

Declaration of the service provided by means
of the Tasmanian Railway Network
under Part IIIA of the *Trade Practices Act 1974*

Statement of Decision and Reasons

I, the Hon Paul Lennon MHA, Premier of Tasmania, as the designated Minister for the purposes of Part IIIA of the *Trade Practices Act 1974* (the "Act"), make the following declaration in relation to the service provided by means of the Tasmanian Railway Network.

NCC Recommendation

Section 44F of the Act provides that the designated Minister, or any other person, may make a written application to the National Competition Council ("NCC") asking the NCC to recommend that a particular service be declared. After receiving the application, the NCC must, after having regard to the objects of Part IIIA of the Act and matters specified in section 44G, recommend to the designated Minister either that the service be declared or that the service not be declared.

On 14 August 2007, the NCC made its recommendation to me in relation to the application made by the Rail Unit of the Tasmanian Department of Infrastructure, Energy and Resources on 2 May 2007 seeking declaration in respect of the use of the rail tracks and associated infrastructure that comprise the Tasmanian Railway Network for the purpose of operating a rail service on the Tasmanian network.

The NCC's recommendation was that this service be declared for a period of 10 years.

In forming its recommendation, the NCC determined that all of the matters in subsection 44G(2) of the Act are satisfied, namely that:

- (a) access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia) other than the market for the service;
- (b) 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 facility can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime; and
- (f) that access (or increased access) to the service would not be contrary to the public interest.

Decision

Section 44H of the Act provides that, on receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare the service. If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.

Following consideration of the NCC's recommendation, I have decided to declare the service described below for a period of 10 years.

The **declared service** is the use of the rail tracks and associated infrastructure that comprise the Tasmanian Railway Network for the purpose of operating a rail service on the Tasmanian network, including, without limitation, loading and unloading freight, making up trains, shunting and other activities necessary for the efficient haulage of freight by rail.

The **facility** which is the subject of this declaration is:

- (a) the infrastructure that comprises the Tasmanian Railway Network consisting of rail lines, crossing loops, sleepers ballast, cuttings, tunnels, embankments, bridges, culverts, rail tracks and yards on wharves, fastenings, points, poles, pylons, structures and supports, signalling equipment, overhead lines, platforms, railway stations, freight sheds and associated buildings (excluding terminals), workshops, electrical substations, train communications systems, plant, machinery and other fixed equipment; and
- (b) the rail terminals at Burnie, Devonport, Launceston and Hobart.

The Tasmanian Railway Network comprises each of the following line segments (shown in green and red on the attached map):

- the Bell Bay line (being the railway line of approximately 57km running from the Western Junction to Bell Bay);
- the Derwent Valley line (being the railway line of approximately 71km running from Bridgewater to Maydena);
- the Fingal line (being the railway line of approximately 55km running from Conara Junction to Fingal Coal Washery);
- the South line (being the railway line of approximately 199km running from the Hobart Rail Yard to Western Junction);
- the North-East line (being the railway line of approximately 73km running from Coldwater Creek to Tonganah);
- the Western line (being the railway line of approximately 78km running from Western Junction to Wiltshire); and
- the Zinc Works line (being the railway line of approximately 3km running from Derwent Park to Risdon).

The facility does not include the Melba line (being the railway line of approximately 130km running from Burnie to Melba Flats shown in blue on the map attached as Schedule 1), nor the workshops and administration facility at Tamar Junction owned by Pacific National Tasmania.

Reasons

Section 44H of the Act provides that:

- in making his or her decision, the designated Minister must have regard to the objects of Part IIIA of the Act;
- in deciding whether or not to declare the service, the designated Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service (s 44H (2));
- the designated Minister cannot declare a service that is the subject of an access undertaking in operation under Division 6 of Part IIIA of the Act (s 44H(3));
- while a decision of the Australian Competition and Consumer Commission ("ACCC") is in force under subsection 44PA(3) approving a tender process for the construction and operation of a facility as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility specified under 44PA(2)(a) (s44H(3)(a)); and
- the designated Minister cannot declare a service unless he or she is satisfied of all of the matters in paragraphs (a) to (f) of subsection 44H(4). These mirror the criteria that the NCC must consider in forming its recommendation (s44G (2) (a) to (f), outlined above).

In making my decision, I have had regard to the objects of Part IIIA of the Act, which are to:

- (a) promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a consistent framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Current rail freight volumes on the Tasmanian network are below the level that would represent an efficient usage of rail in Tasmania, in part due to underinvestment in infrastructure.

Declaration is an important part of the Tasmanian "Rail Rescue Package" designed by the Tasmanian and Federal Governments to remedy this situation and promote the economically efficient operation of, use of, and investment in, the Tasmanian Railway Network, with the expectation that the benefit of investment in improving the network infrastructure will be passed on to end customers via increased competition in the downstream market for rail services.

The service is not the subject of an access undertaking in operation under Division 6 of Part IIIA of the Act, nor is the facility specified in any application to the ACCC under section 44PA.

