Queensland Competition Authority Amendment Bill 2018

Explanatory Notes

Short title

The short title of the Bill is the Queensland Competition Authority Amendment Bill 2018.

Policy objectives and the reasons for them

Queensland's third party access regime is contained under Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act) and is administered by the State's independent economic regulator, the Queensland Competition Authority (Authority).

The regime provides a framework for access regulation of services provided by significant infrastructure facilities (such as rail tracks, ports and other types of infrastructure facilities) where there may be a lack of effective competition.

The following services are declared for the purposes of the regime (section 250 of the QCA Act):

- the use of a coal system for providing transportation by rail (i.e. the central Queensland coal network operated and managed by Aurizon Network);
- the use of the intrastate passenger and freight network operated by Queensland Rail Limited (QR); and
- the coal handling services at Dalrymple Bay Coal Terminal (DBCT).

Other services may be declared through the declaration process set out in the QCA Act (see Part 5, Division 2 of the QCA Act).

All decisions about the application of access regulation under the QCA Act are made on the basis of whether the service satisfies certain access criteria (section 76 of the QCA Act). That is, the Authority must assess the service and make a recommendation to the Minister about whether the service satisfies the access criteria and, in turn, the Minister will decide whether to declare the service based on whether the Minister is satisfied about the access criteria for the service.

A similar process is followed for both revocation of declarations (Part 5, Division 2, subdivision 5 of the QCA Act) and for the review of expiring declared services (section 87A of the QCA Act).

The primary objective of the Bill is to amend these access criteria. These amendments are intended to reflect changes being made at the national level to the access principles in the COAG *Competition Principles Agreement 1995* (the CPA access principles) and the National Access Regime established under Part IIIA of the *Competition and Consumer Act 2010* (Cth).

Following a series of judicial decisions concerning the interpretation of the declaration criteria under the National Access Regime, the Federal Government commissioned high level reviews into the National Access Regime including the application of the declaration criteria (see the Productivity Commission's Inquiry into the National Access Regime (2013) and the Competition Policy Review (2015)) to determine whether amendments were necessary to refocus and clarify the declaration criteria. The recommendations made by the Productivity Commission were accepted by the Federal Government, triggering a process to make changes to the CPA access principles and the criteria in the National Access Regime established under Part IIIA of the *Competition and Consumer Act 2010* (Cth).

While Queensland's access regime is separate from the National Access Regime, the amendments to the access criteria in the Bill are intended to reflect the revised criteria being introduced at the national level.

The changes made to the access criteria by the Bill will also assist in ensuring Queensland's access regime continues to be easily understood and addresses the economic problem of natural monopoly in markets for infrastructure services. Regulatory certainty is a key issue in regulated industries. As such, the amended access criteria are intended to be in place for the Authority's pre-expiry review of existing declarations under Queensland's access regime.

Other amendments will include changes designed to improve some of the regulatory processes contained in the QCA Act, particularly in relation to the development of access undertakings.

Access undertakings are an important element of Queensland's access regime as they increase upfront certainty for all parties in that they establish the detailed terms and conditions on which an access provider undertakes to provide access to access seekers. The Bill makes some targeted amendments and provides for additional accountability and transparency to assist in streamlining the processes undertaken in relation to access undertakings.

Achievement of policy objectives

Amendments to the access criteria under the Queensland Access Regime

Given the importance of the Queensland access regime and its coverage of services provided by economically significant rail and port infrastructure facilities, as well as industry dependent on access to this infrastructure, it is essential that the pathway to declaration is clear. More generally, it is in the interests of all parties, including any future potential access providers and access seekers of facilities that are not currently declared to have certainty about how the criteria are to be interpreted and applied.

The Bill will clarify the access criteria by making the following amendments. These amendments will correspond with the revised criteria being introduced at the National level through changes to the CPA access principles and changes to the National Access Regime:

- amending access criterion (a) so that it reflects a comparison of competition with and without access on reasonable terms and conditions as a result of declaration;

- amending access criterion (b) to confirm that the test to be applied requires an assessment of whether the facility for the service in question could meet the total foreseeable demand in the market at least cost compared to any combination of two or more facilities;
- removing access criterion (d) which required that access to the service can be provided safely. Where relevant, this is a matter that can be considered under the public interest test; and
- amending access criterion (e) to ensure that services may only be declared if it promotes the public interest. The Bill also amends the matters the Authority and the Minister are to have regard to when considering this criterion.

