ECONOMICS AND GOVERNANCE COMMITTEE

Members present:

Mr LP Power MP (Chair)
Ms NA Boyd MP
Mr ST O'Connor MP
Mr DG Purdie MP
Ms KE Richards MP
Mr RA Stevens MP

Staff present:

Ms T Struber (Acting Committee Secretary)
Ms M Salisbury (Assistant Committee Secretary)

PUBLIC BRIEFING—INQUIRY INTO THE QUEENSLAND COMPETITION AUTHORITY AMENDMENT BILL 2018

TRANSCRIPT OF PROCEEDINGS

MONDAY, 5 MARCH 2018

Brisbane

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The committee met at 10.28 am.

CHAIR: Good morning. I declare open the public briefing of the committee's inquiry into the Queensland Competition Authority Amendment Bill 2018. I would like to acknowledge the traditional owners of the land on which we meet. My name is Linus Power. I am the member for Logan and the chair of the committee. With me here today are: the deputy chair, Ray Stevens, the member for Mermaid Beach; Nikki Boyd, the member for Pine Rivers; Sam O'Connor, the member for Bonney; Kim Richards, the member for Redlands; and Dan Purdie, the member for Ninderry.

On 15 February 2018 the Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships, the Hon. Jackie Trad, introduced the bill into parliament. The parliament then referred the bill to the Economics and Governance Committee for examination with a reporting date of 15 March 2018. The purpose of the briefing this morning is to assist the committee with the examination of the bill.

The committee's proceedings are proceedings of the Queensland parliament and are subject to the standing rules and orders of the parliament. The proceedings are currently being recorded by Hansard and also broadcast live on the parliamentary website. Media may be present and will be subject to my direction at all times. The media rules endorsed by the committee are available from the committee staff if anyone requires them. All those present today should note that it is possible you may be filmed or photographed during the proceedings. I ask everyone present to turn off their mobile phones or switch them to silent.

Only the committee and invited officials may participate in the proceedings. As parliamentary proceedings under the standing orders any person may be excluded from the hearing at my discretion or by order of the committee. I remind committee members that officers from the department are here to provide factual and technical information. Questions about government or opposition policy should be directed to the responsible minister or shadow minister or left to debate on the floor of the House. We now will hear from representatives of the Queensland Treasury who have been invited to brief the committee on the bill.

DUNNE, Ms Louise, Principal Treasury Analyst, Shareholder and Structural Policy Division, Queensland Treasury

FLEMING, Mr Robert, Acting Deputy Under Treasurer, Commercial Group, Queensland Treasury

MOLLOY, Mr Dennis, Assistant Under Treasurer, Shareholder and Structural Policy Division, Queensland Treasury

CHAIR: Good morning. I invite you to make an opening statement briefing the committee after which committee members will have some questions for you.

Mr Fleming: Thank you to the committee for the opportunity to brief you on the Queensland Competition Authority Amendment Bill 2018. The bill makes amendments to Queensland's third-party access regime which is contained in part 5 of the Queensland Competition Authority Act 1997. There are two elements to the bill. Firstly, the bill refocuses and clarifies the access criteria under the access regime. Secondly, the bill contains changes to improve the timeliness of regulatory decision-making processes. I turn first to access criteria.

The Queensland access regime provides a pathway for persons to seek to use significant infrastructure facilities like railways and ports where it would be uneconomical to build another facility and where other access criteria are met. A fair access regime permits the efficient use of existing facilities, increases productivity and competition, and provides a reasonable return to the owner of the facility.

The access criteria is arguably the most critical part of the Queensland access regime in that it determines what infrastructure can be declared subject to the regime. The declaration provides an access seeker with a legislative right to negotiate access to the infrastructure facility with recourse to

the independent regulator, the Queensland Competition Authority. For example, if a railway is declared, a person can seek to use its trains on that railway as an alternative to building its own railway.

In order for the authority to recommend that a service be declared and for the minister to make that declaration, the service must satisfy each of the access criteria. Clause 4 of the bill sets out the changes to the access criteria. Changing the access criteria meets two objectives. Firstly, it will ensure the Queensland access regime is consistent with the national access regime following changes made federally in October 2017. Secondly, it meets the Queensland government objective to clarify the interpretation to be given to some elements of the criteria. Queensland's access regime is broadly similar to the national access regime. The national access regime is established under the Commonwealth's Competition and Consumer Act 2010. It can apply to monopoly businesses of national significance which are not subject to state access regulation. A nationally coordinated and consistent approach to access regulation is important to avoid any overlap of jurisdictional powers and reduce regulatory risk in regulated industries.

