

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010

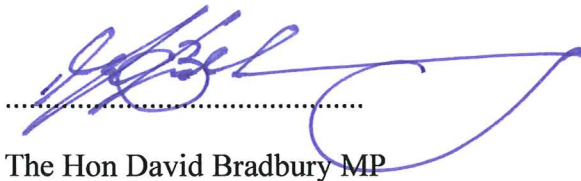
**DECISION ON EFFECTIVENESS OF ACCESS REGIME
UNDER SECTION 44N**

I, the Hon David Bradbury MP, Parliamentary Secretary to the Treasurer, as designated Minister, hereby decide that the Western Australian Rail Access Regime is an effective access regime under section 44N of the *Competition and Consumer Act 2010*.

The Western Australian Rail Access Regime comprises the relevant provisions of the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA).

My decision is to be in force for a period of five years.

Dated: 11th February 2011



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The Hon David Bradbury MP

Parliamentary Secretary to the Treasurer

STATEMENT OF REASONS – DECISION ON THE EFFECTIVENESS OF THE WESTERN AUSTRALIAN RAIL ACCESS REGIME

Competition and Consumer Act 2010 (Cth), section 44N

BACKGROUND

The certification of State and Territory access regimes

- Under Part IIIA of the *Competition and Consumer Act 2010 (Cth)* (CCA), if a State or Territory that is a party to the Competition Principles Agreement (CPA) has established an access regime, the responsible Minister for the State or Territory may apply to the National Competition Council (NCC), asking the NCC to recommend that the Commonwealth Minister decide that the regime for access to the service is an effective access regime (subsections 44M(1) and (2) of the CCA).
- The NCC must recommend to the Commonwealth Minister that he or she decide that the access regime is either an effective access regime for the service, or not an effective access regime for the service.

Ministerial decision on effectiveness of access regime

- Section 44N of the CCA provides that on receiving a recommendation from the NCC in relation to the effectiveness of an access regime, the Commonwealth Minister must decide that the access regime is or is not an effective access regime for the service (subsection 44N(1)).
- Further, in making a decision, subsection 44N(2) requires that the Commonwealth Minister apply the relevant principles in the CPA, treating those principles as guidelines rather than binding rules, and must have regard to the objects of Part IIIA of the CCA and not consider any other matters.
- The Minister's decision must specify the period for which it is in force (subsection 44N(3)).

HISTORY OF THE APPLICATION

- On 12 May 2010 the Western Australian Premier, the Hon Colin Barnett MLA, applied to the NCC under section 44M of the *Trade Practices Act 1974 (Cth)*¹ for a recommendation that the Western Australian Rail Access Regime (WARAR) be certified effective.
 - The NCC published the notice of application, invited submissions and received five submissions in response.

¹ The application was made under the *Trade Practices Act 1974 (Cth)*, which was renamed the *Competition and Consumer Act 2010* on 1 January 2011.

- On 17 August 2010, the NCC released a draft recommendation that the WARAR be certified as effective for a period of five years.
 - The NCC invited submissions and received four submissions and three supplementary submissions in response.
- On 13 December 2010, I received a recommendation from the NCC that I not certify the WARAR as an effective access regime under Part IIIA of the *Trade Practices Act 1974*.

OVERVIEW OF THE WARAR

- The WARAR applies to about 5 000 kilometres of railway track in the south-west of WA and the Pilbara Infrastructure Pty Ltd railway in the eastern Pilbara.
- The WARAR is established by the:
 - *Railways (Access) Act 1998* (WA) (RAA); and
 - *Railways (Access) Code 2000* (WA) (RAC).
- Broadly, the WARAR establishes a framework within which parties can negotiate access for covered railway infrastructure. The WARAR is optional and parties are free to negotiate access agreements outside of the regime. However, the WARAR exists if access seekers prefer to use it at first instance or as a safety net in situations where an access seeker has attempted to negotiate access outside of the WARAR without success.
- The WARAR applies to access to below-rail infrastructure only.
- The railway routes that are covered by the WARAR are specified in the RAC, with scope to add additional railways in the future provided the Minister ensures that any new routes are of significance, having regard to their length and importance to trade or commerce or to the economy.
 - New routes are not automatically specified, even where they meet the criteria. The specification of a new route is at the Minister's discretion.
 - The WA Government has also used State Agreements with individual operators to specify a route.
- The WARAR establishes a negotiation framework and a formal dispute resolution process. The independent regulator – the Economic Regulation Authority of WA (ERA) – is also provided with powers and functions to monitor the regime.