Amendments to the access undertaking process

The Bill will assist with promoting more timely access undertaking processes by strengthening the Authority's obligations in the event it fails to meet its obligation to decide whether to approve, or refuse to approve, a draft access undertaking within the six-month period provided for under section 147A of the QCA Act.

If the Authority fails to make its decision within the six-month period, it must give written notice of the reasons for the Authority's failure to the owner or operator of the service and the Minister (section 147A(5) of the QCA Act). This obligation will be strengthened by requiring the written notice to also:

- include details about the action the Authority proposes to take to make the decision as soon as reasonably practicable; and
- be published on the Authority's website.

For consistency, similar amendments are proposed to other six-month timeframes that apply to the making of a recommendation to the Minister on whether a service should be declared (section 79A of the QCA Act) and for the making of an access determination (section 117A of the QCA Act). However, for access determinations the written notice will not be required to be published on the Authority's website.

The Bill will also assist the draft access undertaking assessment process by confirming the application of the pricing principles in the QCA Act.

The pricing principles are set out under section 168A of the QCA Act and relate to the price of access for a service. The pricing principles are included in the list of matters to which the Authority must have regard when deciding whether it is appropriate to approve a draft access undertaking (section 138 of the QCA Act) and when making an access determination (section 120 of the QCA Act).

As part of amendments made to the QCA Act in 2010, references to the pricing principles were also included in sections 100, 138A and 168C of the QCA Act in the context of an access provider's ability to differentiate between access seekers or users in the negotiation or provision of access to the service. There is a perceived inconsistency in these references to the pricing principles with the references to the pricing principles in sections 138 and 120 of the QCA Act. This has caused uncertainty amongst stakeholders as to how the Authority should apply the pricing principles when it is assessing draft access undertakings or making access determinations. As such, the Bill will remove the references to the pricing principles from sections 100, 138A and 168C of the QCA Act.

The pricing principles are an important consideration in that the Authority must have regard to these principles when deciding whether to approve a draft access undertaking or make an access determination (along with the other matters to which regard must be had). The weight to be given to the pricing principles is a matter for the Authority to determine as part of these decisions. The Authority is not required to satisfy each pricing principle in deciding whether to approve a draft access undertaking or make an access determination.

The Bill also makes a number of miscellaneous amendments to the QCA Act, such as providing for particular notices to be published on the Authority's website rather than in a newspaper and the removal of obsolete or incorrect references in the QCA Act.

Alternative ways of achieving policy objectives

Given the access criteria are established in the QCA Act, there is no alternative than to amend the legislation to incorporate the revised set of criteria.

With respect to the other objectives of the Bill, achieving timelier access undertaking processes can be achieved through a combination of both legislative and non-legislative measures. In addition to the targeted amendments contained in the Bill, non-legislative measures to assist with achieving timelier processes are also being considered, including the introduction of key performance indicators for the Authority. These are intended to provide increased accountability and transparency of the Authority's performance and will be developed separately from the Bill.

Estimated cost for government implementation

The Bill will not impose any additional cost on Government.

Consistency with fundamental legislative principles

The Bill is consistent with fundamental legislative principles.

Consultation

Key stakeholders expected to be affected by the Bill were consulted and comments provided were taken into account in finalising drafting of the Bill. Stakeholders consulted were Aurizon Network, DBCT Management, Pacific National, the Authority, Queensland Rail and the Queensland Resources Council.

A draft of the Bill and an accompanying consultation paper were released for public consultation on the Queensland Government's 'Get Involved' website.

Consistency with legislation of other jurisdictions

The Bill (and Queensland's access regime) is specific to the State of Queensland and is not part of uniform national legislation.

However, the CPA access principles are intended to be incorporated into State and Territory access regimes. The Bill is intended to be consistent with changes being made to the CPA access principles that are relevant to the access criteria under the QCA Act. Queensland is making the changes now to have the amended access criteria in place prior to commencement of the QCA's pre-expiry review of existing declarations.

Queensland has also had regard to similar changes made to the equivalent access criteria under the National Access Regime established under Part IIIA of the *Competition and Consumer Act 2010* (Cth).

Notes on provisions

Clause 1 states that, when enacted, the Bill will be cited as the *Queensland Competition Authority Amendment Act 2018*.

Clause 2 states that the Bill amends the *Queensland Competition Authority Act 1997*.

Clause 3 amends section 25 (Notice of investigation) to require that the notice must be published on the Authority's website and that, in addition to the persons that must be specifically given the notice under sub section (3), the Authority may give the notice to anyone else it considers appropriate.