In addition to the consistency objective, the bill's revised access criteria ensures that it targets the most appropriate infrastructure services. Most significantly, the bill will clarify the interpretation of the 'uneconomic to duplicate' criterion. It will clarify this criterion by requiring the application of a natural monopoly test when assessing whether infrastructure should be declared: in effect, whether it is more economically efficient to use an existing facility than to develop a duplicate facility. This replaces the private profitability test, which was favoured by the High Court in the 2012 Pilbara rail access decision, where the test was one of assessing whether it is profitable for anyone to duplicate the facility. Capturing natural monopoly infrastructure services ensures the declaration focuses upon the economic problem which access regulation seeks to address, which is the difficulty and inefficiency of duplicating infrastructure that is a natural monopoly such as a port in an area where other port locations are unsuitable.

In relation to regulatory processes, the second element of the bill promotes more timely regulatory processes, particularly with regard to the development of access undertakings. These are an important feature of the Queensland access regime in that they set out the terms and conditions upon which an access provider will offer access to the service. Undertakings deal with complex legal, economic and commercial matters and the process for their development can become protracted.

Clauses 5, 7 and 9 of the bill include provisions that will provide greater transparency about the authority's failures to meet statutory decision time frames and will strengthen the authority's obligations in this regard. If the authority fails to make certain decisions within the legislative six-month period, the legislation will now require the authority to publicly detail reasons for its failure and actions the authority proposes to take to make the decision as soon as reasonably practicable.

Clauses 6, 8 and 10 of the bill remove certain references to the pricing principles in the act in light of differing views amongst stakeholders about how the act requires the authority to apply these principles when deciding whether to approve a draft access undertaking. Pricing principles are, and will remain, an important consideration for the authority in the sense that it must have regard to those principles when deciding whether to approve a draft access undertaking or make an access determination. The authority must consider the pricing principles as one of many factors it has regard to in making regulatory decisions. The authority is also able to consider the weight to be given to the pricing principles along with the other factors on a case-by-case basis. Finally, the remaining clauses in the bill modernise and remove obsolete references in the QCA Act. Affected stakeholders were consulted on the bill.

Treasury considers the bill is appropriate and will assist in improving regulatory outcomes. Thank you for your time this morning. We welcome any questions from the committee in regard to the bill.

CHAIR: Are there any questions from the committee?

Mr STEVENS: Thank you, Mr Fleming, for that excellent overview. The bill proposes to introduce an additional requirement where the QCA does not make a recommendation, decision or determination within six months. Can you advise the committee of the numbers of recommendations, decisions or determinations that are not made within six months and what proportion of total recommendations, decisions or determinations these account for?

Mr Fleming: I can refer to my colleagues, but I would say that it is probably a matter of process for the Queensland Competition Authority. We can take that question on notice in consultation with them.

Mr STEVENS: Absolutely.

CHAIR: Formally we note that we have put that question on notice.

Mr STEVENS: Yes. Perhaps the next question may assist in terms of where I was going. You mentioned that this legislation mirrored the federal legislation in 2010. Can you advise the committee of the differences between what this legislation creates and the federal legislation?

Mr Molloy: It is obviously very similar to the federal legislation but there is probably one very important difference. The federal legislation obviously looks at infrastructure of national significance, whereas in the state regime we are talking about state significance. That is a fairly key difference.

Mr STEVENS: I appreciate that federal legislation covers federal matters, but can you explain what you are trying to address there? Are state matters not as important as federal matters? What is the point you are trying to put forward in that manner?

Mr Molloy: No. It is really to say that obviously something of national significance is a much larger, probably more substantive bit of infrastructure than something that would be captured in the state regime.

Mr STEVENS: There is a lower threshold in state; is that what you are saying?

Mr Molloy: Effectively. It is still important and it is still significant, but for something to satisfy a national significance test that threshold would be higher.

Mr STEVENS: That is the only difference between this legislation and the federal legislation?

Mr Molloy: Probably the only issue of substance, I would think. I will just check with my colleagues.

Ms Dunne: Yes. Some infrastructure services could be captured under both the state access regime and the federal regime.

Mr STEVENS: I think some of them would be, particularly the railway lines—

Ms Dunne: They are not mutually exclusive.

Mr STEVENS:—that Mr Fleming mentioned earlier.