DECISION

- I have considered each of the relevant principles from the CPA, as well as the objects of Part IIIA of the CCA, in assessing the WARAR. I have decided that all relevant matters for certification of the WARAR as an effective access regime are satisfied.
- My decision to certify the WARAR as an effective access regime is to apply for a period of five years.
- My consideration of the NCC's final recommendation, and my conclusions on that recommendation, are described below. In making my decision I have drawn on the findings of the NCC.

CONSIDERATION OF THE WARAR AGAINST THE RELEVANT CPA PRINCIPLES

- The NCC takes the view that a logical framework for analysis of a regime's incorporation of the guiding CPA principles is to consider matters in five categories as follows:
 - the scope of the access regime – 6(3)(a), 6(4)(d);
 - the treatment of interstate issues – 6(2), 6(4)(p);
 - the negotiation framework – 6(4)(a)–(c), (e), (f), (g)–(i), (m), (n), (o);
 - dispute resolution – 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c); and
 - efficiency promoting terms and conditions of access – 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b).
- This approach assisted me to form a view on whether the relevant CPA principles are incorporated in the WARAR.

Scope of the access regime – 6(3)(a), 6(4)(d)

- The CPA principles in 6(3)(a), 6(4)(d) deal with the scope of an effective access regime. It should:
 - apply to services provided by significant infrastructure facilities that are not economically feasible to duplicate, where access is necessary to permit effective competition and can be provided safely at a reasonable cost; and
 - provide for periodic review of the need for access regulation to apply to a particular service.
- I consider the scope of the WARAR is consistent with CPA principles.
 - It applies to services provided by way of significant infrastructure facilities, being railway infrastructure and the facilities necessary to operate a railway.

- The WARAR applies to a limited class of assets – those that exhibit natural monopoly characteristics, where access to such services would promote competition in a market other than a market for the service and can be provided without undue risk to human health or safety.
 - : I note that by using State Agreements, there is potential for the WA Government to apply the WARAR to a new railway in the future that may not possess such characteristics.
 - : However, I note that the addition of a new railway in a manner inconsistent with the CPA may amount to a substantial modification of the regime. A service subject to a certified regime may be declared if there has been a substantial modification of the regime or of CPA in the time since the certification decision.
- The WARAR contains adequate mechanisms for reviewing the right to negotiate access.
- I note that the NCC considers the WARAR satisfies clauses 6(3)(a) and 6(4)(d).

Treatment of interstate issues – 6(2), 6(4)(p)

- The CPA indicates that an effective access regime will adequately provide for treatment of issues which may arise when a facility is subject to multiple access regimes. The NCC may determine a State or Territory regime to be ineffective if substantial difficulties arise from the regime being in one or more jurisdictions.
- I consider the WARAR deals with interstate issues in a manner consistent with CPA principles.
 - The WARAR only applies to part of one interstate rail line, the section between Perth and Kalgoorlie. The Australian Rail Track Corporation (ARTC) has a wholesale agreement in place with the network manager in WA that permits it to enter into contracts for access for interstate services to available capacity on that part of the WA network.
 - Otherwise, operators can contract directly with the WA network manager and the WARAR includes mechanisms that appear to keep interface issues to a minimum.
 - The other infrastructure covered by the WARAR does not extend beyond the borders of WA and there does not appear to be interstate demand for this rail.
 - I note that the NCC considers the WARAR satisfies clauses 6(2) and 6(4)(p).

Negotiation framework – 6(4)(a)–(c), (e), (f), (g)-(i), (m), (n), (o)

- The CPA indicates an effective regime will provide for a negotiation framework, allowing parties to negotiate access to significant infrastructure facilities while being able to resort to an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible.

