Motor Accident Insurance and Other Legislation Amendment Bill 2010

Explanatory Notes

General Outline

Policy Objectives

The objective of the Bill is to reduce delivery and acquisition costs and promote greater price competition within the CTP scheme so as to deliver premium savings to motor vehicle owners.

The Bill amends the *Motor Accident Insurance Act 1994* (MAI Act) to cater for the State as the insurer of last resort in circumstances of a shortfall in private sector underwriting capacity. The Bill also makes a number of technical amendments to align with Queensland's motor vehicle registration legislation, namely the *Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999* and the *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999.*

The Bill also updates the State's third party access regime (the Regime) contained in part 5 of the *Queensland Competition Authority Act 1997* (the QCA Act). The Bill clarifies and strengthens the Regime to reflect the changing nature of investment and competition in regulated infrastructure services since the initial introduction of the QCA Act 13 years ago. The Bill provides ongoing certainty for participants operating under the regulatory framework in Queensland.

The Bill increases the transparency of the regulatory processes provided for in the Regime. It clarifies the role of Government and supplements the powers of the Queensland Competition Authority (the Authority) to ensure that, as the State's independent economic regulator, it is best placed to administer and enforce compliance with the Regime.

The Bill improves the timeliness of regulatory processes under the Regime by streamlining approval processes, applying new timeframes to regulatory

decision making and requiring systematic reviews to assess whether ongoing access regulation is appropriate.

The Bill will also complement the existing protections in the Regime by strengthening the existing prohibitions against unfair differentiation by access providers, including those access providers which have vertically integrated operations (related access providers).

The Bill will ensure that the regulatory environment for third party access in Queensland continues to be effective in fostering competition and promoting investment and efficiency in the Queensland economy by clarifying and supplementing existing provisions, regulatory processes and the powers of the Authority in the QCA Act.

To complement the enhancements to the QCA Act, the Bill will also make amendments to the *Transport Infrastructure Act 1994* (TI Act) which are specific to QR National Limited's (QR National's) corporate governance framework.

The Bill also amends the TI Act to:

- strengthen the existing provisions dealing with priority for regularly scheduled passenger services;
- insert new provisions into the TI Act to preserve existing passenger and non-coal freight train paths; and
- enshrine in legislation the Government's commitment that toll increases on the Gateway Motorway, the Gateway Extension Motorway and the Logan Motorway of Queensland Motorways Limited (QML Network) will be limited to annual Consumer Price Index (CPI rates).

Reasons for the Bill

Motor Accident Insurance Act 1994

A review of the CTP scheme recently conducted by the Motor Accident Insurance Commission identified high policy and acquisition costs associated with the scheme. In particular, the payment of commissions and other inducements by insurers to intermediaries has increased significantly over a number of years resulting in higher CTP premiums for motorists and hindering competition. It has also contributed to the tendency of insurers over several years to file their premiums at the ceiling or upper limit set by the Motor Accident Insurance Commission. Prohibiting these types of

payments will improve efficiencies in the CTP scheme and deliver savings to motor vehicle owners.

Queensland Competition Authority Act 1997

Part 5 of the QCA Act establishes the State-based third party access regime for services provided by means of significant infrastructure in Queensland. A service may be declared for third party access under the Regime and subject to regulation by the QCA.

The services currently declared for third party access under the Regime are:

(a) rail transport services provided by Queensland Rail Limited's intrastate rail network;

(b) rail transport services provided by use of specific coal systems in the Central Queensland Coal Network; and

(c) coal handling services at Dalrymple Bay Coal Terminal.

The Regime has been in place for more than a decade and is modelled on part IIIA of the *Trade Practices Act 1974* (Cth). The Regime has been effective in promoting competition and providing safeguards for businesses seeking access to declared services.

Since the Regime's introduction, the nature of infrastructure investment has changed and there have been significant developments in third party access regulation. The Bill seeks to update and enhance the Regime to reflect these changes and provide increased certainty for regulated businesses and their customers.

The Bill complements existing protections in the Regime which guard against unfair differentiation by access providers. This will ensure the Regime continues to promote competition within the Queensland economy.

Transport Infrastructure Act 1994

The Bill also amends the TI Act to:

- enhance the governance of the QR Network Board within the QR National Group;
- strengthen the framework which maintains priority for regularly scheduled passenger services over other rail services;
- introduce a process for the preservation and allocation of existing passenger and non-coal train paths; and
- set the base tolls payable by motorists on the QML Network.

Achievement of the Objectives

Motor Accident Insurance Act 1994

The objectives of the Bill are achieved by providing a legislative basis for:

- the banning of commissions and inducements paid to third parties;
- allowing an insurer, at the request of a CTP policyholder, to assign an inducement made to the policyholder as a financial donation to a charity (registered in Queensland) or a road safety research entity (as defined) but prohibiting any type of trailing payment;
- not allowing the cost of providing direct policyholder incentives to be charged against the CTP insurance scheme.

