistent with the framework set out in *clause 6(4)(a)-(c)* of the CPA for negotiation and enforcement arrangements.

The ORG is required to reconsider the declaration (under the PSA) of a channel as a significant infrastructure facility before 30 June 2000, and every five years thereafter. I therefore agree with the NCC's conclusion and supporting reasons that the Victorian Regime contains mechanisms to review, over time, the right to negotiate access, as required by State or Territory access regimes (*clause 6(4)(d)*).

Section 59(2) of the PSA provides the person seeking access a right to commercial negotiation with the channel operator. I therefore agree with the NCC's conclusion and supporting reasons that the Victorian Regime satisfies *clause 6(4)(e)*.

Clause 6(4)(f) is intended to remove any doubt that access may be provided on different terms and conditions to different users. Section 59(3) of the PSA states that the terms and conditions of access may vary according to the actual and opportunity costs to the channel operator. I agree with the NCC's conclusion and supporting reasons that the Victorian Regime satisfies this clause.

Clause 6(4)(g) requires that an effective access regime must contain some means to ensure that an independent body is appointed to resolve a dispute. Section 60(2) of the PSA allows for the appointment of the ORG for the arbitration of a dispute that has not been successfully resolved. The ORG Act sets up the ORG as an independent body. Also, Section 60(9) of the PSA requires that both parties to a dispute fund the costs of the ORG incurred in the dispute resolution, as required by clause 6(4)(g). I therefore agree with the NCC's conclusion and supporting reasons that the Victorian Regime meets this clause.

Clause 6(4)(h) requires that any decision by the dispute resolution body should bind the parties, whilst still preserving legislative rights of appeal. A determination by the ORG in respect to a dispute is enforceable (by section 35 of the ORG Act). Section 37 of the ORG Act allows individuals to appeal against a determination of the ORG to an Appeal Panel where they feel there has been a bias or misinterpretation of the facts on which a determination is based. Further, there is also limited recourse to the Supreme Court on matters of legal review. While the NCC acknowledged that the Victorian Regime provides for limited appeal rights, it was satisfied that the Regime is consistent with clause 6(4)(h). I concur with the NCC's conclusion and supporting reasons that the Victorian Regime satisfies clause 6(4)(h).

The NCC stated in its draft guide to Part IIIA of the Act that the dispute resolution body should be required to take all the sub-clauses in *6(4)(i)* into account when deciding on the terms and conditions for access. Section 60(5) of the PSA directs the ORG to consider the matters raised in this clause when making a determination. I agree with the NCC's conclusion and supporting reasons that the Victorian Regime satisfies this clause.

I concur with the NCC's conclusion and supporting reasons that the Victorian Regime satisfies *clause 6(4)(j)* on the basis that, under section 60(5) of the PSA, the ORG must consider the matters stipulated by the clause in making a determination in respect to an access dispute.

Clause 6(4)(k) enables parties to apply for a revocation or modification of an access arrangement which was made at the conclusion of a dispute resolution process. There is explicit provision contained in the Victorian Regime (section 60(6) of the PSA) enabling parties to apply for amendment or revocation of a determination made by the ORG, where there has been a material change in circumstances. I agree with the NCC's conclusion and supporting reasons that the Victorian Regime satisfies this clause.

Clause 6(4)(l) requires that a dispute resolution body should only impede the existing rights 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. In this regard, the NCC notes that the ORG has the scope to require a party to a dispute to pay compensation under a determination. Accordingly, the NCC's assessment is that the Victorian Regime has the ability to address issues of compensation should they arise. I agree with the NCC's conclusion and supporting reasons that the Victorian Regime meets clause 6(4)(l).

Section 61(1) of the PSA says that a channel operator or person having access to a prescribed channel is prohibited from hindering access by any other person in the reasonable exercise of a right of access. I therefore agree with the NCC's conclusion and supporting reasons that the Victorian Regime satisfies *clause 6(4)(m)*.

Section 56(1) of the PSA requires a channel operator to keep separate financial and business records applicable to channel access services. I agree with the NCC's assessment that the Victorian Regime will provide that separate accounting arrangements are in operation for the elements of a business which are covered by the regime. Therefore, I support the NCC's conclusion and supporting reasons that the Victorian Regime satisfies *clause 6(4)(n)*.

The ORG has the ability to acquire information required for a determination through use of its information gathering powers under provisions in Part 3A of the ORG Act and sections 60(3) and 56(3) of the PSA. I therefore support the NCC's conclusion and supporting reasons that the Victorian Regime satisfies *clause 6(4)(o)* that the dispute resolution body should have access to financial statements and other accounting information pertaining to a service.

Clause 6(4)(p) can be considered in conjunction with clause 6(2) and therefore I concur with the NCC's conclusion and supporting reasons that this principle is not relevant due to the specific geographic nature of the asset which ensures that Victorian Shipping Channels could not be subject to more than one State or Territory access regime.