STATEMENT OF REASONS

DECISION

I have decided to accept the National Competition Council (NCC) recommendation that the *Australasia Railway Access Regime* (the Regime) is an effective access regime for the purpose of Section 44N of the *Trade Practices Act 1974* until 31 December 2030. The NCC's recommendation is available from its internet site www.ncc.gov.au.

In making my decision, I am satisfied that the Regime conforms with the principles set out in Clause 6 of the *Competition Principles Agreement 1995*. The certification is in relation to rail services on the line from Tarcoola to Darwin, part of which is yet to be completed.

The Regime comprises the *AustralAsia Railway (Third Party Access) Act 1999* (NT), the *AustralAsia Railway (Third Party Access) Act 1999* (SA), and the *AustralAsia Railway (Third Party Access) Code* which is attached as a schedule to each Act. The Regime also includes two safety Acts – the *Northern Territory Rail Safety Act 1998* (NT) and the *Rail Safety Act 1996* (SA). The regulator for the Regime is the SA Independent Industry Regulator, and therefore the *Independent Industry Regulator Act 1999* (SA) is also relevant.

BACKGROUND

The Regime covers the facilities necessary for the operation of the railway from Tarcoola to Darwin, and commences operation when some services on the new part of the line from Alice Springs to Darwin can be provided.

The Regime establishes the right to negotiate access to use the railway infrastructure between Tarcoola and Darwin. It sets out the rights and responsibilities of both access seekers and the infrastructure owner, covering matters such as terms and conditions of access, the negotiation process, and dispute resolution.

In making my decision that the Regime is an effective access regime, Section 44N of the *Trade Practices Act 1974* requires that, on receiving a recommendation by the NCC, I apply the relevant principles of the *Competition Principles Agreement 1995* and that I not consider any other matters. I note that Section 44DA clarifies that these principles are to be applied as guidelines rather than binding rules.

RELEVANT PRINCIPLES

Clause 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.

I am satisfied that the Regime is not ineffective having regard to the influence of the facility beyond the jurisdictional boundaries of South Australia and the Northern Territory. I am also satisfied that no substantial difficulties arise from the facility being situated in more than one jurisdiction.

The Regime applies to a facility that is located across two jurisdictions. The users of the facility are also likely to require the use of similar facilities in other jurisdictions, and the regime has therefore

been implemented through joint legislation of the Governments of South Australia and the Northern Territory. However, most access seekers using the facility are likely to also require interconnection with rail systems in other jurisdictions. The Regime takes into account the developing national rail access arrangements, and the need to integrate the Regime with the National Regime and those of other jurisdictions. The Regime requires the Regulator and arbitrator to consider cross border issues in the development of its guidelines and arbitration processes.

Clause 6(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.

I consider that the Regime applies to infrastructure that is significant in terms of its size, value, national significance and importance for commerce. I am satisfied that it would not be economically feasible to duplicate the facility and that access to the service is necessary to permit effective competition in a downstream or upstream market. I therefore agree with the Council that the criteria in Clause 6(3)(a) is met. In support of this conclusion:

- for the reasons set out in the NCC's statement of reasons, I am satisfied that the cost of construction compared to the expected demand, is such that it is not economically feasible to duplicate the rail line;

- I am satisfied with the NCC's finding that access to the facilities will permit a competitive above rail market and facilitate increased competition in general freight services; and

- I find that the *Northern Territory Rail Safety Act 1998* (NT) and the *Rail Safety Act 1996* (SA), which both adopt the Australian Rail Safety Standard, provide a safety accreditation regime to ensure the safe use of the railway at an economically feasible cost.

Clause 6(3)(b) *The Regime should incorporate the principles referred to in sub clause 6(4).*

Sub-clause 6(4) of the *Competition Principles Agreement* specifies that an 'effective' State or Territory regime should incorporate a set of principles. I consider that the regime satisfies these principles for reasons set out below.

Clause 6(4)(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.*

The Regime provides a sound framework that encourages negotiation between the access seeker and the access provider, and reflects the negotiation processes expected from a competitive market. I note that the Regime requires the parties to negotiate in good faith to achieve productive outcomes. The pricing principles, for example, which are a key negotiation parameter, provide for a ceiling and floor with negotiation of the access price to be within these limits.

Clause 6(4)(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.*

I am satisfied that the Regime provides an effective right for persons to negotiate access which commences when the access seeker presents the access provider with a proposal for access. I consider the Regime to adequately provide a mechanism for disputes to be resolved through the use

of directions, conciliation and formal arbitration. I note the importance of the independent regulator within the dispute resolution process.

Clause 6(4)(c) *Any right to negotiate access should provide for an enforcement process.*

Effective enforcement of the Regime is achieved through the arbitration process, which provides for a right of appeal to the Supreme Court. The Supreme Court has a sufficient range of options available under the Regime in order to enforce the appropriate outcomes. I also note that the regulator can effect enforcement by seeking an injunction in the Supreme Court against any party who contravenes the provisions of the Regime.