Queensland Competition Authority Act 1997

The Bill will provide increased certainty for stakeholders by ensuring that all decisions which affect the coverage of the Regime will be made with explicit reference to the legislated access criteria and with the express involvement of the Authority. This is achieved by the removal of the 'candidate service' requirement for declarations, and the removal of the ability for Government to declare services by regulation or to exclude services or facilities from coverage under the Regime by regulation. The Bill will also provide increased certainty for stakeholders by:

- clarifying that the Regime is only intended to apply to services provided by significant infrastructure facilities;
- introducing a review process for the Authority to assess whether significant infrastructure which is covered by an expiring declaration should be declared again;
- providing more explicit guidance on the matters that the Ministers must have regard to when making an access code; and
- removing deemed decisions for access declarations.

The Bill will promote more timely regulatory processes by:

- streamlining the approval process for access undertakings relating to declared services;
- applying a six month time limit to declaration recommendations made by the Authority; and

- clarifying that the Authority may make certain decisions based on information that has been made available to it by a specified date, where it is reasonable to do so.

To ensure that the Regime remains effective in promoting competition in regulated industries, the Bill will introduce amendments which complement existing protections in the QCA Act against unfair differentiation by access providers. Specifically, the Bill will introduce explicit prohibitions on unfair differentiation by an access provider both during negotiations with access seekers, and in the provision of access for users of declared services. The Bill also introduces specific requirements for access undertakings for declared services provided by related access providers to ensure that these undertakings contain requirements to identify, prevent and remedy certain anti-competitive behaviour. The Bill will also clarify certain investigative and enforcement powers of the Authority, including the introduction of an explicit power for the Authority to obtain information from access providers to ensure compliance with approved access undertakings.

Transport Infrastructure Act 1994

The TI Act amendments achieve their objectives by:

- enhancing the governance of the QR Network Board from the QR National Group by requiring the majority of directors of the QR Network Board to be independent of the executive management of the QR National Group;
- preventing QR Network directors from approving an access agreement with QR National unless they are reasonably satisfied the agreement is on arms length terms;
- preserving existing train paths for regularly scheduled passenger and non-coal freight train paths;
- introducing a process by which the chief executive's consent is required for the reallocation of a preserved train path;
- introducing a framework to impose penalties on railway managers for breach of the provisions regarding priority for passenger services and preserved train paths; and
- not permitting the Minister to make further tolling declarations for the QML Network under section 93 of the TI Act.

Alternatives to the Bill

Motor Accident Insurance Act 1994

Various options have been canvassed to reduce inefficiencies in the CTP scheme.

An alternative is to allow the market to act without government intervention, accepting the need for commissions in order for insurers to compete for market share. Under a purely price competitive model, ideally there could be no constraints on the level of commissions payable giving insurers the opportunity and discretion to determine their own basis of commissions having regard to their own strategies for gaining and holding market share. However, evidence points to intermediaries and insurers being the beneficiary rather than motor vehicle owners.

Legislative action is considered the best option to ensure commission payments and other inducements are not included in premium calculations and to create a level playing field for all insurers to compete for new business.

Queensland Competition Authority Act 1997

The policy objectives can only be achieved through legislation.

Transport Infrastructure Act 1994

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Estimated Cost for Government Implementation

Motor Accident Insurance Act 1994

The amendments to the MAI Act will not result in material implementation costs to Government.

Queensland Competition Authority Act 1997

It is not expected that the amendments to the QCA Act will impose costs for Government as they largely seek to streamline and clarify existing regulatory processes performed under the State's third party access regime.

Transport Infrastructure Act 1994

The Department of Transport works cooperatively with existing railway managers regarding the allocation of passenger and regional freight train paths. The TI Act amendments in relation to the passenger priority and the preservation of passenger and non-coal freight train paths, seek to strengthen the existing framework and are not considered to materially increase administrative costs beyond the current regulation.

While the TI Act amendments allow the chief executive to apply to the Supreme Court to impose a penalty for breaches of the passenger priority and preserved train path provisions, the additional work for the Supreme Court is expected to be minimal.

There will be no additional administrative cost to Government with respect to the TI Act amendment of the tolling declaration power with respect to the QML Network.

Consistency with Fundamental Legislative Principles

Amendments to the QCA Act and TI Act raise some issues with regard to fundamental legislative principles (FLP) which have been adequately considered.

Candidate services

The Bill removes the concept of a 'candidate service' from the Regime. This eliminates the preliminary requirement for the Ministers to make a regulation to identify a service provided by a private facility as a 'candidate service' before the service may be considered for declaration under the Regime.

The repeal of the candidate service requirement may remove a 'protection' for the owners or operators of a private facility, as it essentially removes an extra step for the declaration of services provided by a private facility. However, the removal of the candidate service requirement is justified on the basis that the process for the declaration of a service is clear and transparent, and requires the Authority and the Ministers to assess whether the service meets each of the legislated access criteria in the Regime. A service may only be declared if the Ministers are satisfied about all of the access criteria for the service. This reflects the intention of the Regime to only apply to services provided by a defined and very limited class of significant infrastructure facilities.

Furthermore, as there was no existing legislative guidance for the Ministers when making a candidate service regulation, its removal reduces potential inconsistency and uncertainty in regulatory outcomes which could arise as a result of specific facilities being declared as candidate services.

It is important to note that private facilities in Queensland are potentially subject to access regulation at the Commonwealth level as there is no equivalent candidate service requirement under the National Access Regime established under part IIIA of the *Trade Practices Act 1974* (Cth).

