Queensland Government

APPLICATION TO THE NATIONAL COMPETITION COUNCIL FOR A RECOMMENDATION ON THE EFFECTIVENESS OF AN ACCESS REGIME

Queensland Third Party Access Regime for Rail Services Provided by Queensland Intrastate Rail Network

17 June 2010

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1. Application and Contact Details

This Application is made under section 44M(2) of the TPA.

The following information is provided in accordance with Regulation 6B of the *Trade Practices Regulations 1974* (Cth).

Applicant

The application is made on behalf of the State of Queensland.

Responsible Minister

The responsible Minister for the State of Queensland is the Honourable Ms Anna Bligh MP, Premier of Queensland.

Contact Officer

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2. Background

The Competition Principles Agreement[1] (**CPA**) provides that States and Territories may establish statutory regimes for regulating third party access to significant infrastructure within their respective jurisdictions. The CPA also provides that where the State or Territory regime is an effective access regime, then it would apply to the exclusion of the third party access regime under Part IIIA of the TPA (**National Access Regime**).

As a result of the CPA, amendments were made to the *Trade Practices Act 1974* (Cth) (**TPA**) to provide for a process whereby a State or Territory could apply to the National Competition Council (**Council**) for a recommendation to be made to the relevant Commonwealth Minister that the Commonwealth Minister decide that a regime is an effective access regime.

In 1997, the Queensland Government passed the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**), which contained a third party access regime in Part 5 of that Act which was modelled on the National Access Regime. In 1998, the Queensland Government made the *Queensland Competition Authority Amendment Regulation (No. 1)* 1998 (Qld) which declared a service for the use of rail transport infrastructure where Queensland Rail (**Queensland Rail**)[2] was the railway manager. This had the effect of making the Queensland rail network subject to the operation of the third party access regime in Part 5 of the QCA Act.

Part 5 of the QCA Act provides two methods of regulating access to declared services:

(a) a "negotiate/arbitrate" model under which the QCA Act imposes an obligation upon the provider of the service to negotiate with access seekers for the making of an access agreement[3] and, if agreement cannot be reached, allows a dispute to be

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[1] The Competition Principles Agreement is an intergovernmental agreement dated 11 April 1995 between the Commonwealth of Australia and the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania, and the Australian Capital Territory and the Northern Territory.

[2] In 1998 QR was a statutory Government Owned Corporation established under the *Government Owned Corporations (Queensland Rail) Regulation 1995* (Qld) as "**Queensland Rail**". The name of Queensland Rail was changed to "**QR**" by the *Government Owned Corporations Amendment Regulation (No. 1) 2007* (Qld). On 1 July 2007 QR became a company Government Owned Corporation and was registered as "**QR Limited**". In 2008 QR Limited was restructured and QR Limited remained the holding company and two subsidiaries were established, being, **QR Network Pty Ltd**, which operates the below rail infrastructure and **QR Passenger Pty Ltd** which operates the passenger business. QR Limited has five business units trading under different registered business names including **QR National** which provides above rail haulage services to coal mines. From 1 July 2010 QR Passenger Pty Ltd will cease to be a wholly owned subsidiary of QR Limited and become a Government Owned Corporation known as "Queensland Rail Limited".

[3] Subdivision 1 of Division 4 of Part 5 of the QCA Act.

arbitrated, and a determination made, by the Queensland Competition Authority (**QCA**) in respect of the access dispute[4]; and

(b) an "access undertaking" model which allows the provider of the service to voluntarily submit an undertaking which sets out in detail the terms and conditions upon which the provider will give access to the declared service[5]. The QCA also has the power under the Regime to require a provider of a declared service to submit an undertaking[6].

In 1999, Queensland Rail voluntarily submitted an access undertaking which was approved by the QCA and became effective as at 1 July 2001. This version of the access undertaking became known in the industry as UT1. Replacement access undertakings were approved by the QCA and became effective as at 1 July 2005 and 1 September 2008. The second of these access undertakings was submitted, in part, to address the fact that Queensland Rail had been restructured and the entity to be responsible under the access undertaking was QR Network Pty Ltd (**QR Network**). These versions of the access undertaking became known in the industry as UT2. On 9 September 2008 QR Network voluntarily submitted a replacement access undertaking. On 18 December 2009 the QCA refused to approve the replacement access undertaking and on 15 April 2010 QR Network submitted a replacement access undertaking. In this document the version of the access undertaking submitted by QR Network on 15 April 2010 is referred to as UT3. In summary, the access undertaking which currently applies is UT2 and it is expected that the QCA will approve UT3 in July/August 2010.[7]

Queensland's rail access regime has been in place for more than a decade and is the most comprehensive and developed rail access regime in Australia. The rail access regime has been effective in promoting competition within the above-rail industry. The access regime, including the process for developing an access undertaking through the QCA is open, transparent and well understood within the sector. To ensure certainty for government and industry about whether the National Access Regime could be applied to govern third party access in Queensland to the service in addition to the current Queensland access regime, the Queensland Government is requesting that the Council assess the effectiveness of the

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[4] Subdivision 3 of Division 4 of Part 5 of the QCA Act.

[5] Division 7 of Part 5 of the QCA Act. The QCA has the power to require a provider to submit an access undertaking under section 133 of the QCA Act.

[6] Section 133 of the QCA Act.

[7] The QCA is expected to approve an amendment to UT2 by the end of June 2010 that will implement the pricing provisions of UT3 and is expected to approve UT3 in July/August 2010.

Queensland access regime, and make a recommendation to the Commonwealth Minister that the regime be certified as an effective access regime.

A period of 15 years is sought for the certification of the effectiveness of the Queensland rail access regime.

3. Overview of the Rail Industry in Queensland

Queensland comprises the largest geographical region of total freight movements in the Australian rail industry, shipping 44,045 million net tonne-kilometres, representing 42.3% of the nation's total[8]. Queensland is a major market for both bulk and non-bulk or intermodal goods. The strong demand is due to Queensland's large population base, abundant resource reserves and large geographical area.

Queensland Rail

QR Limited is a major provider of rail services in the state. QR Limited's rail network totals almost 10,000 kilometres and includes its metropolitan Citytrain network, regional freight and tourist lines, heavy haul tracks in central Queensland, and the interstate track between the New South Wales border and Brisbane.

In 2007-08, QR carried 244 million tonnes of freight and catered for more than 62 million passenger journeys. The majority of freight carried was coal (185 million tonnes) and the bulk of passenger journeys were on Brisbane's suburban rail network. In 2008-09, 159.5 million tonnes of coal were transported to Queensland's coal ports for export. In addition to these export tonnes, around 10.7 million tonnes were railed for domestic use[9].

The Queensland Government has announced its intention to undertake an Initial Public Offering (**IPO**). QR Limited's coal freight business will be publicly listed as a vertically integrated company, **QR National Limited**, and will trade as "QR National". QR Network (which will be a wholly owned subsidiary of QR National Limited) will hold a long-term lease over the Central Queensland Coal Network (**CQCN**) and the coal sections of the North Coast Line. The below rail track within the CQCN will be owned by the Queensland Government through a company with all the share capital held by Queensland Treasury Holdings Pty Ltd. Queensland Rail Limited will lease the coal sections of the North Coast

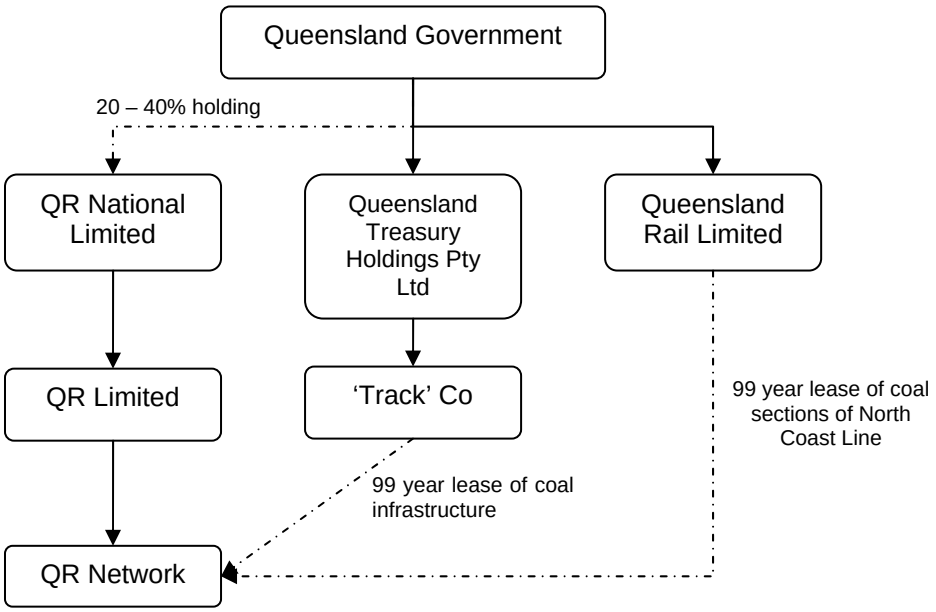
[8] Ian MacGowan, Rail Freight Transport in Australia, *IBIS World Industry Report I6201*, February 2010, p.18.

[9] Queensland Government, *Railing Queensland's Coal, A New Era for Queensland's Coal Export Industry*, May 2010, p.32.

Line to QR Network. The Queensland Government intends to initially retain ownership of 25% to 40% of QR National Limited.

The Queensland Government is transferring QR Limited's passenger business, including the metropolitan rail and regional freight networks, into a new Government Owned Corporation called "**Queensland Rail Limited**".

