

Briefing Note for Economics and Governance Committee

Inquiry into the Queensland Competition Authority Amendment Bill 2018

Queensland Treasury

Issues

1. The Bill amends Queensland's Access Regime contained under Part 5 of the *Queensland Competition Authority Act 1997* (the Act). The Bill clarifies the access criteria that must be satisfied in order for a service to become declared and regulated under the regime and assists in improving the timeliness of access regulatory processes.

Access criteria

Consistency with the National access regime

2. The updated access criteria in the Bill will ensure consistency with changes that were made to the National Access Regime in October 2017 (established under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA)). Corresponding changes are also underway to the COAG Competition Principles Agreement 1995 (CPA access principles), which sets out the overarching principles for all Australian access regimes.
3. Consistency between the State and Federal access regimes is critical to regulatory certainty for key infrastructure and investment incentives in the State.

Refocusing the criteria

4. The updated access criteria in the Bill will clarify and refocus the criteria to ensure that Queensland's access regime remains appropriately targeted to capture economically significant, natural monopoly infrastructure services.
5. Most importantly, the Bill will restore a 'natural monopoly test' when assessing the criterion relating to whether a facility is 'uneconomic to duplicate'.
6. The clarification is necessary due to a series of judicial decisions which changed the interpretation of "uneconomic to duplicate" from the 'natural monopoly test', which considered whether the development of a duplicate facility is economically efficient, to a 'private profitability test' which assessed whether it is profitable for anyone to duplicate the facility. The 'natural monopoly' test interpretation is the Queensland Government's original intention and remains its preference.
7. Other changes to the access criteria include:
 - amending the public interest criterion, including by reframing it as a positive test (from its current negative framing) and inserting additional matters the Queensland Competition Authority (the Authority) and the Minister for the Authority must have regard to when assessing the public interest (such as the effect declaration will have on investment in facilities and dependent markets);
 - removal of the safety criterion, noting that legitimate safety concerns would be a matter considered under the public interest criterion; and
 - amending the competition criterion so that it requires a comparison of competition with and without access on reasonable terms and conditions as a result of a declaration.

Timing

8. It is important the access criteria is updated prior to the commencement of the Authority's impending 'pre-expiry review' of existing declarations under section 87A of the Act.
9. The existing declarations of the following services will expire in September 2020:
 - 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 rail network operated and managed by Queensland Rail Limited; and
 - the coal handling services at Dalrymple Bay Coal Terminal.
10. As required under section 87A of the Act, six to 12 months prior to the expiry, the Authority must recommend to the Minister whether each should be declared for a further period. Given the assessments are based on a strict application of the access criteria, it is important the 'pre-expiry review' is conducted using the updated criteria in the Bill.
11. Given the necessary lead times for these reviews, the Authority will need to begin the review process as soon as possible.

Regulatory processes

12. Regulatory processes, and the development of access undertakings, while complicated and lengthy processes, are an important feature of the Queensland Access Regime as they establish detailed terms and conditions of access, providing more upfront certainty and minimising the potential for access disputes to arise.
13. The Bill will assist with promoting more timely and efficient access undertaking processes by strengthening the Authority's notification obligations in regard to timeframes and confirming the intended application of the pricing principles.

Six-month timelines

14. The Bill will obligate the Authority to publicly detail the action it will take if it fails to make a decision on a draft access undertaking within the six-month period provided for under the Act.

Pricing Principles

15. In light of differing views amongst stakeholders around how the Act requires the Authority to apply the pricing principles in its draft access undertaking decisions, the Bill will remove certain references to the pricing principles in the Act.
16. 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 still consider the pricing principles as one of many factors it must have regard to when making regulatory decisions but it is appropriate that the Authority is able to consider the weight to be given to the pricing principles along with the other matters on a case by case basis.

Background

17. Third party access regulation ensures that monopoly businesses providing essential infrastructure facilities (such as rail tracks, port channels and other types of infrastructure facilities) do not abuse their market power through unfair pricing or restrictive access arrangements. The Queensland Access Regime provides a framework for access regulation over services provided by significant infrastructure facilities in Queensland.

18. All decisions about the application of the Queensland Access Regime are made on the basis of whether the service satisfies the access criteria. That is, for a service to be declared, both the Authority and the Minister for the Authority must be satisfied each of the access criteria is met. The criteria is also used when assessing revocation of declarations.

Access criteria changes

19. The access criteria under Queensland's Access Regime (and all State and Territory regimes) are based on principles contained in the CPA access principles. A similar set of criteria are also included in the National Access Regime in the CCA.
20. Uncertainty in these criteria in relation to the interpretation of the 'uneconomic to duplicate' criterion arose as part of a rail access dispute in the Pilbara in Western Australia. This was a long running dispute that was considered by the Australian Competition Tribunal, the Federal Court and ultimately the High Court (*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) HCA 36).
21. The High Court held that the uneconomic to duplicate criterion be interpreted in accordance with the 'private profitability' test (i.e. that there is not anyone for whom it would be profitable to develop another facility).
22. The natural monopoly test better reflects the objectives of the third party access regime. It brings the assessment of this criterion to one based on overall economic efficiency of whether spare capacity at an existing facility can be utilised at least economic cost, whereas the private profitability test moves this assessment to one of whether it is profitable for another party to build a duplicate, albeit potentially economically wasteful, facility.
23. After significant independent review of the issue, the Australian Government decided to amend the National Access Regime access criteria to restore the natural monopoly test in October 2017.
24. While the uncertainty was in the context of the National Access Regime, it also caused uncertainty for State access regimes, including the Queensland Access Regime, given the similarity in the criteria between the regimes.
25. While Queensland's Access Regime is separate from the National Access Regime, the amendments to the access criteria in the Bill reflect the updated National Access Criteria. Consistency between the Queensland and the National Access Regimes is important to retain investment confidence in regulated, significant infrastructure, and in industries dependent on access to that infrastructure.

Regulatory processes

26. The second element of the Bill makes targeted amendments that will improve some of the regulatory processes contained under the Queensland Access Regime such as the application of the pricing principles.
27. Pricing principles relate to the price of access for a service. There are four pricing principles which are set out in in section 168A. The Authority must have regard to these pricing principles when deciding whether to approve a draft access undertaking (section 138(2)) and also when making an access determination (section 120(2)).
28. The Bill removes other references to pricing principles in the Act (sections 100, 138A and 168C). This will clarify the Authority's application of the pricing principles in light of some uncertainty amongst stakeholders around how these references to the pricing principles should be applied.