Increased investigative powers for the Authority

New section 150AA of the QCA Act provides the Authority with specific powers to require information from access providers for the purpose of investigating compliance with an approved access undertaking. This section also creates a new offence (with a maximum penalty of 500 penalty units or six months imprisonment) should an access provider fail, without a reasonable excuse, to comply with a requirement to give information to the Authority.

Approved access undertakings are an important feature of the Regime. They provide guidance on the terms and conditions under which an access provider is to offer or negotiate access to services with access seekers. They also establish specific obligations for access providers including in relation to ringfencing, negotiations with access seekers and the provision of access to users of the service. By setting out the terms and conditions on which access will be made available to third parties, access undertakings provide certainty to access providers, users and access seekers.

Given the key role of access undertakings under the Regime, it is considered necessary to enable the Authority, as the independent regulator, to obtain necessary information to effectively monitor an access provider's compliance with the applicable access arrangements under an approved access undertaking.

The introduction of an offence for not complying with an information request from the Authority is justified on the grounds that it reflects the significance of approved access undertakings in the regulatory process. However, the Bill provides appropriate protections for access providers by ensuring that the Authority allows an access provider a reasonable length of time to provide information, and that the access provider will not have committed an offence where it had a reasonable excuse for not complying with an information request. The offence (including the maximum

penalty) is consistent with other offences supporting similar investigative powers provided to the Authority under the QCA Act.

Clarification of the Authority's ability to make certain decisions

New section 168B of the QCA Act clarifies the Authority's ability to make certain specified decisions under the Regime. Under this section, the Authority may make certain decisions without taking into account information that has not been provided to it by a specified date, if doing so is reasonable in all of the circumstances. The intent of this provision is to provide incentive for relevant persons to provide the Authority with full and accurate information in a timely manner so that important regulatory processes are not unduly delayed.

While administrative law principles dictate that a decision maker should consider the most recent and accurate information available to it when making decisions, the Bill is quite specific in ensuring that 'late' information may only be disregarded if doing so is reasonable in all of the circumstances.

Train Path Obligations

(i) Size of penalties

The chief executive can impose a penalty of $5,000 for a breach of section 265(1), 266(4) or 266(5A); or $25,000 for a breach of section 266(5E) or 266A(2). It is intended that the chief executive would issue a penalty notice in relation to matters where more immediate action is appropriate and/or the consequences are less serious.

Where appropriate, the chief executive may also apply to the Supreme Court for a higher penalty up to $50,000 for a breach of section 265(1), 266(4) or 266(5A); or $250,000 for a breach of section 266(5E) or 266A(2). In determining the penalty, the Supreme Court must have regard to the following matters:

(a) the nature and extent of the breach, including for a breach of section 266(5E) or 266A(2):

    (i) the benefit the railway manager has or is likely to obtain from the allocation of the train path; and

    (ii) the extent of adverse economic impact of the allocation of the train path on providers, and customers of providers, of the services; and

(iii) the extent of the social impact of the allocation of the train path on the provision of the services; and

(b) the circumstances in which the breach took place:

(i) including whether the breach was deliberate; and

(ii) whether the railway manager took steps to attempt to prevent the breach occurring or to mitigate the effect of the breach; and

(c) whether the railway manager has previously engaged in any similar conduct.

The maximum penalty of $250,000 for breaches of section 266(5E) and 266A(2) ensures that there is a commercial disincentive for non-compliance, given the high commercial value of the train paths, and takes into account the extent of any economic and social impact of the breach on the provision of services generally.

The penalty regime is regarded as reasonable and proportionate to the circumstances of the breach.

It is noted that railway managers are corporations. Given this, the TI Act amendments do not impose penalties on individuals.

Precedents include:

- *Gas Supply Act 2003* - The regulator may impose penalties up to $133,000 for a contravention of a compliance direction under the *Energy Ombudsman Act 2006* or a material contravention of an industry code.
- *Electricity Act 1994* - The Queensland Competition Authority may apply to the Supreme Court for a civil penalty up to $500,000 in relation to a material contravention of an industry code.

(ii) Defence

The TI Act amendments provide for an appropriate defence for a railway manager. The chief executive or court must be satisfied the railway manager has breached a train path obligation without a reasonable excuse.

(iii) Natural Justice

The TI Act amendments are consistent with the principles of natural justice. The TI Act amendments provide for a process by which the chief executive may give the railway manager a written notice proposing to

impose a penalty under section 266B on the railway manager. The proposed penalty notice must state each of the following matters:

- the chief executive proposes to impose a penalty under section 266B on the railway manager;
- the grounds for imposing the proposed penalty;
- an outline of the facts and circumstances forming the basis for the grounds for imposing the proposed penalty;
- the railway manager may make a written submission to the chief executive, no later than 28 days after the railway manager is given the notice; and
- the way in which the submission may be made.

The railway manager may make a submission against the imposition of the penalty in accordance with section 266D.

The chief executive may decide to give the railway manager a penalty notice imposing a penalty under section 266B on the grounds of the breach. The penalty notice must be in writing and must state each of the following:

- the chief executive has decided to impose a penalty under section 266B on the railway manager;
- the reasons for the decision;
- the amount of the penalty and the day it must be paid (which cannot be less than 28 days);
- that the railway manager may appeal against the decision within 28 days after the railway manager is given the penalty notice; and
- how to appeal.