The following diagram describes the ownership of Queensland's rail infrastructure moving forward.



It is the Government's firm intention that open access to the Queensland rail network will be maintained regardless of the ownership of the relevant infrastructure.

Pacific National

Pacific National (**PN**), a wholly owned subsidiary of Asciano Limited, is currently Australia's largest privately owned rail freight business. PN is Australia's second largest haulier of coal. It operates a coal haulage business on standard gauge track in New South Wales and South Australia and on narrow gauge track in Queensland. The business currently holds approximately 17% of Queensland's coal haulage market[10].

[10] Asciano investor briefing 13 May 2010 (basis for market share calculation not disclosed). Asciano now has about 17% of the Queensland market, but this will increase to 20% when this contract with Anglo

During 2008-2009, PN contracted 30 million tonnes for Queensland and is projecting further increases in tonnage as expansion opportunities arise. PN's current contracted tonnages will give it approximately 17% of the Queensland coal haulage market. PN has haulage contracts with the following mines:

(a) Rio Tinto Limited and Xstrata Australia Limited for the movement of coal on both the Goonyella and Blackwater Systems;

(b) Anglo American Metallurgical Coal Pty Ltd for the haulage of existing coal volumes from Anglo Coal's Moranbah mine, and a new contract, announced on 15 June 2010, commencing 1 January 2012, for the haulage of 10.9 million tonnes per annum from Anglo Coal's German Creek mine which will encompass the existing coal volumes from Anglo Coal's Moranbah North mine;

(c) Macarthur Coal Limited to provide haulage services from Moorvale to Dalrymple Bay Coal Terminal (**DBCT**); and

(d) Bowen Central Coal Pty Ltd to provide haulage services from Isaac Plains to DBCT.

In addition to coal haulage, PN is an established operator of intermodal freight haulage on the Queensland freight network[11].

Queensland's coal rail network

Queensland's coal mines are connected to the State's coal export port terminals via five rail supply chains; the Newlands, Goonyella, Blackwater, Moura and Western systems. These systems stretch more than 2,200 kilometres and have more than 35 coal loading points. The CQCN refers to the rail tracks that are almost exclusively used for the mine to port transport of coal, ie the Newlands, Goonyella, Blackwater, Moura systems. The mainline coal network is interconnected with a number of mine spur lines, which are built by mine operators to take coal from the mine to the major trunk lines.

Coal accounts for an estimated 84% of the value of Queensland's total mining production. In 2008-09, Queensland produced 190 million tonnes of coal valued at an estimated $41.5 billion. Of this, Queensland exported approximately 160 million tonnes with a total value

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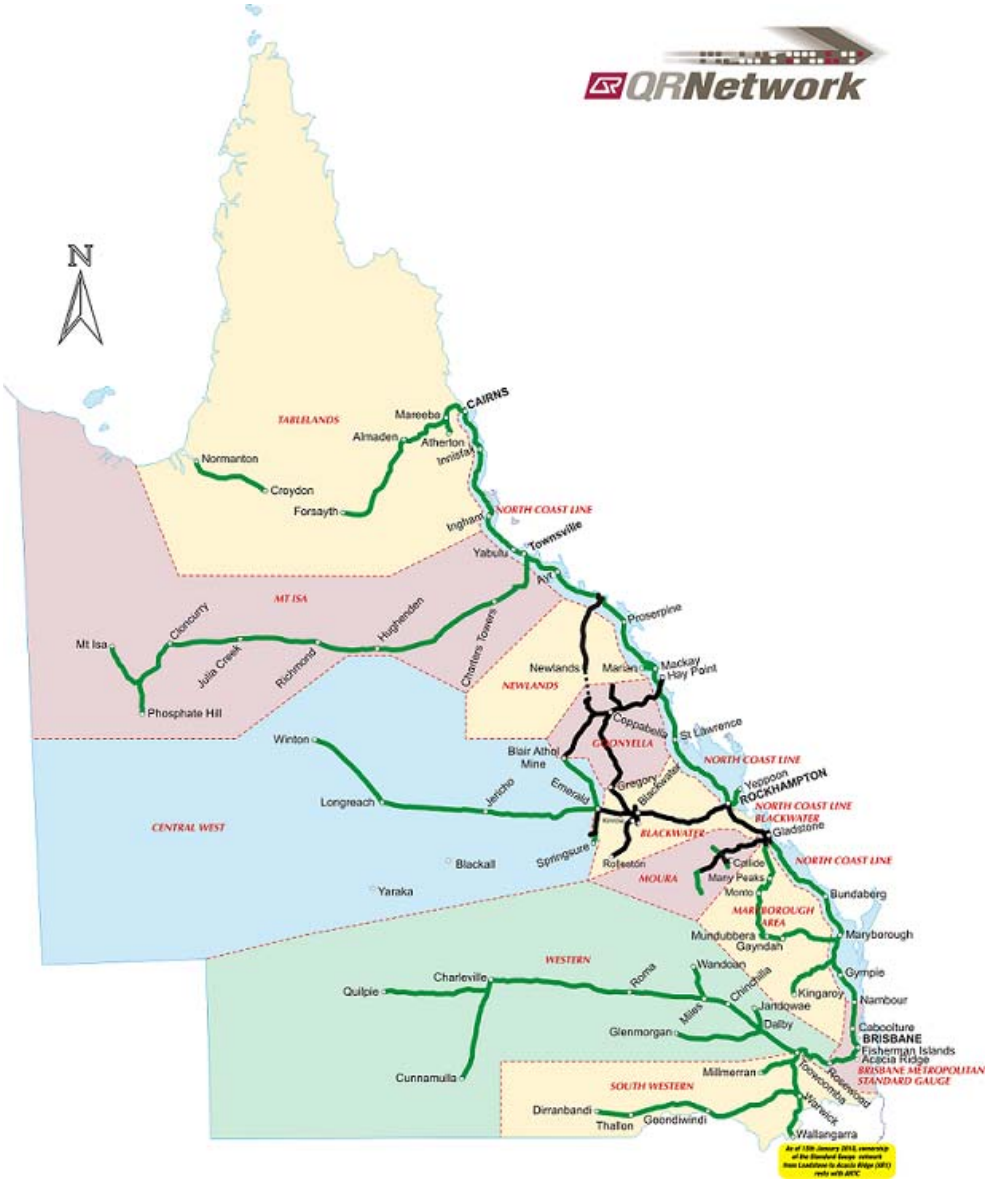
American for German Creek comes on stream in 2012 and the company is expected to have approximately 30% by 2015. See Andrew Fraser, "Asciano poaches key QR coal contract", *The Australian*, 16 June 2010.

[11] Queensland Government, *Railing Queensland's Coal, A New Era for Queensland's Coal Export Industry*, May 2010.

over $37 billion[12]. The coal rail systems account for around 22% of Queensland's total rail track. The coal network is broadly defined as those rail tracks that are exclusively, or almost exclusively, used for the mine to port transport of coal.

Diagram 1: Map of Queensland rail network



[12] Queensland Competition Authority, Report for QR Network Access Undertaking, Assessment of Operating and Maintenance Costs for UT3, September 2009.

4. Overview of Queensland's Third Party Rail Access Regime

The QCA Act provides the legislative framework for economic regulation in Queensland, including a third party access regime for services provided by means of significant infrastructure.

The third party access regime for rail in Queensland (**Regime**) comprises the following:

(a) the QCA Act (**Attachment 1**) (including the proposed amendments to the QCA Act which are set out in the Draft Bill in **Attachment 2**);

(b) the QCA Regulation (**Attachment 3**) (including the exposure draft of the proposed QCA Regulation set out in **Attachment 4**)[13];

(c) the provisions of the *Transport Infrastructure Act 1994* (Qld) (**TIA**) (**Attachment 5**) which deal with the organisational governance arrangements for QR (including the proposed amendments which are set out in Attachment 2);

(d) the rail safety regime in Queensland which is currently established by the TIA but will transition to the regime established in the *Transport (Rail Safety Act) 2010* (Qld) (**Rail Safety Act**)[14] (**Attachment 6**) when proclaimed later this year; and

(e) QR Network's Access Undertaking as accepted by the QCA under the provisions of the QCA Act and amended from time to time. As outlined above, the current undertaking is UT2 (**Attachment 7**) and it is expected that UT3 will be finalised in July/August 2010[15]. As UT3 is currently in the process of being finalised, attached to this application is the original version of UT3 submitted to the QCA which is known in the industry as UT3.1 (**Attachment 8**), the draft decision of the QCA in respect of UT3.1 (**Attachment 9**) and the second version of UT3 submitted to the QCA in response to the draft decision which is known in the industry as UT3.2 (**Attachment 10**)[16].

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[13] The Queensland Government has issued for public comment a copy of the draft QCA Regulation. This Regulation is likely to be made on 15 July 2010.

[14] The *Transport (Rail Safety Act) 2010* (Qld) was passed on 4 March 2010 and the Queensland Government has indicated that will be proclaimed later this year.

[15] The QCA is expected to approve an amendment to UT2 by the end of June 2010 that will implement the pricing provisions of UT3 and is expected to approve UT3 in July/August 2010.

[16] All references to "UT3" are to UT3.2 unless otherwise specified.

The object of the Regime is to promote the economically efficient and safe operation of, use of and investment in, infrastructure by which services are provided, with the effect of promoting effective competition in upstream or downstream markets. This objective is set out in section 69E of the QCA Act and mirrors the object of Part IIIA of the TPA, which is set out in section 44AA(a) of the TPA.