- The CPA also sets out a number of features that should be included within a negotiation framework for the regime to be considered effective including:
 - a requirement upon the service provider to make reasonable endeavours to accommodate the requirements of access seekers;
 - recognition that access need not be on exactly the same terms and conditions;
 - certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - provision for the dispute resolution body or relevant authority to have access to financial information relating to the service and requiring separate accounting arrangements for elements of a business covered by the access regime; and
 - the prohibition of conduct with the purpose of hindering access.
- I consider that the negotiation framework provided by the WARAR is consistent with CPA principles.
 - The WARAR establishes a framework within which parties can negotiate access for covered services, with negotiations to be in good faith, with a requirement for the service provider to make all reasonable efforts to satisfy reasonable requirements of the access seeker, and which provides for binding arbitration where a railway owner refuses to enter into negotiations or where negotiations have broken down (clauses 6(4)(a)–(c), (e), (g), (h)).
 - : Decisions made by the arbitrator may be subject to judicial review in accordance with the *Commercial Arbitration Act 1985* (WA) (clause 6(4)(h)).
 - The WARAR allows the access provider to treat access seekers differently where it is justified because of different circumstances (clauses 6(4)(f)).
 - The WARAR provides principles of dispute resolution to guide an arbitrator that mirror the price and non-price terms and conditions of access set out in clause 6(4)(i) of the CPA.
 - The WARAR prohibits an access provider from engaging in conduct aimed at hindering or preventing access or the making of access agreements (clause 6(4)(m)).
 - The WARAR requires access providers to keep accounting records for the service separately from accounting records relating to other operations (clause 6(4)(n)).
 - The *Commercial Arbitration Act 1985* (WA) allows a party to an arbitration to obtain a subpoena from the Supreme Court of WA requiring a person to attend an examination before the arbitrator and to produce any documents specified in the subpoena. The ERA also has information gathering powers for its regulatory responsibilities relating to the WARAR (clause 6(4)(o)).

- I note that the NCC considers the WARAR satisfies clauses 6(4)(a)–(c), (e), (f), (g)–(i), (m), (n) and (o).

Dispute resolution – 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c)

- CPA clauses 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o) and 6(5)(c) provide guidance on the principles which should be contained in an effective access regime in relation to dispute resolution.
- An effective access regime should reasonably incorporate:
 - a dispute resolution procedure, providing for an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible;
 - certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - an ability for the dispute resolution body to determine whether the access provider should extend or permit extensions of the service, subject to certain requirements;
 - the capacity for a party to an access determination to apply for the determination to be set aside or modified on account of a material change in circumstances;
 - provision for the dispute resolution body to have access to financial information relating to the service; and
 - where merits review of a decision is provided, the review should be limited to information submitted to the original decision maker.
- I consider that the dispute resolution framework provided by the WARAR is consistent with CPA principles.
 - The WARAR provides for binding arbitration where agreement cannot be reached (clauses 6(4)(a)–(c)).
 - : Disputes are referred to the ERA, who appoints an independent arbitrator from a panel of qualified arbitrators. Arbitration is binding and is governed by the *Commercial Arbitration Act 1985* (WA), subject to specific provisions of the WARAR (clauses 6(4)(g) and (h)).
 - The WARAR provides principles of dispute resolution to guide an arbitrator that mirror the price and non-price terms and conditions of access set out in clause 6(4)(i) of the CPA.
 - The WARAR provides that the arbitrator must take into account the matters set out in clauses 6(4)(j) and (l) of the CPA. The WARAR provides that an arbitrator may require the access provider to extend or expand a route or the associated railway infrastructure as part of their determination.

- The WARAR requires access providers and access seekers to identify in the access agreement the circumstances in which the agreement may be varied or terminated. I consider it reasonable to expect that this would include provision for where there is a material change in circumstances (clause 6(4)(k)).
- The *Commercial Arbitration Act 1985* (WA) allows a party to an arbitration to obtain a subpoena from the Supreme Court of WA requiring a person to attend an examination before the arbitrator and to produce any documents specified in the subpoena (clause 6(4)(o)).
- The WARAR does not provide for merits review. Decisions made by the arbitrator, however, may be subject to judicial review in accordance with the *Commercial Arbitration Act 1985* (WA).
 - : The CPA does not require an effective access regime to include merits review. Rather, it provides that where merits review of decisions is provided, the review should be limited primarily to information before the decision maker (clause 6(5)(c)).
- I note that the NCC considers the WARAR satisfies clauses 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o) and 6(5)(c).