I agree with the NCC determination that the relevant criteria are satisfied. The reasons in relation to each matter specified in 44H(4) (a) to (f) and 44H (2) are addressed below:

- In relation to the criterion in paragraph (a), there is a clear functional separation between the upstream market for the service and the downstream market for rail line haul services. I agree with the NCC's conclusion that, because rail line haul services are dependent on the use of the service provided by the Tasmanian Rail Network, enabling access to the service will promote a material increase in competition in the downstream, dependent market of rail line haul services.
- In relation to paragraph (b), the Tasmanian Rail Network exhibits "natural monopoly" characteristics in that, although there are relatively low operating costs, developing another facility would involve significant capital investment and the existing and potential capacity of

the facility is sufficient to meet the foreseeable demand over the 10-year declaration period. I therefore agree with the NCC that it would be uneconomical for anyone to develop another facility to provide the service.

- Pursuant to subsection 44H (2), I have also considered whether it would be economical for anyone to develop another facility that could provide part of the service. Essentially this would involve duplicating part of the Tasmanian Railway Network, which, again, would be uneconomic given the spare capacity in relation to foreseeable demand.
- In addition, the rail terminals included within the facility are an integral part of the network infrastructure used by freight rail services and exhibit the same "natural monopoly" characteristics as rail tracks. The capital and maintenance cost relative to demand means that aggregating rail freight at these nodes through one common user terminal is more cost effective than multiple terminals.
- In relation to s44H (4)(c), I agree with the NCC that the facility is of national significance on the basis of its importance to constitutional trade or commerce, which is defined in the Act to include trade or commerce among States or between Australia and places outside Australia. This is recognised by both the amount of import and export traffic on the Tasmanian Railway Network, and the inclusion of the Tasmanian Railway Network in the AusLink Tasmanian Corridor.
- In relation to paragraph (d), the NCC found that the existing accreditation regime (which requires all rail operators to be accredited under the *Tasmanian Rail Safety Act 1997*), combined with a single operator, and the opportunity to negotiate and arbitrate the terms of access, will ensure the safe operation of the facility and provision of the service. Based on these factors, I agree that access to the facility can be provided without undue risk to human health or safety.
- In relation to paragraph (e), the NCC considered whether the Rail Management and Maintenance Deed (RMMD) between the Tasmanian Government and Pacific National Tasmania constitutes an effective access regime, having regard to the Competition Principles Agreement and objects of Part IIIA of the Act. I agree with the NCC's determination that, because a third party access seeker is not a party to the RMMD, and because the RMMD evidences the intention to seek declaration under the Act to establish an access regime, the RMMD itself does not constitute an effective access regime.
- In relation to the criterion in paragraph (f), the NCC concluded that the benefits of declaration outweigh any costs flowing from declaration and that accordingly access is not contrary to the public interest. I agree with this conclusion.

The Tasmanian Railway Network is primarily a freight system linking industry and ports. Rail plays an important role in Tasmanian supply chains especially in relation to interstate and international freight moving to and from Tasmania's three northern ports. Businesses make investment decisions in Tasmania based on options in rail, and road is not an efficient alternative.

There has never been "above rail" competition in freight rail services in Tasmania. Access to the Tasmanian Railway Network is essential to permit effective competition in rail services within Tasmania, with flow on effects for competition in the downstream markets for freight forwarding or logistics services to and from or within Tasmania.

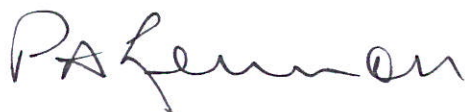
Declaration under Part IIIA of the Act is an important part of the arrangements implementing the "Rail Rescue Package" designed by the Tasmanian and Federal Governments. These arrangements are aimed at removing impediments to the investment of public money in rail

infrastructure that is timely and well targeted, and at facilitating private investment and effective competition in rail services and supply chain solutions, in a manner that is consistent with the national approach to economic regulation of significant infrastructure.