QCA Act

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[17].

As outlined above, Part 5 of the QCA Act contains two separate methods of obtaining access to declared services. Those are the "negotiate/arbitrate" model and the "access undertaking" model. These methods are only available where a service is a declared service and so the structure of Part 5 of the QCA Act is essentially as follows:

(a) *Declaration of a service* – Division 2 of Part 5 of the QCA Act sets out a process for the declaration of services which triggers the two methods of obtaining access under the QCA Act. Currently a declaration can be made either by ministerial decision[18] or by a regulation under the QCA Act[19]. However, the proposed amendments to the QCA Act set out in Attachment 1 remove the ability of a declaration to be made by regulation in order to bring the Regime into line with Part IIIA of the TPA;

(b) *Negotiation framework* – once a service has been declared there is a statutory obligation on access providers to negotiate access rights with access seekers[20]. The Regime contains various provisions to provide a framework for good faith negotiations between parties as set out below;

(c) *Dispute resolution process* – in the event that there is an access dispute, the QCA may act as an arbitrator and make an access determination to settle the dispute;

(d) *Access undertaking framework* - Division 7 of Part 5 of the QCA Act sets out a process for the submission and approval of access undertakings which cover a wide

[17] The owner or operator of a service that is not declared may also give an access undertaking.

[18] Division 2 of Part 5 of the QCA Act.

[19] Division 3 of Part 5 of the QCA Act.

[20] Section 99 of the QCA Act.

range of issues relating to the service including access charges, the provision of information to access seekers, ring-fencing arrangements, extensions of the facility and the safe operation of the facility; and

(e) *Enforcement* – Division 8 of Part 5 of the QCA Act sets out various enforcement mechanisms including orders to enforce access determinations and the prohibition on hindering access, injunctions and orders to enforce access undertakings.

QCA Regulation

The declaration of the relevant services is currently made under section 6 of the QCA Regulation.

The two services that are currently declared under the QCA Regulation are:

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

(b) coal handling services at DBCT.

The current declaration in section 6 of the QCA Regulation applies to the use of rail transport infrastructure for providing transportation by rail.

The Queensland Government is amending the QCA Regulation to ensure the declaration continues to apply to all necessary rail infrastructure in Queensland following the IPO. The consultation paper proposes to do this by amending the QCA Regulation to separately declare rail services provided by the CQCN and rail services provided by the remaining intrastate freight and passenger network. This will result in three services being declared for third party access under the regime:

(a) rail transport services provided by the CQCN;

(b) rail transport services provided by QR's intrastate passenger and freight network; and

(c) coal handling services at DBCT.

The QCA Regulation will be preserved for five years under proposed amendments to the QCA Act (see Attachment 2). The proposed amendments will also require that the QCA recommend whether the declaration should be continued at least six months prior to the expiry of these provisions.

Access Undertaking under QCA Act

The Access Undertaking currently in force is known in the industry as UT2. The QCA is currently considering an Access Undertaking which was submitted by QR in April 2010 and is known in the industry as UT3. The QCA is expected to be issuing a draft decision by 30 June 2010 with a final decision in July/August 2010[21].

The Access Undertaking is made and enforced under the QCA Act and covers a significant range of issues, including:

(a) ring fencing arrangements (Part 3);

(b) framework for negotiating access (Part 4);

(c) the development of access agreements (Part 5);

(d) pricing principles (Part 6);

(e) the utilisation of network capacity (Part 7);

(f) reporting to the QCA (Part 9);

(g) dispute resolution and amendment processes (Part 10); and

(h) coordination and planning of coal rail infrastructure (Part 11).

Following the restructure of QR Limited for the purpose of the IPO, Queensland Rail Limited will become a party to UT2 by virtue of a transfer notice under section 9 of the *Infrastructure Investment (Asset Restructure and Disposal) Act 2009* (Qld). The specific arrangements for this transfer will be finalised in June or July 2010.

TIA

To complement the changes to the Regime, the Queensland Government will also be legislating protections in the TIA, specifically to QR National's corporate governance framework, including:

(a) a requirement that the majority of directors of QR Network's Board are independent of the executive management of the QR Group;

(b) a requirement that access agreements between QR Network and its related entities be approved in advance by the QR Network Board; and

[21] The QCA is expected to approve an amendment to UT2 by the end of June 2010 that will implement the pricing provisions of UT3 and is expected to approve UT3 in July/August 2010.

(c) that directors must not approve an access agreement with QR National unless the directors are reasonably satisfied the agreement is on arm's length terms.

These proposed amendments are set out in Attachment 2.

5. Approach to analysis of Clause 6 Principles

The TPA and the CPA set out the appropriate approach to the consideration of an application for certification.

Sections 44M(4) and 44N(2) of the TPA require the Council in considering what recommendation should be made as to certification, and the Minister, in deciding whether to certify the regime, must:

(a) assess whether the access regime is an effective access regime by applying the relevant principles set out in the CPA;

(b) have regard to the objects in Part IIIA of the TPA; and

(c) must not, subject to section 44DA, have regard to any other matter.

Section 44DA confers an obligation on the Council and the relevant Minister to treat each individual Clause 6 Principle as having the status of a guideline rather than a binding rule and highlights that an effective access regime may contain additional matters that are not inconsistent with the Clause 6 Principles.

Clause 6(3) of the CPA states that provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a Clause 6 Principle, the regime can be taken to have reasonably incorporated that principle.

Clause 6(3A) of the CPA states that in assessing whether a State or Territory access regime is an effective access regime, the Council and the Commonwealth Minister should not consider any matters other than the Clause 6 Principles and those matters which should not be considered include the outcome of any arbitration or any decision made under the access regime. This includes pricing decisions such as the establishment of the revenue cap, the Weighted Average Cost of Capital (**WACC**) and the Reference Tariffs discussed in further detail under the clause 6(4)(g) principle.

It is clear from the above matters that the approach to considering an application for certification is:

(a) to only consider the Clause 6 Principles and that general debate about the details of how the regime operates is not relevant unless the debate relates to a Clause 6 Principle; and

(b) there are a range of approaches to the incorporation of a Clause 6 Principle and that as long as the approach adopted by the Queensland Government is a reasonable approach then the Clause 6 Principle is satisfied.

There has been significant recent public debate about the relative merits of vertical integration and vertical separation. However, the issue of the relative merits of a vertical integration or vertical separation is not a matter that is relevant to certification. There is no Clause 6 Principle which envisages a consideration of this issue. Although each Clause 6 Principle must be considered in the context of whether it is reasonably incorporated having regard to the presence of vertical integration, one of the fundamental purposes of third party access regimes is to promote competition where there is vertical integration. Any consideration of the relative merits of vertical integration and vertical separation would be the consideration of a matter other than a Clause 6 Principle in breach of section 44M(4)(b) and 44N(2)(b) of the TPA.

6. Clauses 6(2) and 6(4)(p): jurisdictional issues

Clause 6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or

(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

Clause 6(4)(p): cross-jurisdictional regimes

Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

Section 5 of the QCA Regulation and the proposed amendments to the QCA Act (Attachment 2) specifically exclude the interstate rail track (that is, the interstate standard gauge rail track that links Acacia Ridge to the New South Wales border). Accordingly, the Regime only applies to railway lines which are situated wholly within the State of Queensland.

The interstate rail track situated between Acacia Ridge and the New South Wales border is owned and operated by the Australian Rail Track Corporation (**ARTC**).

The NCC Guidelines state that in considering the application of clause 6(2) to intrastate rail networks, consideration may need to be given to whether inefficiencies could arise if access to state-based services is determined without consideration of the requirements of interstate demand. However, there is no interstate demand in respect of the Queensland rail network.

Therefore, the Regime is not ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State nor do substantial difficulties arise from the facility being situated in more than one jurisdiction.

Summary

The infrastructure covered by the Regime does not extend beyond the jurisdictional boundary of Queensland.

Therefore, the clause 6(2) and 6(4)(p) principles are satisfied.

7. Clause 6(3): significant infrastructure

Clause 6(3) - For a State or Territory access regime to conform to the principles set out in this clause, it should:

(a) apply to services provided by means of significant infrastructure facilities where:

(i) it would not be economically feasible to duplicate the facility;

(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and

(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and

(b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

Services Covered by the Regime

The NCC Guidelines state that a clear and precise definition of the service(s) and/or proposed service(s) that an access regime covers is essential to ensuring that the regime applies only to services for which access is necessary to promote competition in upstream or downstream markets[22].

Section 72(1) of the QCA Act provides that Part 5 of the QCA Act applies to services provided, or to be provided, by means of a facility and includes:

(a) the use of a facility (including, for example, a road or railway line);

(b) the transporting of people;

(c) the handling or transporting of goods or other things; and

(d) a communications service or similar service.

[22] NCC Guidelines at [3.3].

Section 72(2) specifically excludes the following from the definition of services covered by the Regime:

(a) the supply of goods (except to the extent the supply is an integral, but subsidiary, part of the service);

(b) the use of intellectual property or a production process (except to the extent the use is an integral, but subsidiary, part of the service); or

(c) a service –

  (i) provided, or to be provided, by means of a facility for which a decision of the ACCC, approving a competitive tender process under the TPA, section 44PA, is in force; and

  (ii) that was stated under section 44PA(2) of the TPA in the application for the approval; or

(d) a service declared under a regulation to be a service to which the regime does not apply.

The proposed amendments to the QCA Act will remove the ability to exclude a service by regulation[23].