Efficiency promoting terms and conditions of access – 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b)

- A fundamental premise of any effective access regime is that it promotes efficient use of and investment in significant infrastructure facilities. This is reflected in the objects of Part IIIA of the CCA and in clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b) of the CPA.
- An effective access regime should reasonably incorporate:
 - a negotiation framework, allowing parties to negotiate access to significant infrastructure facilities while being able to resort to an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible;
 - a requirement upon the service provider to make reasonable endeavours to accommodate the requirements of access seekers;
 - recognition that access need not be on exactly the same terms and conditions for each access seeker;
 - certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - the capacity for a party to an access determination to apply for the determination to be set aside or modified on account of a material change in circumstances;
 - require separate accounting for elements of a business covered by the access regime;

- an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation, use and investment in infrastructure thereby promoting competition in upstream and downstream markets; and
 - pricing principles that require regulated access prices to be set so as to cover costs, allow price discrimination when it aids efficiency, not allow discrimination by a vertically integrated firm unless justified by the cost of providing access, provide a return on investment that is commensurate with the risks involved and provide incentives to reduce costs or improve productivity.
- I consider the WARAR reasonably incorporates efficiency promoting terms and conditions of access, consistent with CPA principles.
 - The WARAR establishes a framework within which parties can negotiate access for services, with negotiations to be in good faith, with a requirement for the service provider to make all reasonable efforts to satisfy reasonable requirements of the access seeker, and which provides for binding arbitration where a railway owner refuses to enter into negotiations or where negotiations have broken down (clauses 6(4)(a)–(c), (e)).
 - The WARAR allows the access provider to treat access seekers differently where it is justified because of different circumstances (clauses 6(4)(f)).
 - The WARAR provides principles of dispute resolution to guide an arbitrator that mirror the price and non-price terms and conditions of access set out in clause 6(4)(i) of the CPA.
 - The WARAR requires access providers and access seekers to identify in the access agreement the circumstances in which the agreement may be varied or terminated. I consider it reasonable to expect that this would include provision for where there is a material change in circumstances (clause 6(4)(k)).
 - The WARAR requires access providers to keep accounting records for the service separately from accounting records relating to other operations (clause 6(4)(n)).
 - I consider that the objects clause in section 2A of the *Rail (Access) Act 1998* (WA) satisfies clause 6(5)(a). Section 2A provides that the object of the Act is:
 - ‘to establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.’
 - The WARAR contains pricing principles that are consistent with the principles set out in clause 6(5)(b). An access provider is bound to follow the pricing principles when negotiating access prices.
 - I note that the NCC considers the WARAR satisfies clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b).

CONSIDERATION OF THE WARAR AGAINST THE OBJECTS OF PART IIIA

- In making a recommendation as to whether an access regime is an effective access regime, I must have regard to the objects of Part IIIA of the CCA.
 - I am mindful that to ‘have regard’ to these matters is a lesser requirement than the requirement to ‘apply’ the relevant principles set out in the CPA.
- Section 44AA of the CCA provides that the objects of Part IIIA are:
 - to 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
 - to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.
- I consider the WARAR accords with the objects of Part IIIA and I have provided my reasoning below.

The first limb – competition and efficiency

- As I noted when considering the CPA principles, the WARAR contains provisions which promote the efficient use of and investment in significant infrastructure facilities and, in doing so, competition in other markets.
- This is reflected in the object of the WARAR, which is to “establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.”
- Before a route can be specified under the WARAR, the Minister must determine that access to the route would promote competition in at least one market other than the market for the service.
- I note that the NCC considers that the WARAR accords with the first limb of the Part IIIA objects.

The second limb – consistency

- The second limb of the objects clause requires me to consider how the WARAR sits within the ‘framework and guiding principles to encourage a consistent approach to access regulation in each industry’ established by Part IIIA of the CCA.
- I note that the NCC has interpreted this clause as requiring consideration of whether the WARAR provides a framework and guiding principles to encourage a consistent approach to access regulation for railways in WA.
- I do not consider that the terms of Part IIIA require the approach adopted by the NCC.