(iv) Reviewing the use of administrative power

The TI Act amendments are consistent with the fundamental legislative principles for the review of administrative decisions.

The TI Act amendments confer administrative decision-making powers on the chief executive. The chief executive's powers are subject to appropriate review – being an appeal by way of rehearing by the Supreme Court.

Consultation

Motor Accident Insurance Act 1994

In formulating the proposed Bill, consultation has been undertaken with the scheme's licensed CTP insurers and the Insurance Council of Australia, the motor dealer industry and the Motor Trades Association of Queensland and the Royal Automobile Club of Queensland.

Queensland Competition Authority Act 1997

The parties whose rights could have been affected by the QCA Act amendments have been consulted. A discussion paper and exposure draft of proposed amendments to the QCA Act were released for public consultation.

Transport Infrastructure Act 1994

The TI Act amendments in relation to the passenger priority and the preservation of passenger and non-coal freight train paths were developed in consultation with the Department of Transport and Main Roads. Further consultation was undertaken with the Department of Justice and Attorney-General and Department of Premier and Cabinet.

The Department of Transport and Main Roads and the Department of Premier and Cabinet were consulted in relation to the restriction on toll increases on the QML Network. The Government had previously announced its intention to amend this legislation earlier this year.

Notes on Provisions

Part 1 Preliminary

Clause 1 states the short title of the Bill.

Clause 2 provides for the commencement of specific sections of the Bill.

Part 2 Amendment of Motor Accident Insurance Act 1994

Clause 3 states that this part amends the *Motor Accident Insurance Act 1994* (MAI Act).

Clause 4 amends section 3 (Objects*)* to introduce a new object of the MAI Act which is to promote competition in the setting of premiums for CTP insurance.

Clause 5 amends section 4 (Definitions). This clause is a technical amendment required to align with the remaking of the *Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999* and the *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999*.

Clause 6 amends section 20A (Temporary gratuitous insurance). This clause is a technical amendment required to align with the remaking of the *Transport Operations (Road Use Management – Vehicle Registration) Regulation 1999* and the *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999.*

Clause 7 amends section 23 (Statutory policy of insurance). This clause is a technical amendment required to align with the definitions proposed in the *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010.*

Clause 8 amends section 66 (Withdrawal or suspension of licence). This clause formalises what happens in practice to enable an orderly withdrawal by an insurer and a smooth transfer of CTP policies.

Clause 9 amends section 67 (Effect of withdrawal or suspension on existing liabilities etc). The existing provisions contained in the Act, while providing a process for the random allocation of CTP policies in the event of an insurer withdrawing from the Queensland CTP scheme or becoming insolvent, do not provide for consideration of the insurer's capacity (financial reserves) to underwrite the CTP insurance policies. The purpose of this clause is to modify the existing process around random allocation of an insurer's CTP business. The clause introduces a process whereby the Motor Accident Insurance Commission must consult with the remaining licensed insurers and the Australian Prudential Regulation Authority (APRA) to determine the capacity of the remaining insurers to

take on the additional business and subject to there being capacity, to then randomly allocate those CTP policies (across all classes).

Clause 10 inserts a new section 67A (When State may underwrite CTP insurance policies) to introduce provisions that in the event that insurers do not have capacity to take on additional business, the Act will ensure that all motor vehicle owners have the protection of CTP insurance by allowing the government, in those special circumstances, to underwrite any shortfall or under capacity in the market. Terms and conditions associated with the State as the underwriter would be specified in regulation.

Clause 11 inserts a new section 72A (Declarations from licensed insurer). This clause is part of the package to create a level playing field for new vehicle business and places a requirement for the chief executive officer, and/or another appropriate officer of a licensed insurer, to confirm compliance with the new provisions (sections 96(1), 96(2)(c), 96(3)(b) and 97(5)) of the Act relating to the banning of the payment of commissions and inducements to third parties including that any costs associated with policyholder inducements have not been charged to the CTP business.

Clause 12 inserts a new section 96 (Inducement for CTP insurance business prohibited). This clause introduces the ban on licensed insurers paying inducements including commissions to third parties or intermediaries in exchange for their nomination on new CTP policies. However, the clause allows the policyholder to direct the insurer to assign the financial value of an inducement to a particular registered charity or road safety research entity (both defined). Trailing payments on subsequent renewals are prohibited.

Clause 13 amends section 97 (CTP premiums not to be discounted etc). This clause introduces a requirement that the costs associated with policyholder inducements and general insurer advertising are not charged to the CTP business. The clause is intended to promote CTP insurance as a stand alone insurance product and price competition.

Clause 14 inserts a new part 7, division 6 (Transitional provisions for the Motor Accident Insurance and Other Legislation Amendment Act 2010). In order to deliver CTP premium savings to motor vehicle owners from 1 October 2010 and to promote CTP price competition, this clause ensures that any arrangements, including contracts entered into by the insurer and the third party for the purpose of directing CTP policies at any time, as well as any payment that has been made prior to

1 October 2010 for direction of CTP policies after 1 October 2010, are null and void.

Part 3 Amendment of Queensland Competition Authority Act 1997

Clause 15 states that this part amends the *Queensland Competition Authority Act 1997* (QCA Act).