Clause 4 amends section 76 (Access criteria) of the Act by replacing subsections (2) and (3).

The new subsection (2) contains the new access criteria that the Authority is required to be satisfied for recommending that a service be declared by the Minister, and that the Minister is required to be satisfied for declaring a service. The access criteria must also be considered by the Authority and the Minister in decisions on the revocation of a declaration.

The new subsection (2)(a) requires an assessment of whether access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition.

The new subsection (2)(b) requires an assessment of whether the facility for the service could meet the total foreseeable demand for the service over the period for which the service would be declared at the least cost compared to any two or more facilities.

The existing subsection (2)(d) is repealed. However, where relevant, safety can be considered under the public interest test in the new subsection (2)(d).

The new subsection (2)(d) amends, and replaces, the existing subsection (2)(e) to require an assessment of whether access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration would promote the public interest.

The new section 76(3) and (4) sets out particular considerations for the purposes of the new section 76(2)(b).

The new section 76(5) provides a non-exhaustive list of matters to which the Authority and the Minister must have regard to when considering the new section 76(2)(d). It replaces the existing section 76(3).

While the new section 76(5) simplifies the range of matters the Authority and the Minister must have regard to when assessing the public interest criterion, under the new subsection (5)(d) the Authority or the Minister can still have regard to any of the matters that were previously listed in the existing section 76(3), if considered relevant.

Clause 5 amends section 79A (Period for making recommendation) to strengthen what the Authority is required to do in the event it fails to make the recommendation within the six month statutory time period. In addition to providing the written notice to the applicant for the

request and the Minister, it requires the Authority to publish the written notice on its website so that it is publicly available. It also requires the written notice to include details about the action the Authority proposes to take to make the recommendation as soon as reasonably practicable.

Clause 6 amends section 100 (Obligations of parties to negotiations) by omitting subsection (4)(b) to remove the reference to the pricing principles mentioned in section 168A of the QCA Act.

Clause 7 amends section 117A (Period for making access determination) to strengthen what the Authority is required to do in the event it fails to make an access determination within the six month statutory time period. It requires the written notice to include details about the actions the Authority proposes to take to make the access determination as soon as reasonably practicable.

Clause 8 amends section 138A (Terms of particular approved access undertakings) by omitting subsection (2) to remove the reference to the pricing principles mentioned in section 168A of the QCA Act.

Clause 9 amends section 147A (Period for approving draft access undertaking) to strengthen what the Authority is required to do in the event it fails to make the decision within the six month statutory time period. In addition to providing the written notice to the owner or operator of the service and the Minister, it requires the Authority to publish the written notice on its website so that it is publicly available. It also requires the written notice to include details about the action the Authority proposes to take to decide whether to approve, or refuse to approve, the draft access undertaking as soon as reasonably practicable.

Clause 10 amends section 168C (Prohibition on particular treatment of users by access providers) by omitting subsection (3)(b) to remove the reference to the pricing principles mentioned in section 168A of the QCA Act.

Clause 11 amends section 171 (Application of part) to remove obsolete references to Part 4 of the QCA Act, which was previously repealed from the QCA Act.

Clause 12 amends section 176 (Notice of hearings) to require the Authority to publish a notice of a hearing on its website. The Authority will still be required to give the notice to specific persons as set out under this section. This section is also amended to remove obsolete references to Part 4 of the QCA Act, which was previously repealed from the QCA Act.

Clause 13 amends section 187B (Constitution of mediator) to change an incorrect reference under subsection (2) from section 214D(2) to 214D(3) of the QCA Act.

Clause 14 amends section 242 (Annual reports) to remove obsolete references to Part 4 of the QCA Act, which was previously repealed from the QCA Act.

Clause 15 Amends section 244 (Tabling reports) to remove an obsolete reference to Part 4 of the QCA Act, which was previously repealed from the QCA Act.

Clause 16 amends section 245 (Regulation-making power) to remove an obsolete reference to Part 4 of the QCA Act, which was previously repealed from the QCA Act.

Clause 17 inserts a new Part 17 (Transitional provision for Queensland Competition Authority Amendment Act 2018). This includes a new section 255 (Preparation and approval of particular draft, or draft amending, access undertakings) to ensure the pre-amended Act continues to apply to the preparation and approval of a draft access undertaking and a draft amending access undertaking started, but not completed, before the commencement of this Bill.

Clause 18 amends the definition of *applicant* in schedule 2 (Dictionary) to remove an obsolete reference to Part 4 of the QCA Act, which was previously repealed from the QCA Act.