

## Access case studies

### Applications for declaration under Part IIIA of the *Trade Practices Act 1974*

#### **Carpenteria Transport Pty Ltd: Queensland**

In December 1996 the National Competition Council (NCC) received an application from Carpenteria Transport Pty Ltd (Carpenteria) to declare specified rail freight services provided by Queensland Rail (QR).

Carpenteria is a company incorporated in Queensland which is a wholly owned subsidiary of TNT Limited (now Toll Rail). Carpenteria provides a range of freight transportation and warehousing services within Queensland, including rail freight forwarding services (using the rail system provided by QR). This rail freight service mainly involves haulage along the coastal corridor between Brisbane and Cairns by dedicated trains which are owned and operated by QR.

Carpenteria's application to the NCC essentially sought access to the facilities needed to run linehaul services between Brisbane and Cairns, which included: track; rolling stock; shunting and loading equipment; and terminal facilities.

The Carpenteria application did not define the linehaul service in terms of specific categories of freight to be carried. It indicated that Carpenteria intended to carry a range of freight, including bulk products (such as minerals).

Following assessment of the Carpenteria application in the first part of 1997, the NCC concluded that application for declaration failed to meet the criteria set out in 44F(4) and 44G(2) of Part IIIA of the *Trade Practices Act 1974*. In particular, the NCC found that aspects of the facility identified by Carpenteria in its application, namely above rail elements including rolling stock and terminals, were able to be economically duplicated and could not be considered of national significance.

On 2 June 1997 the NCC forwarded a recommendation to the Queensland Premier (designated Minister) that the services in question not be declared. The Queensland Premier subsequently decided not to declare the service. Some of the reasons given by the NCC for its decision differ from those of the Queensland Premier.

On 22 August 1997, Carpenteria lodged an appeal to the Australian Competition Tribunal. At the time of writing this matter remained before the Tribunal.

### **Specialized Container Transport: NSW**

On 4 February 1997 Specialized Container Transport (SCT) applied to the NCC for the declaration of rail lines provided by the Rail Access Corporation (RAC) of New South Wales between Sydney and Broken Hill.

SCT currently provides an interstate rail freight forwarding and distribution service from Melbourne to Perth. Its application to the NCC sought declaration of the Sydney-Broken Hill line service to enable the firm to provide freight forwarding services between Perth and Sydney. SCT did not define the service by reference to the particular categories of freight to be forwarded on the service, but did specify the segments of the standard gauge rail line to be made subject to declaration.

NSW has a rail access regime for third party access to the NSW rail network in place. As part of its consideration of the application against the criteria in Part IIIA of the *Trades Practices Act 1974* (TPA), the NCC was required to examine whether the service to which SCT sought access was already the subject of an 'effective' access regime. If the NSW regime was found to be 'effective', declaration under Part IIIA provisions would have been precluded.

Following consideration of the SCT application, the NCC concluded that the identified service met all the criteria specified in Section 44(F) of the TPA, and that the NSW rail access regime could not be considered 'effective' under Section 6(2-4) of the CPA. It recommended that the service be declared. On 16 June 1997 this recommendation was subsequently forwarded to the NSW Premier, who then allowed the sixty day decision period to elapse. As a result, the service is deemed not to be declared.

On 27 August 1997 SCT lodged an appeal over this decision with the Australian Competition Tribunal. However, it has since reached an agreement with RAC enabling access from June 1998, and has formally withdrawn its application to the NCC (and hence appeal to the Australian Competition Tribunal).

## **NSW Minerals Council Limited: NSW**

In April 1997 the NCC received an application from the NSW Minerals Council Limited to recommend the declaration of a rail service provided by the Railway Access Corporation (RAC) in NSW.

The NSW Minerals Council, through its Hunter Rail Access Taskforce (HRATF), represents twenty one coal producing companies in the Hunter Valley region. It sought declaration of the use of a rail line (incorporating associated infrastructure facilities), known as the Hunter Railway Line Service, so that coal mining companies covered by the HRATF can move coal to export ports and power stations.

The owner of the rail line is RAC, a NSW Government agency which sells access to the State Rail Network. RAC owns and maintains all publicly owned rail infrastructure facilities, defined as including railway track and supporting structures as well as the signalling systems, seaboard coal terminals, overhead electrical power supply systems and trackside fencing.