The proposed declaration to be contained in the QCA Regulation is set out in the Exposure Draft[24] and replicated below.

Proposed declaration under section 97 of the QCA Act

2B Declaration under section 97 of the Act

(1) The service mentioned in subsection (2) is declared for section 97 of the Act.
(2) The service is the use of relevant rail infrastructure for providing transportation by rail.
(3) In this section—

addition, to an existing system, means an augmentation, duplication, replacement or extension of the existing system, built after the commencement of this section, that—
(a) does not connect the existing system to a coal basin to which the existing system is not connected on the commencement of this section; and
(b) does not connect the existing system to another existing system; and

[23] See clause 8 of the Bill in Attachment 2.

[24] Exposure Draft, *Queensland Competition Authority Amendment Regulation 2010* made under the QCA Act 2007, May 2010.

(c) is owned or leased by—
(i) the owner or lessee of the existing system; or
(ii) a related body corporate of the owner or lessee of the existing system.

relevant rail infrastructure means rail transport infrastructure that is—
(a) an existing system; or
(b) an addition to an existing system.

existing system means the following—
(a) the Blackwater system as shown in red on the diagram in schedule 1, part 1;
(b) the Goonyella system as shown in red on the diagram in schedule 1, part 2;
(c) the Moura system as shown in red on the diagram in schedule 1, part 3;
(d) the Newlands system as shown in red on the diagram in schedule 1, part 4.

2C Declaration under section 97 of the Act

(1) The service mentioned in subsection (2) is declared for section 97 of the Act.
(2) The service is the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail, or a successor, assign or subsidiary of Queensland Rail, is the railway manager.
(3) The declaration has effect only while the rail transport infrastructure remains a public facility.'

Note: The existing systems will be defined by line diagrams in the Schedule to the Regulation. These line diagrams will reflect the current line diagrams prepared by QR Network and monitored by the QCA. These are available for viewing on QR Network's website (www.qrnetwork.com.au). These line diagrams will be updated to reflect the separation of infrastructure between QR Limited and Queensland Rail. It should also be noted that the Northern Missing Link, to be constructed between the Goonyella and Newlands coal systems, will be included as red track and covered under Part 5 of the QCA Act.

"Rail transport infrastructure" is defined in the Schedule to the QCA Act by reference to the definition of that phrase in schedule 6 of the TIA. Schedule 6 of the TIA defines "rail transport infrastructure" as the facilities necessary for operating a railway including:

(a) railway track and works built for the railway, including, for example:

(i) cuttings;

(ii) drainage works;

(iii) excavations;

(iv) land fill;

(v) track support earthworks; and

(b) any of the following things that are associated with the railway's operation:

(i) bridges;

(ii) communication systems;

(iii) machinery and other equipment;

(iv) marshalling yards;

(v) notice boards, notice markers and signs;

(vi) overhead electrical power supply systems;

(vii) over-track structures;

(viii) platforms;

(ix) power and communication cables;

(x) service roads;

(xi) signalling facilities and equipment;

(xii) stations;

(xiii) survey stations, pegs and marks;

(xiv) train operation control facilities;

(xv) tunnels;

(xvi) under-track structures;

(xvii) vehicle parking and set down facilities; and

(xviii) pedestrian facilities,

but not "other rail infrastructure".

"Other rail infrastructure" is excluded from the definition of "rail transport infrastructure" and therefore is not subject to the access regime. It is defined in Schedule 6 of the TIA as:

(a) freight centres or depots;

(b) maintenance depots;

(c) office buildings or housing;

(d) rollingstock or other vehicles that operate on a railway;

(e) workshops; and

(f) any railway track, works or thing that is part of anything mentioned in paragraphs (a) to (e) above.

The definition of "rail transport infrastructure" clearly defines the facility that is the subject of the declaration and the QCA Regulation clearly defines the service provided by means of that facility.

The NCC Guidelines state that in cases where an access regime expressly excludes certain services, the exclusion will raise certification issues if the exclusion poses a barrier to access, for example, where the excluded service is integral to accessing the services covered by the regime[25]. Whilst the definition of "other rail infrastructure" excludes certain facilities from the regime, the exclusion will not pose a barrier to access because the excluded facilities are economically feasible to duplicate or are not necessary to obtaining access. If there is some infrastructure which is not listed in either the definition of "rail transport infrastructure" or "other rail infrastructure" and it is considered necessary to obtaining access then it will be covered on the basis that the definition of "rail transport infrastructure" is an inclusive definition which covers all infrastructure necessary for operating a railway.

If there is a dispute about whether a piece of infrastructure is covered by the Regime then a dispute may be raised under the Access Undertaking[26]. In addition, the matter may be raised with the QCA as an access dispute and QCA determination could be sought[27].

In respect of infrastructure which is not currently covered by the Regime but an access seeker believes that the infrastructure should be covered:

(a) if the infrastructure falls within the declaration in the QCA Regulation, then the Access Undertaking provides for a process which allows any access seeker who reasonably forms the conclusion that any rail transport infrastructure that is owned by any related body corporate of Queensland Rail should be part of the regulated

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[25] NCC Guidelines at [3.6].

[26] Clause 4.7 of UT2 and clause 10.1 of UT3.

[27] Subdivision 2 of Division 5, Part 5 of the QCA Act.

network can require Queensland Rail to obtain ownership of the infrastructure and to amend the line diagrams[28]; and

(b) if the infrastructure falls outside of the declaration then the access seeker may seek a declaration of that infrastructure. The criteria to be applied in considering an application for declaration are discussed below.

Under the proposed declaration of the CQCN, large "greenfield" rail infrastructure projects, comprising the development of a new rail line to a coal basin not currently serviced by existing infrastructure, will be excluded from automatic declaration[29]. However, greenfield projects will remain within the scope of the regulatory regime to the extent that any access seeker will have the ability to make an application to the QCA for a recommendation to be made to the Ministers to have any greenfield rail infrastructure declared provided they meet the access criteria in section 76 of the QCA Act.

This will mean that large 'greenfield' rail infrastructure projects not covered by the CQCN declaration or the QR declaration would need to meet the declaration criteria before it could be recommended for declaration. The purpose of this approach is to provide an incentive for private sector investment in new mining projects and promote competition in respect of the construction of greenfield projects between QR Network and other private companies (in particular, coal company customers) by placing QR Network on a "level playing field" with the other private companies. This ensures optionality for funds and construction of new projects and thus drives competition in the provision of the infrastructure.

To give effect to this amendment, the proposed amendments to the QCA Act will remove the requirement that a service be a "candidate" service to allow a declaration regardless of whether the infrastructure is owned and/or operated by QR Network or a third party[30].

Significant infrastructure facility

The NCC Guidelines state that to satisfy the clause 6(3)(a) principle, an access regime should apply only to the service(s) and/or proposed service(s) of a significant infrastructure facility or facilities where[31]:

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[28] Clause 2.2(f) of UT2 and clause 3.7.2 of UT3.

[29] Consultation Paper, *Proposed Amendments to the Queensland Competition Authority Regulation 2007*, May 2010 at pp. 4-5.

[30] See, for example, clauses 12, 13, 15, 16, 17 and 19 of the Bill in Attachment 2.

[31] NCC Guidelines at [3.7].

(a) duplication of the facility is not economically feasible (clause 6(3)(a)(i));

(b) access is necessary to permit effective competition in an upstream or downstream market (clause 6(3)(a)(ii)); and

(c) safe use of the facility by an access seeker is economically feasible and subject to appropriate regulatory arrangements (clause 6(3)(a)(iii)).

The Regime incorporates these principles in the Ministerial declaration process. The Ministerial declaration process is a two step process, similar to the declaration process in the National Access Regime. An application may be made to the QCA for a recommendation that a particular service be declared by the Ministers[32]. The Ministers then make a decision as to whether a particular service should be declared[33]. Both the QCA and the Ministers must conclude that all of the access criteria are satisfied before a recommendation or a decision can be made that the service be declared[34].

The access criteria are set out in section 76(2) of the QCA Act and reflect the principles set out in clause 6(3)(a) of the CPA. Specifically, the access criteria are as follows:

(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical to duplicate the facility for the service;

(c) that access (or increased access) to the service can be provided safely; and

(d) that access (or increased access) to the service would not be contrary to the public interest.

The access criteria in the Regime largely replicate the declaration criteria contained in the National Access Regime.

Table 1 contains a comparison of the principles set out in clause 6(3)(a) of the CPA and the access criteria in section 76(2) of the QCA Act.

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[32] Section 77 of the QCA Act. It should be noted that whilst section 77 currently requires the service to be a "candidate service" the proposed amendments to the QCA Act set out in Attachment 2 will remove the concept of "candidate service" and allow the process to apply to all services.

[33] Section 84 of the QCA Act.

[34] Sections 80(1) and 86(1) of the QCA Act.

Table 1: Summary of principles satisfied under Clause 6(3)(a)

Clause 6(3)(a) Principles	Related declaration criteria - QCA Act
(a) significant infrastructure facility	The QCA Act defines facility to include rail transport infrastructure and other infrastructure which is generally considered to be significant. The proposed amendments to the QCA Act set out in Attachment 2 will amend the objects of Part 5 to put beyond doubt that the object is to promote the efficient operation of, and investment in "significant" infrastructure. The amendments also introduce an access criterion where the Ministers in considering whether to make a declaration must consider the size of the facility and the importance of the facility to the State economy.
(i) it would not be economically feasible to duplicate the facility	Section 76(2)(b) - that it would be uneconomical to duplicate the facility for the service.
(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market	Section 76(2)(a) - that access (or increased access) to the service would promote competition in at least 1 market (whether or not in Australia), other than the market for the service.
(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist	Section 76(2)(c) - that access (or increased access) to the service can be provided safely.

