

Queensland Competition Authority Amendment Bill 2005

Explanatory Notes

General Outline

Policy Objectives

To amend the *Queensland Competition Authority Act 1997* to:

- (1) ensure the legislative provisions in the *Queensland Competition Authority Act 1997* (“the Act”), are workable and enforceable against access providers where those access providers are not the owners of the declared facility;
- (2) allow the Queensland Competition Authority (QCA) to undertake an additional monitoring and/or dispute resolution role for government business voluntary Codes of Conduct; and
- (3) allow the QCA to share relevant confidential information with the State departmental co-regulators for electricity, rail and water without the regulated entities consent.

Reasons for the Bill

State Access Regime

The current State-based access legislation fails to adequately address all potential access arrangements. In particular, the Act does not allow the QCA to *directly* enforce access undertakings against, and manage access disputes involving, access providers where those access providers are not the owners of the declared facility.

Currently, in these circumstances, the QCA must rely on contractual provisions in agreements between the owner and the access provider.

Additional Role for QCA

A voluntary Code of Conduct, as an alternative to heavy-handed price regulation, imposes behavioural constraints on a relevant business in order

to mitigate opportunities for the misuse of its market power. Given the voluntary nature of this arrangement, its integrity and success depends upon the presence of an independent and reputable compliance monitor and/or dispute resolution arbiter.

While the QCA is seen as best-placed to perform this role, the Act precludes it from doing so.

Information Sharing

The Act does not allow the QCA to disclose commercially-confidential information to another person without the provider's consent, except in those circumstances where the recipient of this information is a Minister, a QCA member or an entity that performs similar functions to the QCA 'under a law of the Commonwealth, another State or a foreign country.'

This list does not include other Queensland regulators, who may require this information to make informed regulatory decisions.

Achievement of the Objectives

State Access Regime

To ensure investor confidence and a workable State access regime, it is essential that the legislation addresses all potential access arrangements.

The amendments will overcome the existing short-coming, allowing:

- the QCA to enforce approved access undertakings against access providers who are not owners of declared services;
- the QCA to make access determinations requiring access providers who are not facility owners to make facility expansions; and
- an access provider who is not an owner of a declared service to voluntarily give, or be required to give, a draft access undertaking for the service to the QCA

Additional Role for QCA

To ensure the credibility of voluntary Codes of Conduct, the QCA is considered to be best-placed to perform the role of independent compliance monitor and/or dispute resolution arbiter.

The proposed amendments provide the QCA with the capacity to perform this role, if required by Ministers.

Information sharing

The amendments will allow the QCA to share confidential information, relating to the State's regulated rail, energy and water entities, with the relevant departmental co-regulator (namely, the Directors-General of Transport, Energy and Natural Resources and Mines, respectively), without the need for first obtaining the relevant regulated entity's consent.

This is expected to provide the best overall regulatory outcome for industries and consumers.

Alternatives to the Bill

The policy objectives can only be achieved by legislative enactment.

Estimated Cost for Government Implementation

No implementation costs are expected.

Consistency with Fundamental Legislative Principles

There is an argument that the Bill may infringe fundamental legislative principles because it adversely affects the rights of access providers who are not owners by newly providing for approved access undertakings to be enforced, and facility extension determinations to be made, against them.

The Bill does not change the existing legal obligations faced by access providers as, through a more indirect path (via the owner of the infrastructure in question), the existing legislation always provided for such enforcement action to be undertaken against access providers. The only party affected by the Bill was consulted and had no objections on the basis that the amendments provide certainty to a pre-existing arrangement.

Consultation

All stakeholders received a consultation draft of the Amendment Bill and were given the opportunity to comment.

Notes on Provisions

Clause 1 cites the short title of the Bill.

Clause 2 states the date on which the Bill is taken to have commenced.

Clause 3 states the Bill amends the *Queensland Competition Authority Act 1997*.

Clause 4 amends section 10 to provide the Authority with an additional function. The new function allows the Authority to monitor compliance and/or resolve disputes about a government business's compliance with a voluntary Code of Conduct.

Clause 5 amends the heading of Section 75 to specifically apply to *owners* of services or facilities. The purpose of this amendment is to differentiate it from Section 75(A).

Clause 6 inserts Section 75(A) to specifically apply to *operators* of services or facilities. The clause provides for the giving of notices by the Authority in circumstances where there is more than one operator of the service or facility.