As part of its consideration of the NSW Minerals Council application, the NCC was required to examine whether the service to which the NSW Minerals Council sought access was already the subject of an 'effective' access regime. As noted earlier, NSW already operates a rail access regime for third party access to the NSW rail network. The NCC also had to consider particular provisions of the *Competition Policy Reform Act (CPA) 1995* which allow for government coal carrying services to be made exempt from Part IIIA of the *Trades Practices Act 1974 (TPA)*, for a period of five years from the enactment of the legislation.

The NSW Minerals Council argued that the Hunter Railway Line Service has the characteristics of a natural monopoly and is of substantial importance to the Australian economy in that it is a vital conduit between mines and markets. It argued that declaration would allow its members to negotiate directly with RAC and freight haulers, imposing competitive pressure on both services.

With regard to Section 78 of the CPA covering coal service exemptions, the NSW Minerals Council argued that its application should still be considered under Part IIIA of the TPA. More specifically, the NSW Minerals Council based its argument on the definition of a service under Section 44B of the TPA, which draws a distinction between the use of an infrastructure facility (for example, a rail line) and the handling or transporting of goods or people (for example, rail haulage). The Minerals Council specifically addressed its application to the former, on the basis that rail haulage is a different market to the service of the use of a rail line.

Following consideration of the NSW Minerals Council application, the NCC found that the rail line service identified met each of the criteria set out in Section 44F and 44G of the TPA, and was consistent with the provisions of Section 78 of the CPA. It recommended that the service be declared, and on 1 September 1997 forwarded its recommendation to the NSW Premier.

The NSW Premier allowed the sixty decision period provided for under Part IIIA of the TPA to lapse. As a result, the service was deemed to be not declared. Subsequently, the NSW Minerals Council has appealed to the Australian Competition Tribunal to declare the Hunter Railway Line Service. At the time of writing, this appeal had yet to be heard by the Australian Competition Tribunal.

### **Specialized Container Transport: WA**

On 25 July 1997, the NCC received five separate applications from Specialized Container Transport (SCT) for declaration of certain rail and freight support services provided by Westrail in Western Australia. These consisted of :

- the service provided through the use of the Westrail railway network and associated infrastructure between Kalgoorlie and the Perth metropolitan area;
- particular arriving and departing services at the Forrestfield yard;
- particular marshalling and shunting services operated on Westrail track;
- particular Westrail network services and associated infrastructure to enable SCT to undertake its own marshalling and shunting activities; and
- particular fuelling services operated on Westrail track, including the Kalgoorlie to Perth line.

All services identified by SCT are provided by Westrail, the corporate identity of the Western Australian Government Railways Commission. Westrail is responsible for managing the State's rail infrastructure and associated facilities.

As noted elsewhere, SCT provides an interstate rail freight forwarding and distribution service from Melbourne and Sydney to Perth. SCT's application sought declaration of the various services (listed above) provided by Westrail to enable the firm to continue to offer interstate freight forwarding and distribution services.

At the time of application, SCT already carried freight on Westrail track between Kalgoorlie and Perth as part of a two way transcontinental service in conjunction with Australia National. The aim of the SCT applications was not to secure access per se, but to provide the firm with the right to negotiate improved terms and conditions of access with Westrail in the first instance, or seek arbitration through legal mechanisms (for example the Australian Competition and Consumer Commission) in the second.

In considering the SCT application, the National Competition Council found that while the application relating to the rail line service and associated infrastructure between Kalgoorlie and Perth met all the relevant criteria under Part IIIA of the *Trades Practices Act 1974* (TPA), the applications for declaration of Westrail's freight support services did not.

Accordingly, in November 1997 the NCC forwarded a recommendation to the Western Australian Premier to declare the rail line service but not the various freight support services. On 20 January 1998, the Premier announced the Western Australian Government's decision not to declare any of the services identified by SCT in its application. SCT subsequently appealed the decision to the Australian Competition Tribunal. This appeal was withdrawn in May 1998. As such, the Premier's decision not to declare rail services by Westrail stands.