It is clear from the structure of the Regime that access regulation under the QCA Act is intended only to be applied to a limited class of facilities, specifically those that exhibit natural monopoly characteristics. The object of Part 5 of the QCA Act and the access criteria which guide declaration decisions reflect this intention by ensuring that services are only declared subject to the Regime where there is a demonstrated case that access regulation is appropriate and efficient, having regard to the nature of the facility and the competitive outcomes which may result from declaration.

The NCC Guidelines state that State and Territory governments can consider the public interest effects of implementing an access regime for a particular industry[35]. The Regime incorporates a consideration of the public interest through the access criteria set out in section 76 of the QCA Act. The criterion in section 76(2)(d) is that access (or increased

[35] NCC Guidelines at [3.13].

access) to the service would not be contrary to the public interest. The access criteria must be considered by the QCA in making a recommendation as to whether a service should be declared[36] and by the Ministers in making a decision whether to declare the service[37]. The Regime gives further guidance in section 76(3) on the matters to be considered in respect of the public interest and include:

(a) the object of Part 5 of the QCA Act;

(b) legislation and government policies relating to ecologically sustainable development;

(c) social welfare and equity considerations including community service obligations and the availability of goods and services to consumers;

(d) legislation and government policies relating to occupational health and safety and industrial relations;

(e) economic and regional development issues, including employment and investment growth;

(f) the interests of consumers or any class of consumers;

(g) the need to promote competition; and

(h) the efficient allocation of resources.

These public interest considerations support the fundamental objective of Part 5 of the QCA Act.

The Queensland Rail Network

The Queensland rail network the subject of the declaration is clearly significant infrastructure which satisfies the clause 6(3)(a) principles.

The declaration covers rail transport infrastructure constituting the bulk of Queensland's extensive rail network (almost 10,000 kilometres) and facilitates a significant share of the bulk freight transport market in Queensland, including for commodities such as grain, sugar and livestock. The rail network runs the length of the State and extends inland to regional communities. The infrastructure includes Australia's largest export coal rail network,

[36] Section 80(1) of the QCA Act.

[37] Section 86(1) of the QCA Act.

transporting approximately 160 million tonnes of coal from Central Queensland mines to six ports each year[38].

The rail transport infrastructure is critical to Queensland's substantial mining industry and is of high importance to the Queensland economy.

For mining operations throughout Queensland's regions, rail remains the only viable means of transporting coal and other extracted mineral resources to export facilities. The rail transport infrastructure covered under the declaration therefore occupies a strategic position in the transportation of these resources, with the use or control over this facility having a significant influence and effect over dependent downstream export markets.

The declared infrastructure will also be a significant component of Queensland's urban transport network, as historically QR Passenger (a wholly owned subsidiary of QR Ltd) carried more than 66 million passengers in 2008/09[39].

Duplication of the facility is not economically feasible

The NCC Guidelines state that the test to be applied in determining whether this criterion is satisfied is whether, over the likely range of reasonably foreseeable demand for the services covered by the regime, it would be more efficient, in terms of the costs and benefits to the community as a whole, for the facility to provide those services than for two or more facilities to do so[40].

In general terms, this test requires that the facility is a "natural monopoly"[41]. This approach has been endorsed by the Australian Competition Tribunal (**Tribunal**) in *Review of Freight Handling at the Sydney International Airport*[42] when the test was applied found that the features of a natural monopoly include:

(a) economies of scale (i.e. unit cost falls sharply as the scale of operations increases);

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[38] Queensland Rail Network 2008 at www.qrnetwork.com.au/Networks/coal/overview.aspx (accessed on 7 June 2010).

[39] QR Network, Annual Report 2008/2009 at p. 36.

[40] NCC Guidelines at [3.7].

[41] See the approach of the NCC in *Australian Cargo Terminal Operators Pty Ltd* [1997] ATPR (NCC) 70-000 where the NCC applied the test that a facility is "uneconomic to duplicate" if it has natural monopoly characteristics (pp. 30-31).

[42] (2000) ATPR 41-754 at para 82.

(b) economies of scope (lower unit cost because the facility produces a number of different but complementary products); and

(c) specialised assets (i.e. high sunk costs).

In *Specialized Container Transport* [1997] ATPR (NCC) 70-004 the definition of the natural monopoly adopted by the Council was that the total costs of production are lower when a single firm produces the entire industry output than two or more[43]. This test was applied by the Council in a number of declaration decisions[44].

Rail infrastructure is associated with significant economies of scale, in that its development requires large initial outlays, typically sunk costs. However, once operational, the actual operating costs for these facilities are relatively low, resulting in decreasing average unit costs[45].

There is no doubt that it would be more efficient to increase the usage of the Queensland rail network (or expand the capacity of the network), and realise these economies of scale, than to expend the considerable costs necessary to duplicate the network. The lack of the availability of a suitable location and access to land mean the cost of duplicating the network is prohibitive.

Accordingly, given these natural monopoly characteristics, it is not economically feasible to duplicate the Queensland rail network.

Access permits effective competition in another market

Access to the Queensland rail network is necessary to permit effective competition in upstream and downstream markets. In particular, access to the network is necessary to allow effective competition in the rail haulage market.

In fact, it can be shown that access to the network under the Regime has already promoted competition in the market of rail haulage services and has allowed third parties to enter into

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[43] *Specialized Container Transport* [1997] ATPR (NCC) 70-004 at 70,353.

[44] *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005 at 70,401; *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) at 16; *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) at 16.

[45] See the Pilbara Railway Decisions: the Goldsworthy Railway NCC Final Recommendation at [5.5]; [5.62-5.67]; [5.107]; the Hemmersley Railway NCC Final Recommendation at [5.5]; [5.48]; [5.55-5.62]; and the Robe Railway NCC Final Recommendation at [5.5]; [5.48]; [5.54-5.63].

and compete effectively in the rail haulage market. In Asciano's 2010 Investor Briefing, Asciano highlights the competitiveness of the rail market and its expanding market share[46].

Safe use of the facility can be ensured

The TIA currently governs the safe use of transport infrastructure. Chapter 7 of the TIA specifically deals with rail transport infrastructure. Part 3 of Chapter 7 establishes an accreditation system, whereby all railway managers and operators must be accredited. Applicants for accreditation must demonstrate that, among other things, they have an appropriate safety management system which manages and mitigates potential safety risks[47].

Later this year the Governor in Council will proclaim the Rail Safety Act which will replace the provisions of the TIA. The Rail Safety Act will also provide for a rigorous system of accreditation of railway managers and operators.

Therefore, there are sufficient regulatory arrangements in place to ensure the safe use of the Queensland rail network by an access seeker at an economically feasible cost.

Summary

The services the subject of the Regime are clearly defined and the access criteria in the QCA Act are consistent with the clause 6(3)(a) principles. In respect of the Queensland rail network under the declaration:

(a) it is significant infrastructure when its size and importance to the Queensland economy is considered;

(b) it is not economically feasible to duplicate;

(c) access to the network promotes competition in dependent markets; and

(d) the safe use of the network can be ensured through the rail safety provisions of the TIA and the Rail Safety Act.

Therefore, the clause 6(3)(a) principles are satisfied.

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[46] See Asciano 2010 ASX Investor Briefing Paper at p. 4 (Intermodal) and p. 2 (Divisional Overview).

[47] Section 126 of the TIA.

8. Clauses 6(4)(a)-(c): negotiated access

Clause 6(4) - A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an enforcement process.

The NCC Guidelines state that together clauses 6(4)(a)–(c) seek to ensure that access regimes provide an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations. An appropriate balance means that regulatory arrangements support the achievement of negotiated outcomes. Therefore regulatory arrangements should not preclude negotiated outcomes[48].

The objective of the Regime, as specified in the QCA Act, is to encourage the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations. In order to realise this, the Regime is based on the negotiate-arbitrate model. This model facilitates the commercial negotiation of access agreements between railway owners and access seekers. In the case of disagreement between the parties, a rigorous dispute resolution process is in place to resolve the dispute. The Access Undertaking facilitates commercial negotiation by setting out a process for negotiation and then providing a "safety net" to be applied in circumstances where agreement cannot be reached.

Primacy of Contractual Negotiations

The Regime incorporates the principle of the primacy of contractual negotiations through the adoption of a "negotiate/arbitrate" model in the QCA Act. This operates so that once a service is declared the following process applies:

(a) the service provider is obliged to negotiate with the access seekers in respect of an access agreement[49]; and

[48] NCC Guidelines at [3.17].

[49] Section 99 of the QCA Act.

(b) if, and only if, commercial agreement cannot be reached then an access dispute may be raised[50] and arbitration by the QCA is available[51].

The primacy of contractual negotiations is also recognised by the Access Undertaking which contains the following provisions:

(a) a detailed negotiation framework to facilitate commercial negotiation[52];

(b) a dispute resolution process where commercial agreement cannot be reached[53]; and

(c) an acknowledgement that the standard access agreement approved by the QCA (**Standard Access Agreement**) applies "unless otherwise agreed between QR Network and the Access Seeker"[54]. This acknowledges that the Standard Access Agreements only apply when commercial agreement has not been reached. This applies irrespective of whether the Access Undertaking has been submitted voluntarily under section 136 of the QCA Act or the QCA has required the owner or operator to submit the Access Undertaking under section 133 of the QCA Act.