Mr Fleming: That is obviously a key reason why we need to have this consistency.

Ms BOYD: Thank you for coming along today and briefing the committee. Have you had an opportunity to read through the submissions that have been made to the committee on this bill?

Mr Fleming: Yes, we have.

Ms BOYD: Would you be able to provide us with any commentary around Aurizon's submissions and your views on that?

Mr Fleming: I guess the key question around Aurizon's submission is talking about the current pricing principles. It is an area where there has been divergence amongst stakeholders about how the legislation requires the Queensland Competition Authority to apply the pricing principles in draft access undertaking processes.

Based on the submission, Aurizon takes the view that pricing principles have an elevated status and the QCA is required to satisfy the pricing principles as part of its decision. The contrary view, we understand, is that the QCA considers the pricing principles to be fundamental considerations in the sense of being a central element in the deliberative process but does not require them to have primacy over other considerations. This has caused an area of inconsistency and those divergent views of stakeholders which, in our view, has provided an outcome of extending and protracting the draft access undertaking process, given those divergent views, and has taken a focus around the application of the pricing principles.

We certainly agree with the QCA that it is one of a number of factors that needs to be taken into account. The other factors particularly are around users, owners and the public interest. Obviously, pricing is a key component of that as well. The changes to remove some references to the pricing principles are to really reduce the inconsistency that appears to be perceived in terms of the application of those principles. It certainly does not mean that the QCA, as it is required to, will consider pricing principles as one of the many factors and also will consider the appropriate weighting on a case-by-case basis for those pricing principles as compared to each of the other aspects.

Mr Molloy: Could I elaborate on that if that would be useful for the committee. The bill removes three separate references to the pricing principles which relate to an access provider's ability to differentiate between access seekers or users in the negotiation or provision of access. In recent undertaking processes it had become apparent that there was a perceived inconsistency in these references with the reference to the pricing principles in section 138 of the act. Even though in

substance it was not really creating an issue, it was in perception creating an issue of potential inconsistencies and also it affects the way stakeholders would make their case. Basically, the proposed amendments still keep pricing principles very central but they remove some of that duplication to ensure there is a clearer focus.

Ms BOYD: If I am to understand you clearly, the submissions that some stakeholders have provided to the committee may be under a certain perception due to inconsistencies that currently exist, and the amendments through this process are looking to clear that up and make that more understandable for industry?

Mr Molloy: Yes. Certainly there are some stakeholders, particularly Aurizon, who would obviously see these changes as being more substantive than they really are. I would characterise them more as good housekeeping.

CHAIR: My understanding is that originally the QCA could only recommend the declaration of a service. It had phrases such that it would be uneconomic to duplicate the infrastructure and promote a material increase in competition. The language changes, especially the private profitability test, to uneconomic if there is not anyone for whom it is profitable to develop the additional infrastructure. In that case, would that have a substantive difference in the way these things are judged? You said before it is more about perception of changes to housekeeping. Would that have unintended consequences where that test is now about private profitability rather than uneconomic?

Mr Molloy: That previous reference I made about the housekeeping was particularly on pricing principles.

CHAIR: I understand, yes.

Mr Molloy: That was made in that context. The proposal which is in the matter of substance that you raise, which is in the bill, is really going back to what was the original intention of the regime, if we go back to the competition principles agreements of a couple of decades ago and that focus. It really goes to that economic efficiency of duplicating assets, because it is not really in the nation's interest to be duplicating infrastructure where access on a competitive and a regulated basis can be provided. It just leads to fairly inefficient use of resources. Actually, it is sometimes characterised as that you could get a spaghetti railway type outcome. This change is responding to a High Court decision relating to the Pilbara which would have otherwise in all likelihood changed that sort of interpretation. It is now just giving primacy. We are returning to the original intent of the access regime.

Mr STEVENS: In terms of the change, which I take it is criteria (b), can you explain the difference in those tests—the net social benefit test, the natural monopoly test and the private profitability test? Why was it considered necessary and what will be the practical effect?

Mr Molloy: I will go to why it is considered important and perhaps I will then defer to Louise on the detail. It does go back to the original intent of infrastructure regulation when something is declared. It is just making sure that, when infrastructure is significant, the economic efficiency argument is important. The private profitability test means, 'Is it possible for another infrastructure provider to still make profit by effectively duplicating infrastructure?' That is saying that if they could make a profit then there is a possibility that, if prices were too high or access criteria were too draconian, another provider could come into the marketplace because there is that potential for profitability. That is a very different approach to the intent of the access regime. That would change things dramatically. In going back to the economic efficiency approach we are really making sure that we can still have appropriate access to infrastructure. Obviously it is still important that the owner of that infrastructure receives appropriate recompense and recognition for that.

