

Queensland Competition Authority Amendment Bill 2008

Explanatory Notes

General Outline

Policy Objectives

The Bill amends the *Queensland Competition Authority Act 1997* (the Act) to:

- apply the monopoly prices oversight regime to non-government monopoly business activities, that are provided by rail, port, electricity or water infrastructure facilities;
- provide an option for the Queensland Competition Authority (the Authority) to price monitor monopoly business activities;
- extend the revocation process for certain declared activities;
- include a nationally consistent objects clause and pricing principles in the third party access regime;
- provide up-front immunity from third party access regulation of services provided by infrastructure that is developed through an approved competitive tender process;
- impose a timeline on the Authority in making regulatory decisions under the third party access regime;
- require the Authority to consider the effect its decisions have on the rate of return of regulated entities;
- require the Authority to not reject a draft undertakings on the basis of a minor and inconsequential matter; and
- permit the Authority to make rulings regarding third party access matters outside a regulatory determination.

Reasons for the Bill

After a decade of operating under the State's economic regulation framework, it was timely to review the institutional arrangements encompassed in the *Queensland Competition Authority Act 1997* (the Act). In response to a public review of the Act, submissions were provided by those parties most affected by the regulatory legislation in Queensland.

Around the same time of the review, the Federal Government commissioned a report on the effect of economic regulation on significant export infrastructure investment. This report provided the background to the Council of Australian Governments (COAG) consideration of jurisdiction's respective economic regulation frameworks, which culminated in the 'Competition and Infrastructure Reform Agreement' (CIRA) which was agreed to by all States in February 2006.

The Queensland review of economic regulation coupled with the requirements of the CIRA form the basis of the reforms to the Act provided in the *Queensland Competition Authority Bill 2008* (the Bill).

While the economic regulation framework provides protections to ensure that monopoly businesses do not exploit their market power, it moves towards achieving the outcomes of a competitive market through providing regulatory options that are considered 'light-handed' and less prescriptive. When other jurisdictions implement the CIRA reforms to their respective regulatory regimes, it will bring consistency across jurisdictions' regulatory regimes and improve the timeliness of regulator's decision making.

The Bill will simplify and increase certainty in the regulatory process which will encourage efficient investment in significant infrastructure in Queensland

Achievement of the Objectives

Light-handed regulatory options

- 1. Extend the application of the monopoly prices oversight regime to non-government monopoly business activities and introduce a new price monitoring regime.**

Currently the prices oversight regime applies to government monopoly businesses. The Bill extends its application to certain private monopoly businesses.

The application is only relevant to activities currently nominated under the third party access regime. That is, the activities must be provided by means of a facility including port, rail, electricity, wholesale petroleum, gas, water or sewerage infrastructure. Furthermore the business activity can only be declared if it meets other defined criteria that effectively identifies it as a 'monopoly' (e.g. barriers to entry or no competitive pressure in the market). Should a business activity meets these declaration tests, the Ministers still have the discretion to decide whether the business should be referred to the authority for a pricing oversight investigation.

This provision recognises that some private monopolies in Queensland could, potentially, be regulated by the ACCC under the Commonwealth's regulatory regime which could lead to situations for Queensland businesses to be regulated by both the Authority (for public providers) and ACCC (for private providers) in the same industry. Where applicable, the provision also provides a light-handed regulatory option for those private monopolies that would normally be regulated under Queensland's access regime.

The Bill also introduces a new price monitoring regime into the prices oversight regime. Under price monitoring the Authority will obtain pricing data from the monopoly business activity at defined periods and periodically publicly release the data and any recommendations to the Ministers.

For government monopolies, similar to the current pricing investigation process, any recommendations made in a price monitoring report can be referred to the Ministers responsible for the monopoly government business. Private monopoly businesses will be required to make a written response to any report recommendations.

The Authority (or Ministers) cannot prescribe prices under the light-handed price monitoring regime. The transparent price monitoring process coupled, where applicable, with the underlying threat of direct price setting regulations should provide the right incentives to constrain the monopoly activity exercising its market power.

Price monitoring will provide a light-handed transparent regulatory regime for monopoly business activities that provides maximum flexibility for a monopoly business to operate in the market with minimal interference from the regulator.