Therefore it is clear that the Regime incorporates the principle of the primacy of contractual negotiation.

Right to Negotiate and the Negotiation Process

Consistent with clause 6(4)(b), once a service becomes declared the Regime, pursuant to section 99 of the QCA Act, gives an access seeker the right to negotiate with an access provider for the making of an access agreement. Section 100 of the QCA Act then goes on to provide that the access provider and the access seeker must negotiate in good faith. The obligation to negotiate in good faith is supported by an obligation upon the service provider to make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker as set out in section 101 of the QCA Act.

The negotiation process under the Regime is as follows:

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[50] Section 112 of the QCA Act.

[51] Subdivision 3, Division 5, Part 5 of the QCA Act.

[52] Part 4 of UT2 and UT3.

[53] Section 4.7 of UT2 and Part 10 of UT3.

[54] Clause 5.1(d) of UT2 and UT3.

(a) the access seeker may at any time request the information set out in Schedule D to the Access Undertaking which QR Network is required to provide and includes the following matters:

(i) detailed descriptions of the infrastructure (including signals and operational systems, telecommunication systems and operational constraints), committed corridor upgrades, relevant maps and drawings, level crossings, train operations and capacity information;

(ii) rollingstock interface standards;

(iii) reference tariffs; and

(iv) any applicable Standard Access Agreement[55];

(b) the above information should be provided by QR Network within 14 days of the request for the information[56];

(c) an Access Application is made containing all information reasonably necessary for QR Network to evaluate the Access Application as detailed in the Access Undertaking and prepare an Indicative Access Proposal (**IAP**)[57];

(d) QR Network must either seek further information from the access seeker or acknowledge the receipt of the Access Application within a specified number of business days[58];

(e) QR Network should provide an IAP within 30 days after the date on which QR Network gives an Acknowledgement Notice[59];

(f) The IAP must set out detailed information in respect of a number of matters including:

(i) the rollingstock and rollingstock configurations to which the IAP applies;

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[55] Clause 4.1(c) and Schedule D of UT2 and clause 4.1(d) of UT3 and Schedule D of UT3.

[56] Clause 4.1(d) of UT2 and UT3.

[57] Clause 4.1(b) of UT2 and clause 4.1(a) of UT3.

[58] Clause 4.2 of UT2 and UT3. The specified number of business days is 5 days for UT2 and 10 days for UT3.

[59] Clause 4.2(c) of UT2 and clause 4.3(a) of UT3.

(ii) a summary of the applicable operating characteristics (eg frequency, transit time and commodity carried);

(iii) an indicative assessment as to whether there is available capacity and, if not, an outline of the works and their costs needed to provide the requested capacity;

(iv) advice as to the existence of other access seekers which may affect the ability of QR Network to provide access;

(v) an initial estimate of the relevant access charge based on the pricing principles in the Access Undertaking;

(vi) details of any further information required by QR Network; and

(vii) the expiry date of the IAP;

(g) if an access seeker believes that the IAP has not been prepared in accordance with the Access Undertaking and would therefore not be an appropriate basis for continuing negotiation it may give a notice to QR Network and failing agreement may refer the matter to the QCA for determination;

(h) if an access seeker is happy with the contents of the IAP it provides a notice of intent to progress with the negotiation on the basis of the IAP;

(i) the negotiations proceed and the access seeker may seek further additional information set out in Schedule D of the Access Undertaking; and

(j) if the access seeker is unhappy with the terms and conditions proposed by QR Network a dispute may be raised[60].

If commercial agreement cannot be reached then any relevant Standard Access Agreement will be applied and if a Reference Tariff applies to the service the subject of the Access Application, then the Reference Tariff will be applied.

The Access Undertaking also contains extensive mechanisms to assist access seekers in respect of other issues including:

(a) detailed systems for dealing with interface issues[61] including the development of Interface Risk Management Plans (which include a list of safety and rollingstock

[60] Clauses 4.3 to 4.6 of UT2 and UT3.

issues) [62], the development of an Operating Plan (which include service levels)[63] and the development of an Environmental Investigation and Risk Management Report (which deal with any environmental risks arising out of access)[64]; and

(b) detailed network management principles (including train scheduling and capacity allocation)[65].

It can be seen from the above process that the Regime provides for extensive information to be provided to the access seeker on both pricing and non-pricing terms and conditions of access as part of the negotiation process which deal with information asymmetries and provide an effective basis for negotiations. The Regime also deals extensively with safety requirements, allocation of capacity, interoperability issues and service quality issues.

Independence and transparency

The independence of the QCA as State regulator and transparency of the Regime's regulatory arrangements support commercial negotiations. The NCC Guidelines state that the NCC has previously considered that the QCA is independent and sufficiently resourced to properly carry out tasks in the context of access regulation[66].

There are several measures that ensure that the QCA has the requisite degree of independence. Section 12(2)(c) of the QCA Act stipulates that, in relation to access to services, the QCA is not subject to directions from the Ministers, thus ensuring independence from government. The Regime also provides a process that addresses any conflicts of interest that a QCA member may have in a matter being considered, or about to be considered, by the QCA[67]. Furthermore, the QCA has sufficient information gathering powers to ensure it is well placed to carry out its functions effectively.

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[61] Part 8 of UT2 and UT3.

[62] Clause 8.1.3 of UT2 and UT3.

[63] Clause 8.1.4 and Schedule K of UT2 and clause 8.1.4 and Schedule I of UT3.

[64] Clause 8.2 and Schedule J of UT2 and clause 8.2 and Schedule H of UT3.

[65] Part 7 of UT2 and UT3.

[66] NCC Guidelines at [3.31].

[67] Section 219 of the QCA Act.

The transparency of the Regime's regulatory arrangements is enhanced by the public consultation requirements contained in the Regime. The QCA Act provides for extensive public consultation processes in respect of the following issues:

(a) making a recommendation as to whether to declare a service[68];

(b) the revocation of a declaration[69];

(c) the public register of access determinations[70];

(d) the making of an access code[71]; and

(e) the approval of an access undertaking and any amendments to the access undertaking[72].

The extent of the public transparency in respect of issues relating to the Regime can be seen through the website of the QCA on its rail pages.

Enforcement mechanisms

The NCC Guidelines note that under clause 6(4)(c) an effective access regime must have credible enforcement mechanisms. It may be appropriate for some provisions to be enforceable through arbitration or through regulation[73].

In the event that a dispute arises during access negotiations, a party can access the Regime's dispute resolution process to enforce the right to negotiate and obtain a settlement to the dispute. This process is outlined in Part 5 Division 5 of the QCA Act and is discussed in further detail in section 13.

The Regime also provides enforcement mechanisms through civil penalties for breaches of certain requirements under the QCA Act. For example, civil penalties are available for a

[68] Sections 79(2) and 81-83 of the QCA Act.

[69] Sections 89-91 of the QCA Act.

[70] Section 127 of the QCA Act.

[71] Section 128(2) of the QCA Act.

[72] Sections 144-146 of the QCA Act.

[73] NCC Guidelines at [3.54].

failure to provide information to the QCA when requested to do so[74] and a failure to keep separate accounting records[75].

The Regime also allows a party to obtain relief through the Supreme Court to remedy certain conduct, such as the hindering of access, or contraventions of an access agreement or determination. Relief that may be sought includes compensation and the grant of various types of injunctions. Provisions relating to the enforcement of the Regime are set out in Part 5, Division 8 of the QCA Act and are discussed in detail below at Chapter 5.

Summary

The Regime provides for the primacy of commercial negotiation and provides extensive information to access seekers in respect of the terms and conditions of access including pricing issues, safety requirements, the allocation of capacity, interoperability issues and service quality issues. There is independent and transparent regulation and enforcement under the Regime.

Accordingly, the Regime satisfies the clauses 6(4)(a)-(c) principles.

[74] Section 205 of the QCA Act.

[75] Section 163 of the QCA Act.

9. Clause 6(4)(d): regular review

Clause 6(4)(d): regular review

Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

The NCC Guidelines state that the NCC interprets the clause 6(4)(d) principle to mean that an access regime should include periodic reviews to assess whether regulation need cover a particular service and/or facility[76].

There are two elements to this clause. The first element requires that the regime contains a mechanism to review the appropriateness of a declaration of a particular service and/or facility. The second element requires that existing contractual rights and obligations should not be automatically overridden in the event that a declaration expires or is revoked.

Review mechanism

Under the Regime, all Ministerial declarations must state a date upon which the declaration will expire[77] and the regulation based declarations for the Queensland rail network will expire after five years[78].

Part 5, Division 2, Subdivision 5 of the QCA Act contains the provisions relating to the revocation of Ministerial declarations. Under sections 88 and 89 of the QCA Act, the QCA may conduct an investigation and recommend to the Ministers that a ministerial declaration be revoked. This process may be started by the owner of a declared service, who can ask the QCA to recommend to the Ministers that a particular declaration be revoked[79]. In making a revocation recommendation, the QCA must be satisfied that, at the time of the recommendation, section 86 of the QCA Act would prevent the Ministers from declaring the

[76] NCC Guidelines at [3.57].

[77] Section 84(4) of the QCA Act.

[78] Proposed amendments to the QCA Regulation (Act will preserve the declarations of the rail transport infrastructure and DBCT services) for a period of 5 years. (unless they are revoked earlier).