- Rather, to ‘have regard to’ the object requires me to consider whether the WARAR detracts from the framework and guiding principles provided by Part IIIA.
- Moreover, the NCC interprets the words ‘in each industry’ as requiring consistency of access regulation *within* the WA rail industry. In my view, the words ‘in each industry’ refer rather to consistency *across* different industries.
 - : In coming to this view I have had regard to extrinsic material associated with the legislation. The Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2005 (which introduced the objects clause), the Productivity Commission’s 2002 *Review of the National Access Regime* (which recommended an objects clause) and the previous Government’s response to the *Review*, all make it clear that this limb of the objects clause is concerned with divergence between industries (such as, between electricity and gas access regulation), rather than within industries (such as the WA rail industry).
- In any case, even if the NCC’s interpretation were accepted, I do not consider that for that reason alone the WARAR could be considered not to be an effective access regime, unless such intra-industry inconsistency as exists under the WARAR were so significant as to undermine Part IIIA’s objectives. I do not consider that to be the case.
- The NCC notes that access to WA railways is (or will be) subject to a number of different regulatory arrangements.
 - These arrangements are:
 - : arbitration for below-rail access by the Australian Competition and Consumer Commission (ACCC) following declarations under Part IIIA of the CCA;
 - : arbitration for above-rail haulage by the ACCC, should the ACCC accept an access undertaking under Part IIIA of the CCA;
 - : arbitration under the WARAR; and
 - : no coverage, due to exclusion from the WARAR and unsuccessful applications for declaration under Part IIIA of the CCA.
- While there are railways in WA that are subject to differing regulation, it does not follow that the railways are subject to inconsistent regulation.
 - It may be assumed that regulation under Part IIIA – including decisions not to regulate – is consistent with the relevant principles of the CPA.
 - Having considered the WARAR in light of each of the relevant principles in the CPA, I am satisfied that it is consistent with the CPA.
 - Therefore, while I recognise that different railways in WA are regulated differently, I do not consider that they are regulated inconsistently. The

regulation of each railway fits within the framework and guiding principles established by Part IIIA to encourage a consistent approach to access regulation in each industry.

DURATION OF CERTIFICATION

- Having reached the decision that the WARAR is an effective access regime, I must specify the period for which the certification will be in force.
 - The period of certification may be extended, but there is no provision in the CCA for a certification to be revoked.
- The WA Government did not specify a desired certification period in its application.
 - Even though the final NCC recommendation was not to certify the WARAR, it did consider the issue of duration of certification in the event that I took a different position. The NCC recommended that a five year certification period would be appropriate in this case.
 - : In its response to the Roy Hill Infrastructure Pty Ltd submission, the WA Government indicated it was content with the NCC's draft recommendation to certify the WARAR for five years provided further reasoning was given.
- The period of certification needs to balance the need for regulatory certainty and stability with the likelihood of change in the market environment.
 - The NCC notes that the WARAR is yet to be used and therefore the practical implications of the regime have not been tested.
 - The NCC also notes that there is some uncertainty about the application of the WARAR to new railways and vertically integrated providers.
 - The NCC further notes that the ERA is to commence a third review of the WARAR in late 2014, and considers it appropriate for the certification period to coincide with the finalisation of that review so that any recommended changes can be taken into account.
- I agree with the NCC's assessment. In particular, I am similarly concerned about the uncertainty around how the WARAR is applied to new railways.
 - Arguably, the procedures and criteria established in the WARAR for specifying railways should be applied by the WA Government to all new railways and State Agreements should not circumvent this process.
 - But given State Agreements are a common feature of the WA regime, I consider it is important to ensure that new railways being specified under the WARAR in the next five years are being done so in a manner consistent with the CPA.

- It will also be informative to tie in any consideration of an extension of the period of certification for the WARAR with the ERA's next review, so as to take into account any recommended changes to the regime.
- For these reasons, I am of the view that a certification duration of five years is appropriate.



The Hon David Bradbury MP

Parliamentary Secretary to the Treasurer

Dated: *11th February* 2011