2. Up-front immunity from State regulation

The Bill provides for up-front immunity from the State's access regime for services provided by new infrastructure developed under an ACCC approved competitive tender process.

It is considered an efficient competitive tendering process (specifying conditions of operation) can substitute for regulation of prices charged by a natural monopoly and as such, a business developing infrastructure this way should be legislatively assured of not being regulated.

3. Revocation of declaration

Currently a Ministerial declaration of a monopoly business activity under the prices oversight regime remains in place until its expiry date as there is no legislative provision for revocation under this regime.

To minimise the prospect of unnecessary regulation, should market conditions change such that a regulated entity is no longer operating in a market where it is a monopoly provider, legislative provisions in the Bill provide for a revocation process to be triggered.

Adding certainty to the regulatory process

1. Objects clause and pricing principles:

The inclusion of an objects clause and uniform pricing principles will provide overriding guidance for the Authority and Ministers in making regulatory decisions under the access regime in the Act.

The same clause and principles will be applied to all jurisdictions' access regimes which will promote national consistency in regulatory practice, contribute to consistent and transparent regulatory outcomes and increase certainty for investors, access providers and access seekers which will benefit infrastructure investment.

2. Time limits on determination decisions

The Bill requires the Authority to make a final decision in regard to an access determination within a six month time period, provided it has been given sufficient information. This will assist in more timely regulatory decisions, increase certainty for regulated entities and again, have a positive affect on investment in infrastructure.

3. Factors affecting the making of or the approval of an access undertaking

The Bill requires the Authority to consider additional matters when making or approving an access undertaking. These include:

The effect of excluding assets for pricing purposes: while the Authority cannot guarantee a return on all regulated investment in infrastructure, the risk of the regulator removing assets from the asset base (and therefore decreasing the regulated entities rate of return) can have an adverse effect on the incentives for industry to invest in strategic significant infrastructure over time. This provision will focus the Authority on minimising this effect where possible.

The Authority should not reject a draft access undertaking on the basis of a minor and inconsequential matter: This provision provides for a regulatory approach where the Authority doesn't question a proposal put forward by a regulated entity if it is of a relatively minor nature.

4. Rulings on regulatory issues

Under the third party access regime, the Bill permits the Authority to make a 'binding ruling' on a regulatory parameter relevant to a regulated service (or potentially regulated) service prior to, or outside of, a formal regulatory determination or access undertaking process. Rulings could be made on key parameters such as, for example, the Weighted Average Cost of Capital (WACC), optimised asset valuations or whether or not new infrastructure would be subject to regulation.

Rulings will provide greater certainty prior to regulated infrastructure investment being made and could facilitate the financing of increased 'spare capacity' (i.e. investments over that required to meet existing demand).

Binding rulings can only be revoked where key information used by the Authority to make the ruling was false or misleading or the circumstances or assumptions the ruling is based on, stated up-front by the Authority, change markedly.

The Authority will also be able to provide rulings or general pricing advice to entities carrying on a monopoly business activities (or potential monopoly business activity) under the prices oversight regime. As this regime is recommendatory, any advice or rulings made under this regime are non-binding.

Notes on Provisions

Part 1 Preliminary

Clause 1 cites the short title of the Bill.

Clause 2 provides that the proclamation of Section 40(1) and (2) will be delayed.

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

Clause 4 amends the long title of the Queensland Competition Authority Act 1997 by omitting 'government' from 'government monopoly business activities'. The Bill extends the application of part 3 to non-government business activities.

Part 2 Queensland Competition Authority

Clause 5 expands the Authority's functions under section 10 (Authority's functions) to allow it to:

- develop criteria that must be met to declare a non-government business activity as a monopoly business activity;
- recommend to Ministers a Ministerial declaration be revoked;
- investigate pricing practices relating to monopoly business activities; and
- price monitor monopoly business activities.

Part 3 Pricing practices relating to monopoly business activities

Clause 6 amends the part 3 heading (Pricing practices relating to government monopoly business activities) by omitting ‘government’ from ‘government monopoly business activity’.

Clause 7 extends section 13A (What pt 3 is about) to provide for the declaration of eligible non-government business activities provided by means of significant infrastructure (i.e: rail transport; port; electricity, petroleum or gas transmission and distribution; and water and sewerage) and allow price monitoring investigations;

Clause 8 amends the part 3, division 1A heading (Criteria for declarations of government monopoly business activities) by omitting ‘government’ from ‘government monopoly business activities’.