[79] Section 88(2) of the QCA Act.

service[80]. Section 86 lists the factors affecting the making of a declaration, which includes the need for the service to satisfy the access criteria found in section 76 of the QCA Act. Therefore, a revocation recommendation can be made where the declared service no longer satisfies the access criteria.

The Ministers are similarly constrained in their decision to revoke a declaration. Section 92 of the QCA Act stipulates that the Ministers may only revoke a ministerial declaration after receiving a revocation recommendation from the QCA and after being satisfied that, at the time of the revocation, section 86 of the QCA Act would prevent the declaration of the service.

For declarations by regulation, the QCA Act does not currently contain a specific process for their review or revocation. However, these regulatory declarations can be revoked or amended through the normal legislative process. For example, the owner or operator of a declared service could approach the Ministers seeking a review or revocation of a regulation based declaration. The Bill containing the proposed amendments to the QCA Act set out in Attachment 2 will remove the ability for declarations to be made by regulation[81] and will save the operation of the current declarations of rail infrastructure[82]. The Bill will also contain an appropriate review mechanism that allows the review and revocation of a declared service at any time before its expiry date where the access criteria are no longer satisfied[83].

Protection of existing rights

The second element of the clause 6(4)(d) principle requires that existing contractual rights and obligations are not automatically revoked upon the lapsing of a declaration.

Sections 95 and 98 of the QCA Act preserve existing rights in the event that a declaration is revoked or expires. These rights include mediation or arbitration of an access dispute, the operation of an access agreement and the operation and enforcement of an access determination.

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[80] Section 88(3) of the QCA Act.

[81] Clause 28 of the Bill in Attachment 2.

[82] Clause 49 of the Bill in Attachment 2.

[83] See clause 49 of the Bill in Attachment 2 which deems the current declarations to be a service declared by the Ministers under Division 2 of Part 5 of the QCA Act. The revocation mechanism contained in Subdivision 5 of Division 2 of Part 5 of the QCA Act will then apply.

Summary

The Regime provides for the expiry of declarations after a specified period of time and also includes a mechanism for the revocation of a declaration where the access criteria are no longer satisfied. If a declaration is revoked or expires then existing contractual rights and obligations are not automatically revoked.

Accordingly, the Regime satisfies the clause 6(4)(d) principle.

10. Clause 6(4)(e): reasonable endeavours

Clause 6(4)(e): reasonable endeavours

The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

The NCC Guidelines state that in applying this principle the NCC considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect[84].

The Regime explicitly incorporates the requirement of clause 6(4)(e) in section 101 of the QCA Act. In section 101(1), the wording of clause 6(4)(e) is substantially reproduced as a general obligation for the access provider to 'make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker.'

This general obligation is complemented by section 101(2), which provides that subject to the operation of an approved access undertaking the following list of specific types of information that an access provider must give to an access seeker include:

(a) information about the price at which the access provider provides the service, including the way in which the price is calculated;

(b) information about the costs of providing the service, including the capital, operation and maintenance costs;

(c) information about the value of the access provider's assets, including the way in which the value is calculated;

(d) an estimate of the spare capacity of the service, including the way in which the spare capacity is calculated;

(e) a diagram or map of the facility used to provide the service;

(f) information about the operation of the facility;

(g) information about the safety system for the facility; and

[84] NCC Guidelines at [3.64].

(h) information about any access determinations made by the QCA through arbitration.

The NCC's Guidelines indicate that an access regime should ensure sufficient information is disclosed to enable the access seeker to make informed decisions, so as to facilitate effective negotiation. However, information disclosure requirements should not be so onerous as to impose unnecessary costs on service providers or unduly harm their business[85].

Section 101(6) protects against the disclosure of confidential information by mandating that the access provider or seeker must not, without the giver's consent, disclose information provided under section 101 to another person. In this way, the Regime acknowledges potential confidentiality concerns and is careful to balance the need to keep an access seeker well informed with the need to protect confidentiality.

Where it is reasonably considered that the disclosure of certain information may be likely to damage the commercial activities of an access provider, user or seeker, section 101(3) allows the QCA to either aggregate information, so that its disclosure is not unduly damaging, or authorise the access provider not to give the access seeker the damaging information.

To assist in the effectiveness of the obligation to satisfy all reasonable requests, section 101(5) of the QCA Act allows the access provider or the access seeker to ask the QCA for advice or directions about a matter contained in section 101.

The Access Undertaking supports section 101 of the QCA Act by providing for a detailed negotiation process and information requirements. These are discussed in detail above. In particular, the Access Undertaking:

(a) provides for detailed information to be given to access seekers on pricing and non-pricing terms and conditions;

(b) sets out specific timeframes for the provision of information; and

(c) requires QR Network to explain when there is insufficient capacity to accommodate the request for access and outline the works and costs of undertaking any works to provide the additional capacity.

[85] NCC Guidelines at [3.66].

It also has provisions for the protection of confidentiality which include the right for QR Network to request an access seeker to sign a confidentiality agreement in respect of the information provided to it[86].

Summary

The Regime provides for an explicit obligation upon the service provider to use all reasonable endeavours to accommodate the requirements of persons seeking access.

Accordingly, the Regime satisfies the clause 6(4)(e) principle.

[86] Clause 3.3 and Schedule B of UT2 and UT3.

11. Clause 6(4)(f): negotiated access

Clause 6(4)(f): negotiated access

Access to a service for persons seeking access need not be on exactly the same terms and conditions.

The NCC Guidelines state that an access regime should not limit the scope for commercial negotiation. Rather, the terms and conditions under the Regime should facilitate commercial negotiations and act as a safety net when a reasonable outcome cannot be negotiated[87]. However, the NCC Guidelines also state that this clause does not permit a vertically integrated service provider to set the terms and conditions of access so as to favour an affiliated entity[88].

Section 102 of the QCA Act specifically provides that an access provider is not required to provide access on the same terms under each access agreement.

There are also a number of provisions in the QCA Act which limit the ability of QR Network to unfairly favour an affiliated entity. Section 104(1) of the QCA Act prohibits an access provider from engaging in conduct for the purposes of preventing or hindering access under an access agreement to a declared service. Section 104(2) of the QCA Act specifically provides that an access provider engages in conduct for preventing or hindering a user's access if the access provider provides (or proposes to provide) access to the declared service to an affiliated entity on more favourable terms than the terms on which the access provider provides (or proposes to provide) access to the declared service to a competitor.

Section 104 of the QCA Act makes it very clear that the prohibition applies to conduct prior to the entering into of an access agreement by using the phrase "or proposes to provide". Section 104(3) of the QCA Act also makes it very clear that the prohibition applies to unfair discrimination in respect of both price and non-price issues.

The provisions of section 104 of the QCA Act in respect to access agreements are replicated in section 125 of the QCA Act in respect of access determinations.

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[87] NCC Guidelines at [3.73].

[88] NCC Guidelines at [3.75].

Section 168A of the QCA Act sets out the pricing principles which are to be taken into account by the QCA as arbitrator of any access dispute and in approving the terms of any access undertaking. Those pricing principles include a principle that access prices should not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations except to the extent the cost of providing access to other operators is higher.

The proposed amendments to the QCA Act set out in Attachment 2 amend the QCA Act to introduce another explicit obligation not to unfairly discriminate in respect of the negotiation of access agreements or amendments to access agreements and also to require access undertakings to contain any necessary provisions to ensure that there is no unfair discrimination in favour of affiliated entities.

There are also mechanisms in the Access Undertaking to prevent unfair discrimination. These are discussed in more detailed below in respect of the clause 6(4)(m) principles.

The Regime contains effective mechanisms to ensure that access providers do not engage in unfair discrimination in favour of affiliated entities.

Summary

The Regime explicitly acknowledges that access agreements do not need to be on the same terms and conditions but also contains prohibitions on unfair discrimination in favour of affiliated entities.

Accordingly, the Regime satisfies the clause 6(4)(f) principle.

12. Clause 6(4)(g): independent dispute resolution

Clause 6(4)(g): independent dispute resolution

Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

The NCC Guidelines state that clause 6(4)(g) requires an access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body[89]. In general, the State or Territory regime should provide for:

(a) the appointment of a dispute resolution body;

(b) reasonable funding arrangements – that do not deter parties from seeking access;

(c) independence of the dispute resolution body;

(d) independence of the arbitrator from the regulator;

(e) constraints on the arbitrator;

(f) sufficient resources to ensure quality of process;

(g) a mechanism to deal with minor disputes; and

(h) public access to decisions.

Part 5, Division 5 of the QCA Act sets out an arbitration process for access disputes. Specifically, section 117 of the QCA Act provides that the QCA must make a written determination in an arbitration on access to the declared service. Section 118 of the QCA Act sets out a list of examples of access determinations which can be made by the QCA and includes the following:

(a) requiring the access provider to provide access to the service;

(b) require the access seeker to accept and pay for access to the service;

(c) state the terms on which the access seeker has access to the service;

[89] NCC Guidelines at [3.76].

(d) require the access provider to extend, or permit the extension of, the facility;

(e) require the access provider to permit another facility to be connected to the facility; or

(f) include a requirement that the access provider and access seeker enter into an access agreement to give effect to a matter determined by the QCA.

The QCA is an independent dispute resolution body. The QCA has informal policies and procedures to deal with its separate roles as regulator and arbitrator, it seeks to agree arrangements with the relevant parties on a case by case basis consistent with the *Commercial Arbitration Act 1990* (Qld) (**CA Act**). In an arbitration, the QCA may make any order it considers appropriate in respect of the costs of the arbitration in respect of both the parties' costs and the QCA costs[90]. This approach allows an appropriate balance between the parties being required to pay the costs of arbitration and ensuring that the costs of arbitration do not deter parties from seeking access.