Mr STEVENS: Not excessive.

Mr Molloy: But not excessive. There is no intention to in any way curtail investment. It is just seen as making sure that investment is efficient and that it has benefits for the broader economy as well.

Mr STEVENS: That would be the net social benefit test.

Mr Molloy: There are a number of criteria that are in play in making that decision.

Ms Dunne: I would just add that it is difficult to say what the net effect will be in terms of whether declaration would be harder or easier. It is just ensuring, though, that the test is based on that natural monopoly type—whether we should or should not duplicate these big assets in Queensland—not about whether it is commercially viable for someone to build another one. There are just a whole lot more tests in the legislation to ensure that decision-makers turn their attention to those considerations rather than a commercial consideration.

Mr STEVENS: That is why you felt it was necessary to add these other tests, rather than just draw a profit line or a charging line?

Ms Dunne: Yes. The Australian Productivity Commission has looked into the issue at length. It became clear that the criteria in the legislation was not clear enough to show that it was an 'uneconomic to duplicate' test in terms of a natural monopoly. It was about whether it was commercial for them to build another railway line for instance.

Mr STEVENS: Is there any weighting given to these three separate tests?

Ms Dunne: That is a decision for the independent regulator and then the final decision-maker is the minister for the QCA Act, who is the Deputy Premier.

Ms RICHARDS: That answered my question in regard to the critical analysis comment by Aurizon in its submission around what that process looked like. Thank you.

CHAIR: I have another question on the private profitability test versus the previous criteria. It could be the circumstance where you have one service or asset and a second one could extract maximum value. Duopolies often do not provide large amounts of competition. The duopoly then would be profitable to develop because they are extracting maximum value in a relatively uncompetitive environment. In that case, the test of private profitability would be different from 'uneconomical to duplicate the infrastructure' in a public benefit test. Where we shift it to private profitability we take into account that a duplicate service could have low competition with other assets. They could extract a lot of value and still be able to do it but not necessarily get a strong benefit. Is that a difference in nuance that has unintended consequences where there is a shift to private profitability?

Mr Molloy: I am not really sure what the unintended consequences would be in that circumstance, really. I cannot really follow that sort of argument because I cannot see that would be the case. We have had, as I said, quite a bit of history under that approach previously. When we have a look at that and ask what unintended consequences that has had, I am not sure there has really been any of great substance there.

CHAIR: So you do not have a concern about private profitability being the part of the language that is key to these changes?

Mr Molloy: I think it is important that it should be.

Mr Fleming: To clarify, the intent of the bill is to move away from the private profitability test.

Mr STEVENS: As the sole test.

Mr Fleming: And on the basis of the efficient allocation.

CHAIR: In paragraph (c)—that the infrastructure is significant having regard to its size or its importance to the Queensland economy—in the summary here that is still captured in other sections, that it is only about significant assets to the Queensland economy.

Mr Molloy: That is right. Obviously you cannot have a regulatory regime where it is being applied at infrastructure that is not significant, because there is a certain burden of regulation. Markets should otherwise be able to work within the framework that is established in legislation. That 'significant' test is really important and it really does focus it in on a much smaller set of infrastructure. As I said, that is important because there is a regulatory cost to all regulation. I think if we have a look at the volume of effort that the various stakeholders put into the regulatory process in terms of the expertise they look to draw on—the economists, the engineers, the lawyers—in making their submission, we need to make sure that that process, which is a very deliberative process in the regulatory sphere, is only occurring where the issues are significant.

Ms Dunne: In terms of the nuances that you were talking about, Chair, I would say that the public interest test looks at that on a case-by-case basis.

CHAIR: It is a balance between those two things. Thank you very much for giving your briefing. Thank you for the information you have provided today. Thank you to the Hansard reporters. A transcript of these proceedings will be available on the committee's parliamentary web page in due course. I note that one question has been taken on notice and the response is required by 5 pm tomorrow, Tuesday, 6 March, so that we can include it in our deliberations. I declare this public briefing for the committee's inquiry into the Queensland Competition Authority Amendment Bill 2018 closed.

The committee adjourned at 10.57 am.