Clause 9 amends section 14 (Development of criteria) to reflect that there will be two sets of declaration criteria. The criteria for government business activities has already been developed by the Authority.

Clause 10 inserts a new section 14A (Development of criteria for non-government business activities) to reflect that the Authority will need to develop declaration criteria for non-government business activities.

Clause 11 amends section 15 (Revision of, and advice about, criteria) to enable the Authority to revise the declaration criteria it has developed in section 14 and 14A above.

Clause 12 amends the part 3, division 2 heading (Declaration of government monopoly business activities) by omitting ‘government’ from ‘government monopoly business activities’.

Clause 13 amends part 3, division 2, subdivision 1 heading (Government business activities) to confine this subdivision to only those business activities provided by government.

Clause 14 amends section 18 (Request for declaration) to remove ‘government’ from monopoly business activity. The Clause also provides the Authority with an option to recommend to Ministers the type of pricing investigation that should be undertaken (i.e. price investigation or price monitoring investigation), should Ministers decide to make a referral.

Clause 15 amends section 18B (Requests by local government entities and responsible local governments) to remove 'government' from monopoly business activity. Local governments may recommend to Ministers their preferred pricing investigation option should Ministers decide to make a referral (i.e. pricing practices investigation or price monitoring investigation).

Clause 16 amends section 19 (Declaration by ministers) to provide that Ministers may declare a government business activity to be a monopoly business activity with or without a request from the Authority. The declaration continues to take effect until it is revoked by the Ministers.

Clause 17 amends section 20 (Declaration by regulation) by omitting 'government' from 'government monopoly business activity'.

Clause 18 inserts a new subdivision 2 (Non-government business activities) into part 3, division 2. Section 21A provides for non-government business activities to be declared as monopoly business activities through Ministerial declaration. This declaration remains in operation until it is revoked. To make a declaration, Ministers must consult with the owner of the business and have regard to the relevant declaration criteria and any information or advice about this criteria given to them by the Authority.

Section 21B provides a non-government business activity can be declared by regulation;

Section 21C provides for a change in the person carrying on the monopoly business activity.

The clause inserts a new division 2A (Revocation of declarations made by Ministers) which provides for Ministerial declarations to be revoked when relevant criteria has been satisfied.

The Authority may recommend that a Ministerial declaration be revoked only if it is satisfied the activity no longer meets the relevant declaration criteria. Ministers or a relevant entity of a declared activity (i.e. the private business, government agency or local government) can also ask the Authority to consider whether a revocation is appropriate. The Authority can conduct an investigation about the activity before making a revocation recommendation.

Ministers may revoke a declaration if they are satisfied that revocation would be appropriate having regard to the relevant declaration criteria whether or not a revocation recommendation has been made.

Clause 19 amends the part 3, division 3 heading (Investigations about government monopoly business activities) by omitting ‘government’ from ‘government monopoly business activities’.

Clause 20 replaces section 22 (Investigations by authority – standing reference) with a new section 22 (Meaning of price monitoring investigation) to define “price monitoring investigation” as it applies to monopoly business activities. It sets out the role for the Authority in undertaking a price monitoring investigation.

Clause 21 amends section 23 (Investigations by authority – Ministerial reference) to change the section heading to “Investigations about pricing practices” to reflect that Part 3 now provides for the Authority to conduct either a ‘one-off’ pricing investigation or an ongoing price monitoring investigation.

Clause 22 inserts a new section 23A (Price monitoring investigations) into part 3 to set out the terms and conditions for Ministers to refer a monopoly business activity to the Authority for a price monitoring investigation.

Clause 23 amends section 24 (Directions of Ministers for Ministerial reference) to provide that Ministers, in referring a monopoly business activity to the Authority, may direct the Authority to make recommendations on certain specific matters stated by Ministers in the referral notice.

Clause 24 amends section 25 (Notice of investigation) to require that a notice of investigation be given to the relevant person prior to the commencement of a pricing investigation.

Clause 25 amends section 26 (Matters to be considered by authority for investigation). This reflects that the Authority may investigate issues relating to either a government or non-government business activity.

Clause 26 amends section 28 (Ending of authority’s jurisdiction for investigation) to specify when a pricing investigation ends.