Publication of Decision and Reasons

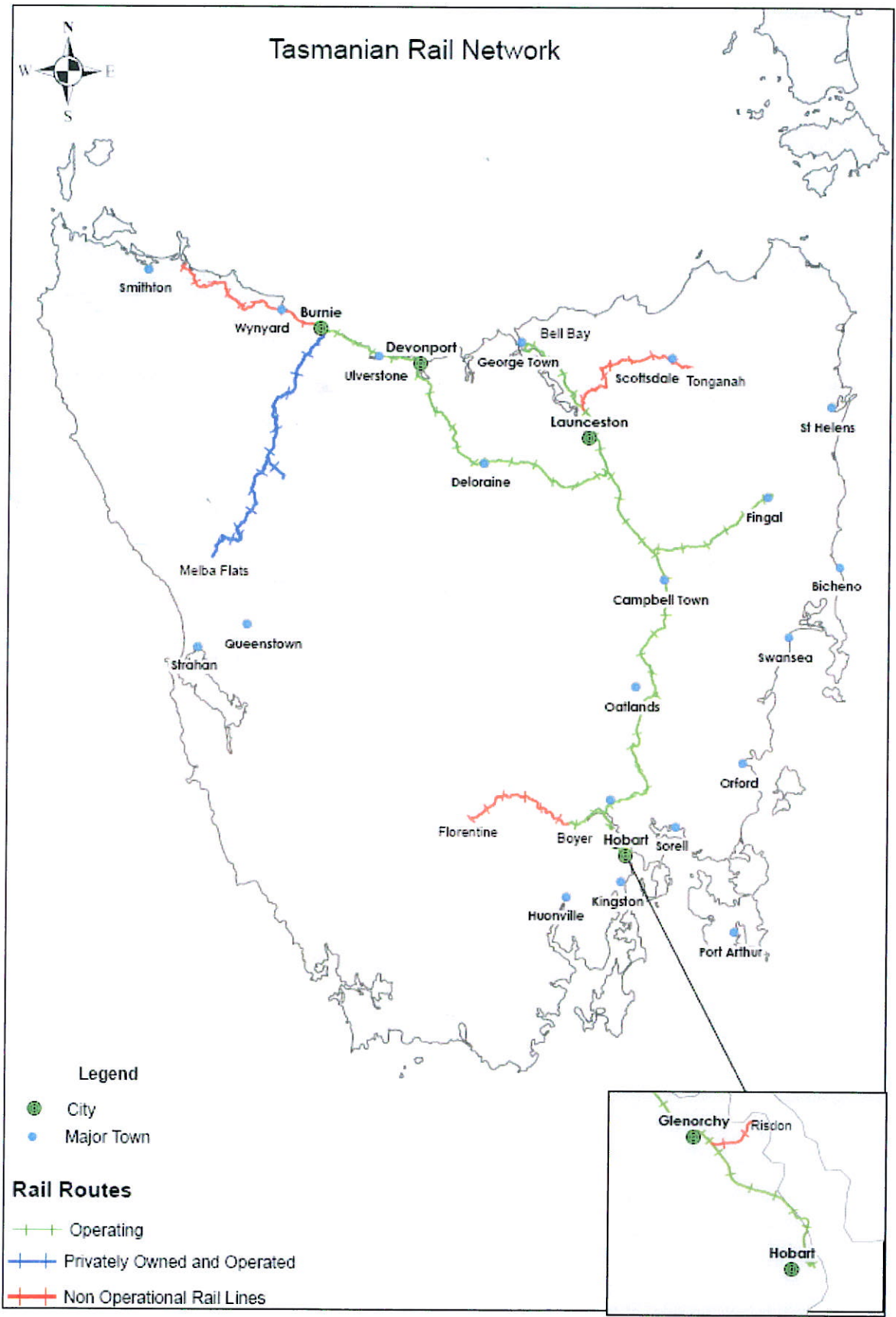
Section 44HA of the Act provides that the designated Minister must publish, by electronic or other means, his or her decision on a declaration recommendation and his or her reasons for the decision.

This declaration decision and statement of reasons will be published today on the Tasmanian Government website and will begin to operate on **23 OCT 2007** being not earlier than 21 days after publication.



The Hon Paul Lennon MHA
Premier of Tasmania

- 2 OCT 2007



Relevant Extracts from Part IIIA of the Trade Practices Act 1974

SECTION 44H Designated Minister may declare a service

- (1) On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it.
- (1A) The designated Minister must have regard to the objects of this Part in making his or her decision.
- (2) In deciding whether to declare the service or not, the designated Minister 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 designated Minister may make a decision whether to declare the service or not.
- (3) The designated Minister cannot declare a service that is the subject of an access undertaking in operation under Division 6.
- (3A) While a decision of the Commission is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, the designated Minister cannot declare any service provided by means of the facility that was specified under paragraph 44PA(2)(a).
- (4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:
 - (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
 - (b) that it would be uneconomical for anyone to develop another facility to provide the service;
 - (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy;
 - (d) that access to the service can be provided without undue risk to human health or safety;
 - (e) that access to the service is not already the subject of an effective access regime;
 - (f) that access (or increased access) to the service would not be contrary to the public interest.
- (5) If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.

- (6) If the designated Minister does not publish under section 44HA his or her decision on the declaration recommendation within 60 days after receiving the declaration recommendation, the designated Minister is taken, at the end of that 60-day period, to have decided not to declare the service and to have published that decision not to declare the service.

SECTION 44HA Designated Minister must publish his or her decision

- (1) The designated Minister must publish, by electronic or other means, his or her decision on a declaration recommendation and his or her reasons for the decision.
- (2) The designated Minister must give a copy of the publication to:
 - (a) the applicant under section 44F; and
 - (b) if the applicant is not the provider of the service--the provider.

SECTION 44I Duration and effect of declaration

- (1) Subject to this section, a declaration begins to operate at a time specified in the declaration. The time cannot be earlier than 21 days after the declaration is published.
- (2) If an application for review of a declaration is made within 21 days after the declaration is published, the declaration does not begin to operate until the Tribunal makes its decision on the review.
- (3) A declaration continues in operation until its expiry date, unless it is earlier revoked.