Clause 16 amends section 5 (Definitions – the dictionary) to reflect that the dictionary is in schedule 2 of the QCA Act.

Clause 17 amends the Authority's functions under section 10 (Authority's functions) to reflect that there is only one avenue for declaration under part 5 of the QCA Act and clarify that it is a function of the Authority to monitor compliance with approved access undertakings.

Clause 18 amends section 69E (Object of pt 5) to clarify that part 5 of the QCA Act is only intended to apply to significant infrastructure.

Clause 19 amends section 70 (Meaning of facility) so that a facility can no longer be excluded from part 5 of the QCA Act through the making of a regulation.

Clause 20 amends section 72 (Meaning of service) so that a service can no longer be excluded from part 5 of the QCA Act through the making of a regulation.

Clause 21 amends the heading of part 5, division 2 (Ministerial declarations) to reflect that there is only one avenue for declaration under part 5 of the QCA Act.

Clause 22 amends the heading for part 5, division 2, subdivision 1 (Criteria for declaration recommendations and Ministerial declarations) to reflect that there is only one avenue for declaration under part 5 of the QCA Act.

Clause 23 amends section 76 (Access criteria) to:

- remove reference to 'candidate services' from the access criteria so that all services, as defined under section 72 of the QCA Act, may be considered for possible declaration under part 5 of the QCA Act, irrespective of whether they are provided by privately owned or

publicly owned facilities, and without the Ministers having to first make a regulation declaring the service to be a 'candidate service';

- amend section 76(2)(a) to clarify that access (or increased access) to the service should be expected to promote a material increase in competition in order for this criterion to be satisfied. This will prevent the declaration of services where only a trivial increase in competition is expected to result;
- insert a new access criterion at section 76(2)(ba) to ensure that a service can only be declared if it is provided by an infrastructure facility that is significant;
- insert a new section 76(3)(i) requiring the Authority and Ministers to have regard to cross-jurisdictional issues when considering whether access (or increased access) to the service is in the public interest; and
- renumber provisions.

Clause 24 amends section 77 (Requests about declarations) to reflect the removal of the candidate service requirement from the declaration process. This will allow a person, or the Ministers, to ask the Authority to recommend that a service be declared, regardless of whether the facility used to provide the service is privately or publicly owned.

Clause 25 amends section 79 (Making recommendation) to remove the requirement for the Authority to make a declaration recommendation within a reasonable time after receiving a declaration request. The Authority will now be required to use its best endeavours to make a declaration recommendation within a 6 month period (see clause 26). The section is also amended to reflect the removal of the candidate service requirement from the declaration process.

Clause 26 inserts a new section 79A (Period for making recommendation) requiring the Authority to use its best endeavours to make a declaration recommendation within 6 months of receiving a declaration request. Certain days are excluded from the six month time limit. If the Authority fails to make a recommendation within the six month period, it must give written notice of the reasons for the failure.

Clause 27 amends section 80 (Factors affecting making of recommendation) to reflect the increased threshold applying to the access criterion at section 76(2)(a) (see clause 23). The Authority will be required to consider the extent of the likely effect of access (or increased access) to the service when considering whether the access criteria are satisfied. The

section is also amended to reflect the removal of the candidate service requirement from the declaration process.

Clause 28 amends the heading for part 5, division 2, subdivision 3 (Investigations about candidate services) to reflect the removal of the candidate service requirement from the declaration process.

Clause 29 amends section 81 (Power of Authority to conduct investigation) to reflect the removal of the candidate service requirement from the declaration process.

Clause 30 amends section 84 (Making declaration) to clarify that if the Ministers receive a declaration recommendation from the Authority made under part 5, division 2, subdivision 4A of the QCA Act (see clause 34), and the Ministers decide not to declare the service (or part of the service), that decision does not affect the existing declaration for that service. The existing declaration will remain in effect until it expires or is revoked.

Clause 31 amends section 85 (Notice of decision) to provide that, if the Ministers do not publish a decision about whether to declare a service within 90 days of the relevant day, the Ministers will no longer be deemed to have published a decision not to declare the service. The amendments also clarify the persons to whom the Ministers must give certain material after they have made a decision about whether to declare a service.

Clause 32 amends section 86 (Factors affecting making of declaration) to reflect the increased threshold applying to the access criterion at section 76(2)(a) (see clause 23). The Ministers will be required to consider the extent of the likely effect of access (or increased access) to the service when considering whether the access criteria are satisfied. The section is also amended to reflect the removal of the candidate service requirement from the declaration process.

Clause 33 amends section 87 (Duration of declaration) to reflect that there is only one avenue for declaration.

Clause 34 inserts a new subdivision 4A (Review of declaration) into part 5, division 2 of the QCA Act to provide a process for the pre-expiry review of an existing declaration of a service. The Authority will be required to make a recommendation to the Ministers about whether a declared service should continue to be declared after the existing declaration expires. The Authority must make its recommendation at least six months (but not more than 12 months) before the existing declaration expires and the Ministers will then be required to make a decision about whether to declare the

service, or part of the service (with effect from the expiry date of the existing declaration) within the specified time period. The purpose of this subdivision is to provide certainty about whether a service will continue to be declared for third party access immediately following the expiry of the existing declaration.