Clause 27 amends section 29 (Application of division) to extend the application of part 3, division 4 (Reports of authority about investigations) to allow the Authority to release price monitoring reports on a periodic basis.

Clause 28 amends section 30 (Authority to report to Ministers) to require the Authority to periodically report to the Ministers, in accordance with their referral notice, on the results of its price monitoring investigation. It

also specifies the reporting requirements of the Authority when investigating significant business activities.

Clause 29 replaces section 31 (Authority to give copy of report to government agency) with a new section 31 (Authority to give copy of report to government agency or other person carrying on activity). This provision requires the Authority to provide its pricing report to the government agency or relevant party carrying on the monopoly business activity on the same day it reports to the Ministers.

Clause 30 amends section 33 (Contents of report). This outlines the general contents of the Authority's pricing report.

Clause 31 amends section 34 (Public availability of report). This provision requires the Authority to publicly release its pricing investigation report as soon as practicable after the report is provided to the Ministers.

Clause 32 amends section 35 (Delaying public availability of reports) to allow the Authority to, when it believes necessary, recommend a delay in the release of the public release of a report.

Clause 33 amends section 36 (Decision of Ministers about report) to change the section heading to (Decision of Ministers about particular recommendations in report – monopoly business activity that is a government business activity, other than a significant business activity). For pricing reports that relate to monopoly business activities that are government owned, Ministers may accept or reject the Authority's recommendations.

Clause 34 amends section 36A (Decision of responsible local governments about report) to change the section heading to 'Decisions of responsible local governments about particular recommendations in report – monopoly business activity that is a significant business activity'. For pricing reports that relate to a monopoly business activity that is a significant business activity, the responsible Local Government may accept or reject the Authority's recommendations within 90 days of receiving the report.

Clause 35 inserts a new section 36B (Response to report of person carrying on activity – monopoly business activity that is a non-government business activity). Persons carrying on non-government monopoly business activities must respond to the Authority's pricing reports within 90 days from receiving the report. The response must include details of any action the person will or may take in response to the recommendations contained in the report.

The penalty is the means of enforcing this obligation. The level of the penalty is considered to be reasonable as it is comparable with other penalties in the Act and is not significant given the types of businesses that would be captured under the Act.

Clause 36 replaces section 37 (Referral of accepted recommendations to responsible Minister) with a new section (Referral of particular accepted recommendations to responsible Minister – monopoly business activity that is a government business activity). For pricing reports that relate to monopoly business activities that are government owned, Ministers must refer any accepted recommendations to the responsible Minister for the government agency carrying on the monopoly business activity;

The Clause also replaces section 37A (Register of recommendations and decisions relating to government monopoly business activities involving the supply of water) with a new section 37A (Register of recommendations, and decisions or responses, involving the supply of water). The Authority must keep a register of recommendations in regard to pricing reports relating to the supply of water.

Clause 37 inserts a new division 5 (Miscellaneous) which includes a new section 37B (Authority may give advice about pricing practices). The Authority, when requested, may provide advice about pricing practices to a government agency or other person carrying on a monopoly business activity. As Part 3 is a recommendatory regime, the advice is non-binding under this Part of the Act.

Part 5 Access to services

Clause 38 replaces the part 5, division 1 heading (Interpretation) with 'Preliminary'.

Clause 39 inserts a new section 69E (Object of pt 5), which sets out the overarching object of the Part.

Clause 40 amends section 72 (Meaning of a service) to exclude services provided by means of a facility that is developed by way of a competitive tender process approved under section 44PA of the *Trade Practices Act 1974* (Commonwealth) (TPA) by the Australian Competition and Consumer Council (ACCC).

Clause 41 amends section 76 (Access criteria) to require the Authority and the Ministers to have regard to the object clause before making declaration decisions.

Clause 42 amends section 88 (Recommendation to revoke) to provide for the owner of a declared service to request that the Authority recommend revocation of a Ministerial declaration.

Clause 43 amends section 109 (Decision on application) to require the Authority to have regard to the object clause in deciding whether to approve an access agreement.

Clause 44 inserts a new section 117A (Period for making access determination) which sets a six month time limit (less excluded days) for the Authority to make access determinations following receipt of an access dispute notice. Should it not meet the required six month timeframe, the Authority must write to the Ministers stating the reasons for the delay.