Clause 6(4)(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.*

The Regime provides for two specific reviews – three years after commencement of rail operations and not later than 12 months before the expiry of the certification period. While regular scheduled reviews of the Regime would be desirable to ensure that regulatory outcomes are consistent with the objectives, I note that Ministers can initiate a review at any time. I also note the role of the Regulator, which can report to Ministers on matters that should be reviewed. The Regime therefore complies with Clause 6(4)(d) by ensuring that access rights do not continue in perpetuity without review.

Clause 6(4)(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.*

I am satisfied that, when considering the Regime as a whole, the access provider is required to accommodate the reasonable needs and requirements of access seekers. In support of this conclusion, I note that the Regime obliges the access provider to supply adequate information and furnish the access seeker with a preliminary indication of access and terms.

Clause 6(4)(f) *Access to a service for persons seeking access need not be on exactly the same terms and conditions.*

I find that the principle in Clause 6(4)(f) is satisfied as the Regime does not require prices, terms or conditions to be identical across all access agreements.

Clause 6(4)(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.*

I am satisfied that, failing agreement, the owner and access-seeker under the Regime must appoint and fund an independent body to resolve the dispute. The Regime provides for the appointment of an independent arbitrator with the power to apportion costs between the parties. I also note the role of the SA Independent Industry Regulator in the dispute resolution mechanisms and I am satisfied that the regulator has the appropriate independence.

Clause 6(4)(h) *The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.*

The independent arbitrator's decision is binding on the parties and that decision can be enforced by the arbitrator through the Supreme Court. The Regime also provides for appeal rights to the Supreme Court.

Clause 6(4)(i) *On 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.

The Regime specifically requires the arbitrator to consider the matters set out in (i) to (viii) in Clause 6(4)(i). While I note the inclusion of s21(b) in the Regime to compel the arbitrator to consider the initial capital cost of the railway, the economic risk of the project, and the consortium's need for a fair return on the investment, I am satisfied that s21(2) of the Regime ensures that this additional consideration will be applied consistently with the principles of Clause 6(4)(i). I therefore regard the Regime as complying with the principles embodied in this Clause.

Clause 6(4)(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.

The Regime adequately incorporates these principles. Under the Regime, an owner may be required to extend or permit the extension of the facility, but only if the extension meets the qualifying principles in (i) to (iii) in Clause 6(4)(j). I consider that provisions which contemplate that an owner may be required to extend or permit the extension of the facility do not place at risk the business interests of the access provider, and I have noted the definition of a business interest as contained in the Regime. The circumstances in which the access provider will not be required to expand or extend the facilities will be limited to where the access provider's business interests are genuinely and unreasonably compromised.

Clause 6(4)(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***.**

The Regime provides for mechanisms for the parties to apply for revocation or modification of the access arrangements, and therefore I conclude that the principle in Clause 6(4)(k) has been satisfied. The Regime provides opportunities for the regulator to revoke an award, or refer the matter to arbitration, depending on what is appropriate in the circumstances. I note that the parties remain free to negotiate a suitable definition of "a material change in circumstances".

Clause 6(4)(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.*

I consider that the Regime effectively satisfies the principles in this clause by requiring the arbitrator to be satisfied that existing access holders are properly compensated for any loss of rights.

Clause 6(4)(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.*

I conclude that the Regime complies with the requirement of this Clause. There are penalties for any person who prevents or hinders another's access to the rail services.

Clause 6(4)(n) *Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.*

The Regime provides for separate accounting arrangements for the elements of a business that are covered by the access regime. In particular, the Regime requires accounts to be separate for above and below rail activities. I note that the regulator will enforce this requirement in order that the negotiated prices are a true reflection of the cost of access.

Clause 6(4)(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.*

Under the Regime, the relevant dispute resolution body has access to financial statements and other relevant accounting information. In particular, the Regime requires the access provider, on receiving a written request, to provide the regulator with financial information and documents. That information can also be disclosed to the arbitrator.

Clause 6(4)(p) *Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislation 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*

I am satisfied that the Regime will be applied consistently in each jurisdiction, as the elements and mechanisms of the Regime have been enacted through mirror legislation in South Australia and the Northern Territory. Further, there is a single Regulator to resolve disputes, and the processes in relation to dispute resolution are consistent across both jurisdictions.

PERIOD OF DURATION FOR THE CERTIFICATION

I agree with the Council's recommendation to certify the regime for a period of 30 years until 31 December 2030. This takes into account the expected completion of the project in 2003, which effectively reduces the certification period to 27 years. I consider that the powers of the regulator will ensure that the Regime will continue to operate in accordance with the relevant principles in the *Competition Principles Agreement* throughout the certification period.

Peter Costello
Treasurer