Clause 35 amends section 88 (Recommendation to revoke) to provide a mechanism whereby the Authority may recommend the revocation of a declaration for part of a service. This recognises that different parts of a service may have distinct characteristics and will ensure that only those parts of a service that meet the access criteria remain declared. The section is also amended to reflect that there is only one avenue for declaration.

Clause 36 amends section 92 (Revocation) to allow the Ministers to revoke a declaration for part of a service if they receive a revocation recommendation from the Authority and are satisfied that the relevant part of the service no longer meets the access criteria. The section is also amended to reflect that there is only one avenue for declaration.

Clause 37 amends section 93 (Notice of decision) to reflect that there is only one avenue for declaration and that the Ministers may make revocation decisions relating to part of a service (see clause 36).

Clause 38 amends section 94 (When revocation takes effect) to reflect that there is only one avenue for declaration and that a declaration of part of a service may be revoked (see clause 36).

Clause 39 amends section 95 (Effect of expiry or revocation of declaration) to reflect that there is only one avenue for declaration and that a declaration of part of a service may be revoked (see clause 36).

Clause 40 amends section 96 (Register of declarations) to reflect that there is only one avenue for declaration.

Clause 41 omits part 5, division 3 (Regulation based declarations) to remove the ability for a service to be declared by regulation. This will leave declaration under part 5, division 2 of the QCA Act as the only avenue for the declaration of services under part 5 of the QCA Act.

Clause 42 inserts new sections 100(2) to (4) (Obligations of parties to negotiations).

New section 100(2) prohibits an access provider from unfairly differentiating between access seekers in negotiating access agreements and amending access agreements in a way that has a material adverse effect on one or more access seekers ability to compete with other access seekers.

New section 100(3) provides that an access provider may treat access seekers differently to the extent the differentiation is reasonably justified given the different circumstances applicable to the access provider or any of the access seekers. Such different circumstances could, for example, include differences in the nature, quality or amount of the service sought by the relevant access seekers, differences in the terms on which, or period for which, access to the service is sought, and differences in circumstances arising over time (e.g. a payment guarantee that was not previously required in buoyant economic times might reasonably be required in more difficult economic times). Section 100(3) also provides that an access provider may treat access seekers differently where required or permitted to do so in an access code, approved access undertaking or access determination.

New section 100(4) notes that section 100(3), which allows different treatment where it is reasonably justified, does not allow the access provider to engage in conduct for the purpose of preventing or hindering a user's access to the declared service or propose a price for access that is not consistent with the pricing principles in section 168A.

Clause 43 amends section 118 (Examples of access determinations) to clarify that, while the Authority may make a determination in regard to the price and terms of access to the service, the access seeker is not obligated to accept access to that service.

Clause 44 amends section 119 (Restrictions affecting making of access determination) to allow the Authority, when making an access determination requiring an access provider to extend (or permit the extension of) a facility, to require the access provider to pay all or part of the costs of that extension. This determination can only be made when it is consistent with a requirement imposed under a voluntary access undertaking approved by the Authority, and the Authority is satisfied about certain specified matters.

Clause 45 amends section 127 (Register of access determinations) to provide that the register of access determinations is to include details of amended or revoked determinations (see clause 46).

Clause 46 inserts a new subdivision 4 (Amendment and revocation of access determinations) into part 5, division 5 of the QCA Act to provide for the amendment or revocation of an access determination where there has been a material change of circumstances. New section 127A provides for a party to an access determination to apply to the Authority for an

amendment or revocation of the determination if the party reasonably believes that there has been a material change of circumstances since the determination was made, and that it justifies the amendment or revocation. The Authority will only be able to amend or revoke a determination where it is satisfied that a material change of circumstances justifying the amendment or revocation has occurred. If all the parties to an access determination do not agree to an amendment or revocation, the Authority may arbitrate the dispute. However, to prevent parties from seeking an amendment or revocation of a determination without justifiable cause, the Authority may decide not to arbitrate the dispute if it considers the giving of the dispute notice is vexatious, the subject matter of the dispute is trivial, misconceived or lacking in substance or that no material change of circumstances has happened since the access determination was made.

Clause 47 amends section 128 (Making codes) to require that the Ministers have regard to certain matters when making an access code.

Clause 48 amends section 134 (Consideration and approval of draft access undertaking by Authority) to allow the Authority to extend the 60 day time period in which the owner or operator of a declared service may submit an amended draft access undertaking in response to a secondary undertaking notice issued by the Authority. The period can not be extended beyond 90 days.

Clause 49 inserts a new section 136A (Compulsory amendment of draft access undertaking for declared service given voluntarily). This section provides that if the Authority refuses to approve a draft access undertaking for a declared service which has been submitted voluntarily by an access provider, and the Authority has previously refused to approve a voluntary draft access undertaking submitted by the same access provider, the Authority can issue a notice requesting that the access provider amend the voluntary draft access undertaking in a way the Authority considers appropriate. If the access provider does not comply with this notice, the Authority may prepare, and approve, an access undertaking for the service.