Clause 7 amends section 79 to omit one of the Authority's obligations. When the Authority receives a request to declare a candidate service from a party that is not the owner of the candidate service, it is not required to provide Ministers with the name of the owner of the candidate service.

Clause 8 amends section 85 to insert a new provision concerning declaration decisions by the Authority. If the owner and operator of a newly declared service are different entities, and the operator did not request the service be declared, the Authority must provide relevant information concerning the declaration decision to the operator.

Clause 9 amends section 93 to insert a new provision to require Ministers to give written decision notices concerning the revocation of declarations to operators in circumstances where the owner of a service and the operator of a service are different entities.

Clause 10 amends section 119 to alter the constraints on the Authority in making access determinations. The Authority may make an access determination requiring a facility extension from an access provider when the access provider is the owner or the operator of the declared facility. A new provision also requires the Authority to be satisfied the legitimate

business interests of the operator of the facility are protected if the owner and operator of the facility are different entities.

Clause 11 amends section 130 to provide for access codes to permit operators to separate their declared service operations from other commercial operations.

Clause 12 amends section 133 to empower the Authority to direct an operator of a declared service to give the Authority a draft access undertaking within 90 days after receiving written notice from the Authority.

Clause 13 inserts new sections 133A and 133B to apply when the owner and operator of a declared service are different entities. Section 133A requires the Authority to consider a number of criteria when deciding whether the owner or the operator should provide the draft access undertaking. Section 133B requires the Authority be given the relevant information to make this decision.

Clause 14 amends section 134 to include the operator in the draft access undertaking process when the operator has submitted the draft access undertaking.

Clause 15 amends section 135 to allow the Authority to prepare a draft access undertaking in relation to the operator if the operator of a declared service does not comply with an initial or secondary undertaking notice.

Clause 16 amends section 136 to allow an operator to voluntarily submit a draft access undertaking to the Authority.

Clause 17 amends section 137 to provide for an operator to set out the matters which may be detailed in an access undertaking for a service.

Clause 18 amends section 138 to set out the approval processes to be followed by the Authority in approving draft access undertakings submitted by operators of declared services.

Clause 19 amends section 139 to provide for the Authority to require the owner or the operator, who initially submitted the draft access undertaking, to amend an approved access undertaking.

Clause 20 amends section 142 to provide for the owner or the operator, who initially submitted the draft access undertaking, to voluntarily amend an approved access undertaking.

Clause 21 amends section 143 to change a cross-reference in provision (3) as a result of an amendment to section 138.

Clause 22 amends section 144 to provide for the Authority to conduct an investigation concerning a draft access undertaking given to the Authority by an operator.

Clause 23 amends section 146 to require the Authority to give reasonable notice of an investigation concerning a draft access undertaking to an operator or the person who submitted the draft access undertaking, being the responsible person.

Clause 24 amends section 158A to allow the Authority or another party to apply for a court order concerning an approved access undertaking against an operator.

Clause 25 amends sections 159-161 to provide for a cost allocation manual to be binding on the access provider of a declared service.

Clause 26 amends section 162 to require an access provider of a declared service to keep relevant books and records in accordance with the requirements of a cost allocation manual.

Clause 27 amends section 163 to require an access provider of a declared service to keep separate accounting records.

Clause 28 amends section 176 to ensure if an investigation relates to the operator of a declared service, the operator is notified of hearings.

Clause 29 amends section 187 to allow the Authority to share confidential information, relating to the State's regulated rail, energy and water entities, with the relevant departmental co-regulators (namely, the Directors-General of Transport, Energy and Natural Resources and Mines, respectively), without the need for first obtaining the relevant regulated entity's consent.

Clause 30 amends section 188A to allow the consolidation of an access dispute and water supply dispute if the operator of the declared service involved in the access dispute and the water supplier involved in the water supply dispute are the same person.

Clause 31 amends section 239 to allow the Authority to share confidential information, relating to the State's regulated rail, energy and water entities, with the relevant departmental co-regulators (namely, the Directors-General of Transport, Energy and Natural Resources and Mines, respectively), without the need for first obtaining the relevant regulated entity's consent.

Clause 32 amends the Schedule (Dictionary) to:

- omit the term responsible operator;
- alter the definition of mediation conference to provide consistency with the its use in the Act;
- amend the definition of access undertaking to enable it to apply to an operator of a service that undertakes to provide access to the service;
- amend the definition of responsible person to include an operator of a declared service.