Clause 45 amends section 119 (Restrictions affecting making of access determination). The Authority cannot make an access determination inconsistent with a current ruling (new division 7A), except for when a ruling doesn't apply for the purposes of making an access determination section 150L.

Clause 46 amends section 120 (Matters to be considered by authority in making access determination). The clause requires the Authority to consider additional matters when making an access determination. The Authority must consider the object of the Part (provision 69E), and the effect of excluding assets for pricing purposes and the pricing principles (168A).

Clause 47 amends section 134 (Consideration and approval of draft access undertaking by authority) to reflect the new time limit provisions (section 147A).

Clause 48 amends section 138 (Factors affecting approval of draft access undertaking) to expand the factors the Authority must take into account, that is, the objects clause, the pricing principles, the effect of excluding assets for pricing purposes and any rulings in effect. It also requires that the Authority not reject an undertaking on the basis of matters that are considered 'minor and inconsequential'.

Clause 49 amends section 140 (Consideration and approval of draft amending access undertaking by authority) to reflect the new time limit provisions.

Clause 50 inserts a new section 147A (Period for approving draft access undertaking) which sets the detailed provisions on the six month time limit process for the Authority to approve, or refuse to approve, a draft access undertaking (whether or not amending a draft access undertaking) given to it. The section details when the time limit should commence, any processes that are excluded from the time period and the process should the time limit not be met.

Clause 51 inserts a new division 7A (Rulings) which sets out a detailed framework for the Authority to make binding decisions in relation to regulatory access issues outside the formal regulatory processes. The purpose of the division is to give the Authority the power to rule on issues that will affect future access related decisions the Authority may be required to make in regard to declared (or potentially declared) services.

Clause 52 inserts a new section 168A (Pricing principles) which sets out pricing principles to which the Authority must have regard when making access determinations or deciding whether to approve an access undertaking.

Part 5A Pricing and supply of water

Clause 53 amends section 170R (Recommendation to revoke) to provide for the water supplier who is carrying on a declared monopoly business activity to request that the Authority recommend revocation of a Ministerial declaration; and

Clause 54 amends section 170ZA (Investigation by authority) to provide that Ministers may only refer a monopoly water supply activity to the Authority for an investigation about the pricing practices relating to the activity.

Clause 55 amends section 170ZI (Matters to be considered by authority in making water pricing determination) by omitting ‘government’ from ‘government monopoly business activities’ to capture non-government water activities in the section.

Clause 56 amends section 170ZZH (Matters to be considered by authority in making a water supply determination) by omitting ‘government’ from

‘government monopoly business activities’ to capture non-government water activities in the section.

Part 6 Investigations by authority

Clause 57 amends section 171 (Application of part) to provide for additional investigations which may be undertaken by the Authority as a result of the expansions of pricing oversight investigations under Part 3.

Clause 58 amends section 176 (Notice of hearings) to provide details of additional persons to whom a notice of hearings must be given in regard to an investigation under part 3.

Part 6 Investigations by authority

Clause 59 inserts a new part 11 (Transitional provisions for Queensland Competition Authority Amendment Act 2007) which sets out the arrangements that will apply to certain access disputes, access undertakings and draft access undertakings that are in place prior to the new amendments taking effect.

Where an access dispute notice under part 5 of the Act has been issued to the Authority prior to the commencement of the amendments, the Authority will be not be required to make an access determination within the new six month time limit set out in section 117A (clause 43). It will also not be prescribed that the Authority must have regard to the following when making an access determination: the object of part 5 (clause 38); the effect of excluding assets for pricing purposes; and the pricing principles contained in section 168A (clause 53). However, the Authority is not prevented from taking these matters into account if it chooses to do so.

Where the Authority has received a draft access undertaking under part 5, division 7 of the Act prior to the commencement of the amendments, it is not required to make a decision whether to approve or not approve the draft access undertaking within the new six month time limit set out in section 147A (clause 50). Rather, the Authority will be required to consider and

approve (or refuse to approve) the draft access undertaking in accordance with section 134, 138 and 140, as they were in force prior to the amendments.

Clause 60 amends the schedule (Dictionary) to:

- remove words no longer used in the Act;
- insert definitions for additional words used in the Act; and
- renumber paragraphs in the schedule.

© State of Queensland 2008