Clause 50 amends section 137 (Contents of access undertakings) to include a requirement that an access undertaking for a related access provider must include provisions for identifying, preventing and remedying conduct by the access provider that unfairly differentiates between access seekers in negotiating access agreements or amendments to access agreements, or between users in the provision of the service. Additionally, a related access provider must include provisions which prevent the access provider from recovering, through the price it charges for access, costs that are not

reasonably attributable to the provision of the service. The recovery of costs which are not attributable to the provision of the service would provide a related access provider with scope to cross subsidise, cost shift and margin squeeze.

Clause 51 amends section 138 (Factors affecting approval of draft access undertaking) to ensure that the Authority has regard to the effect of excluding existing assets for pricing purposes and the pricing principles in section 168A when considering whether to approve draft access undertakings for declared or undeclared services.

Clause 52 inserts a new section 138A (Terms of particular approved access undertakings) to clarify that an access undertaking approved by the Authority may require or permit a related access provider to treat access seekers differently when negotiating access agreements or amendments to access agreements, or between users in the provision of the service, in the circumstances stated in the undertaking. However, this section does not authorise an approved undertaking to permit anything that would be inconsistent with the pricing principles in section 168A.

Clause 53 amends section 140 (Consideration and approval of draft amending access undertaking by Authority) to allow the Authority to extend the 30 day time period in which the owner or operator of a declared service may submit a draft amending access undertaking in response to a secondary amendment notice issued by the Authority. The period can not be extended beyond 60 days.

Clause 54 amends section 144 (Application of subdivision) to clarify that the Authority's investigative powers under division 7, subdivision 3 apply to all draft access undertakings and draft amending access undertakings given to, or prepared by, the Authority under part 5 of the QCA Act.

Clause 55 inserts a new section 150AA (Requirement to give information about compliance) to allow the Authority to require information from a responsible person for an approved access undertaking for the purpose of monitoring compliance with the approved access undertaking.

Clause 56 amends section 153 (Orders to enforce prohibition on hindering access) to enable the prohibition on unfair differentiation (new section 100(2) and 168C) to be enforced in the same way as the similar existing prohibitions in the QCA Act.

Clause 57 amends section 168A (Pricing principles) to provide that the pricing principles are applicable to both declared and undeclared services

and to clarify that section 168A(c) applies to a related access provider as defined in the QCA Act (see clause 64).

Clause 58 inserts new sections 168B (Information to be considered by Authority in making decisions) and 168C (Prohibition on particular treatment of users by access providers).

New section 168B applies to the making of specific decisions by the Authority. This section provides that, if a person makes a submission or gives information to the Authority after the period specified by the Authority, the Authority may make the decision without taking that late information into account, if doing so is reasonable in all of the circumstances. The section specifies factors which the Authority must take into account when deciding whether it is reasonable in all of the circumstances to make the decision without taking late information into account. If a person fails to provide requested information or produce a requested document (whether within or after the specified period), the Authority may make the decision on the basis of the information available to it at the time.

New section 168C prohibits an access provider from unfairly differentiating between users of the declared service in providing access to the service in a way which has a material adverse effect on the ability of one or more users to compete with other users. This prohibition does not apply to the extent the discrimination is expressly required or permitted by an access code, approved access undertaking, access agreement or access determination. However, an access provider can not do anything:

- under an access agreement or access determination which would contravene sections 104 and 125; and
- that is inconsistent with the pricing principles in section 168A.

Clause 59 amends section 171 (Application of part) to provide that the Authority can use its investigation powers under part 6 of the QCA Act when it is making a declaration recommendation under the new provisions under part 5, division 2, subdivision 4A (Review of declaration).

Clause 60 amends section 181 (Notice to witness) to provide that the Authority, rather than just the chairperson of the Authority, may issue a notice to a witness during an investigation.

Clause 61 amends section 185 (Giving information and documents to Authority) to provide that the Authority, rather than just the chairperson of

the Authority, may require a person to give information or documents to the Authority during an investigation.

Clause 62 inserts a new part 12 (Transitional and savings provisions for Motor Accident Insurance and Other Legislation Amendment Act 2010) which sets out the arrangements that will apply to the services that are declared under, or excluded from, part 5 of the QCA Act prior to the new amendments taking effect.

New section 248 (Definition for pt 12) provides a definition specific to the new part 12.

New section 249 (Exclusion of service from pt 5) excludes a specific rail service from coverage under part 5 of the QCA Act for 10 years from the day the section commences.

New section 250 (Saving of declarations of particular services) provides that each of the specified services is taken to be a service declared by the Ministers under part 5, division 2 of the QCA Act. The declaration for each of the services expires 10 years from the day the section commences. However, a declaration for one or more of the services, or part of the services, may be revoked earlier under part 5, division 2, subdivision 5 of the QCA Act.

Clause 63 inserts a new Schedule 1 after part 12 (Schedule 1 Central Queensland coal network rail infrastructure) which shows the Blackwater, Goonyella, Moura and Newlands coal systems to which the declaration under the new section 250(1)(a) applies.

Clause 64 amends the schedule (Dictionary) to:

- remove words no longer used in the QCA Act;
- insert definitions for additional words used in the QCA Act;
- amend definitions to ensure they apply where appropriate to new sections of the QCA Act; and
- renumbers the Schedule and paragraphs in the schedule.

Part 4 Amendment of Queensland Competition Authority Regulation 2007

Clauses 65 to 69 amend the *Queensland Competition Authority Regulation 2007* to omit the declarations that will be replaced with transitional provisions within part 12 of the QCA Act.

Part 5 Amendment of Transport Infrastructure Act 1994

Clause 70 states that this part amends the *Transport Infrastructure Act 1994* (TI Act).

Clause 71 inserts new section 93AA (Application of section 93 to QML Network) which will remove the power of the Minister to make a tolling declaration over the QML Network under section 93 of the TI Act. The last tolling declaration made by the Minister under section 93 of the TI Act will continue to apply to the QML Network.

Clause 72 amends the reference to the dictionary in the QCA Act in section 139 (Chief executive may decide matters on request).

Clause 73 amends the reference to the dictionary in the QCA Act in section 140 (Notice of dispute under agreement for access).

Clause 74 amends section 266 (Priority for regularly scheduled passenger services in allocating train paths).

New subsections 266(5A) and (5B) introduce a process by which the railway manager must notify the chief executive, if the railway manager becomes aware that a train path on a specific section of railway track used for regularly scheduled passenger services is, or will become, available for allocation.

On receiving a notice under section 266(5A), new section 266(5C) provides that a chief executive may give a written notice to the railway manager requiring that the train path be allocated to a stated passenger service. A railway manager given such notice must allocate the train path

in accordance with the terms of the notice and section 266(5D) and 266(5E).

The new subsection 266(6A) provides that section 266 does not apply in relation to preserved train paths under the new section 266A.

Clause 75 inserts new sections 266A to 266H regarding the preservation of train paths.

New section 266A (Allocation of preserved train paths) preserves train paths, on the commencement of this section, used for a regularly scheduled passenger service, or a service involving the transportation of a type of freight other than coal. If a preserved train path becomes available for a railway manager to allocate, the railway manager may allocate the train path to a person for the provision of a different type of service, subject to the chief executive's written consent. If a railway manager allocates a preserved train path without the chief executive's consent, the railway manager may be subject to a civil penalty under new section 266B.

New section 266B (Civil penalty for breach of train path obligation) provides that a railway manager is liable to pay the State a civil penalty, if the railway manager breaches, without reasonable excuse, section 265(1) (Delayed passenger services), section 266(4), (5A), (5E) (Priority for regularly scheduled passenger services in allocating train paths) or section 266A(2) (Allocation of preserved train paths). Under this section, the chief executive can impose a penalty of $5,000 for a breach of section 265(1), 266(4) or 266(5A); or $25,000 for a breach of section 266(5E) or 266A(2).

New sections 266C to 266E provide for the process for the imposition of a penalty on a railway manager. The chief executive may give the railway manager a written notice proposing to impose a penalty under section 266B on the railway manager on the grounds of the breach. Section 266C(3) sets out the information to be included in a written notice to the railway manager. The railway manager may lodge a submission in response to the written notice in accordance with section 266D.

If the chief executive is satisfied the railway manager has breached a train path obligation without reasonable excuse, the chief executive may decide to give the railway manager a notice which imposes a penalty under section 266B on the grounds of the breach. The penalty notice must be issued in accordance with section 266E. The chief executive must give written notice of the decision (including reasons) to the railway manager in accordance with section 266E.

New section 266F (Appeal against imposition of penalty by penalty notice) provides for the process of merits review of the chief executive's decision by the Supreme Court.

New section 266G (Proceeding for civil penalty order) applies if, on application for the chief executive, the Supreme Court is satisfied that a railway manager has breached a train path obligation without reasonable excuse. The provisions allow the Supreme Court to issue penalties up to $50,000 for a breach of section 256(1), 266(4) or 266(5A); or $250,000 for breach of section 266(5E) or 266A(2). In determining the size of the penalty the Supreme court is required to consider the nature and extent of the breach, the circumstances in which the breach took place, and whether the railway manager has engaged in similar conduct.

New section 266H (Conduct by directors, servants or agents of railway manager for provisions about civil penalty) provides that, for the purpose of section 266B, if it is necessary to be satisfied of a railway manager's state of mind, it is enough to be satisfied that a director, servant or agent of the railway manager, acting within the scope of the representative's actual or apparent authority, had the state of mind.

Clause 76 contains the definitions for part 5 of the new chapter 13.

Clause 77 inserts a new part 5 (Governance) relating to the governance of the QR National Group.

New section 438G (Requirements about appointment of directors) provides that the majority of the directors of a network company, being the QR National company which will manage the coal rail network, must be, amongst other things, non-executive directors. This legislative provision enhances the governance of the QR National Group while at the same time balancing the need for directors with experience in rail operations.

New section 438H (Related party access agreements) provides that a network company must not enter into an access agreement with another QR National company unless the agreement has been approved by the board of directors of the network company. The board must not approve such an access agreement unless it is reasonably satisfied that the agreement is on arms-length terms.

Clause 78 inserts new chapter 21 (Transitional provisions for Motor Accident Insurance and Other Legislation Amendment Act 2010) which contains transitional provisions that require railway managers to provide the chief executive with information on the preserved train paths relating to

the railway managers railway. This information is required to support the new provisions relating to preserved train paths.

Clause 79 amends the dictionary to reflect the changes to the new chapter 13.