Section 119 of the QCA Act sets out restrictions on access determinations which can be made by the QCA and include that an access determination cannot:

(a) be inconsistent with an approved access undertaking, access code or a binding ruling;

(b) reduce the amount of the service able to be obtained by an access provider;

(c) result in the access seeker, or someone else, becoming the owner, or 1 of the owners, of the facility, without the existing owner's agreement; or

(d) require an access provider to pay some or all of the costs of extending the facility.

The above restrictions on access determinations are consistent with the National Access Regime. To the extent that section 119 of the QCA Act would require the QCA to apply the Reference Tariffs set out in the Access Undertaking, the Reference Tariffs were established by the QCA as an independent regulator based on the regulatory processes set out in the QCA Act.

The QCA Act also provides the QCA with the ability to appoint an associate member for a particular investigation, mediation or arbitration. Associate members are appointed by

[90] Section 208 of the QCA Act.

Governor in Council upon the recommendation of the Minister under section 214 of the QCA Act.

Section 127 of the QCA Act provides for a public register of access determinations.

The Access Undertaking provides for a dispute resolution process for disputes arising under the Access Undertaking or in relation to the negotiation of access which contains the following elements:

(a) any access dispute is referred to in the first instance to the Chief Executive Officers of QR Network and the other party;

(b) if resolution is not reached within 14 days then the parties may agree for the dispute to be referred to an expert for resolution; or

(c) if the parties do not agree for the dispute to be referred to an expert for resolution then the matter can be referred to the QCA[91].

In respect of expert determination, the expert may be appointed by the parties, or failing agreement between the parties, by the President of CPA Australia for financial matters, the President of the Institute of Engineers Australia for non-financial matters or the President of the Queensland Law Society for legal matters[92]. The expert must have appropriate qualifications and have no interest or duty which conflicts with his or her functions as an expert[93]. The costs of the expert, and any advisors, are to be shared equally and each party shall bear their own costs[94].

Summary

The Regime provides for the appointment of the QCA as an independent dispute resolution body as well as allowing an independent expert to resolve a dispute.

Accordingly, the Regime satisfies the clause 6(4)(g) principle.

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[91] Clause 4.7 of UT2 and clause 10.1 of UT3.

[92] Clause 4.7.3(a) of UT2 and clause 10.1.3 of UT3.

[93] Clause 4.7.3(b) of UT2 and clause 10.2.3(a)(ii)(A)-(B) of UT3.

[94] Clause 4.7.3(j) of UT2 and clause 10.1.3(d) of UT3.

13. Clause 6(4)(h): binding decisions

Clause 6(4)(h): binding decisions

The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

Section 118 of the QCA Act provides that the QCA may make an access determination which includes a requirement that the access provider and access seeker enter into an access agreement to give effect to a matter determined by the QCA. The QCA in making any determination under section 118 of the QCA Act must take into account the interests of the access seeker[95] and would not require an access seeker to take access on terms and conditions unacceptable to the access seeker.

The enforcement provisions set out in Part 5 Division 8 of the QCA Act ensure that the parties to an access dispute are bound by an access determination. Section 152 allows the Queensland Supreme Court, upon the application of a party to an access determination, to make certain orders to enforce an access determination where it satisfied that another party has, is, or proposes to, engage in conduct constituting a contravention of the determination. Enforcement orders that are available to the Queensland Supreme Court include the awarding of compensation for loss or damage suffered as a result of a contravention, as well as the granting of consent, interim, restraining and mandatory injunctions, as set out under sections 154 and 158A.

Rights of appeal

Decisions made by the QCA (including access determinations, decisions about access undertaking and rulings) may be subject to judicial review in accordance with the *Judicial Review Act 1991* (**JR Act**). Under the JR Act, any person aggrieved by a decision of the QCA may apply to the Queensland Supreme Court for a review in relation to the decision.

Where an application is successful, the Court may:

(a) set aside the decision;

(b) refer the matter to the decision-maker for further consideration;

[95] Section 120(1)(c) of the QCA Act.

(c) declare the rights of all parties in respect of the matter;

(d) direct the parties to do anything that the court considers appropriate.

The decision of the Queensland Supreme Court is binding.

The independence and expertise of the QCA, the provisions of the QCA Act in prescribing mandatory decision making processes and Queensland's judicial review arrangements, ensure the rights of affected parties are protected while providing for timely resolution of access related disputes. This approach provides increased certainty for access providers and access seekers by removing risks associated with regulatory gaming and unnecessary access and investment delays.

Summary

The Regime provides for binding dispute resolution and judicial review of any decision by the QCA.

Accordingly, the Regime satisfies the clause 6(4)(h) principle.

14. Clause 6(4)(i): principles for dispute resolution

Clause 6(4)(i): principles for dispute resolution

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets.

Sections 120 and 138(2) of the QCA Act list the matters that the QCA must consider in the making of an access determination and the approval of access undertakings. These sections reflect the clause 6(4)(i) principles.

Matters to be considered by authority in making an access determination

Section 120 of the QCA Act provides that in making an access determination, the authority must have regard to the following matters:

(a) the object of Part 5;

(b) the access provider's legitimate business interests and investment in the facility;

(c) the legitimate business interests of persons who have, or may acquire, rights to use the service;

(d) the public interest, including the benefit to the public in having competitive markets;

(e) the value of the service to:

(i) the access seeker; or

(ii) a class of access seekers or users;

(f) the direct costs to the access provider of providing access to the service, including any costs of extending the facility, but not costs associated with losses arising from increased competition;

(g) the economic value to the access provider of any extensions to, or other additional investment in, the facility that the access provider or access seeker has undertaken or agreed to undertake;

(h) the quality of the service;

(i) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(j) the economically efficient operation of the facility;

(k) the effect of excluding existing assets for pricing purposes; and

(l) the pricing principles mentioned in section 168A.

Under section 120(2) the authority may take into account any other matters relating to the matters mentioned in subsection (1) it considers are appropriate.

Factors affecting approval of draft access undertaking

Section 138(2) of the QCA Act provides that the QCA may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following:

(a) the object of Part 5;

(b) the legitimate business interests of the owner or operator of the service;

(c) if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;

(d) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(e) the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;

(f) if the service is a declared service:

(i) the effect of excluding existing assets for pricing purposes; and

(ii) the pricing principles mentioned in section 168A; and

(g) any other issues the authority considers relevant.

Contents of access undertakings

Section 137(2) of the QCA Act set out the matters which may be contained in an Access Undertaking and includes:

(a) requirements for the safe operation of the facility (section 137(2)(h)); and

(b) how contributions by users to the cost of establishing or maintaining the facility will be taken into account in calculating charges for access to the service (section 137(2)(i)).

Table 2 sets out the sections of the QCA Act that correspond with the Clause 6 Principles.

Table 2: Comparison of Clause 6(4)(i) Principles

Clause 6 Principle	Access Determination (s.120)	Access Undertaking (s.138(2))
6(4)(i)(i) – Owners legitimate interests	120(1)(b)	138(2)(b)
6(4)(i)(ii) – costs to owner of providing access	120(1)(f)	138(2)(b), 138(2)(g), 168A and the pricing principles in Part 6 of Access Undertaking (both UT2 and UT3)
6(4)(i)(iii) – value to the owner of additional investment	120(1)(g)	138(2)(g), 137(2)(i), 69E and 168A
6(4)(i)(iv) – interests of users with contracts	120(1)(c)	138(2)(e)
6(4)(i)(v) – firm and binding contractual obligations	119(2)(a) and 120(1)(b) and (c)	138(2)(e)

6(4)(i)(vi) – safe operation	120(1)(i)	137(2)(h)
6(4)(i)(vii) – economically efficient operation of the facility	120(1)(j) and 69E	69E, 168A and Access Undertaking
6(4)(i)(viii) – public benefit in competition	120(1)(a) and 69E	138(2)(d) and 69E

Summary

The Regime provides principles of dispute resolution to guide the QCA that substantially mirror those principles set out in clause 6(4)(i). This allows access terms and conditions to be set by the QCA where agreement cannot be reached in a fair and timely. manner It ensures that both the interests of both access providers and access seekers are adequately considered.

Accordingly, the Regime satisfies the clause 6(4)(i) principles.

15. Clause 6(4)(j): facility extension

Clause 6(4)(j): facility extension

The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to: (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility; (ii) the owner's legitimate business interests in the facility being protected; and (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

The NCC Guidelines state that matters in respect of clause 6(4)(j) should be subject, in the first instance, to negotiation between the parties. If the parties cannot reach an agreement, the arbitrator should then be empowered to determine, subject to the clause 6(4)(j) criteria, whether the owner should be required to extend or permit extension of the facility[96].

Section 118 of the QCA Act provides that an access determination may require the access provider to extend or permit the extension of, the facility or require the access provider to permit another facility to be connected to the facility.

Section 119(4) provides that the QCA may make an access determination requiring an access provider to extend, or permit the extension of, a facility if either:

(a) the requirement is consistent with an approved access undertaking[97], in response to the submission of a voluntary draft access undertaking and the following requirements are satisfied:

(i) the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility[98]; and

(ii) the legitimate business interests of the owner and operator are protected[99]; and

[96] NCC Guidelines at [3.176].

[97] See clause 32 of the Bill set out in Attachment 2 and, in particular, the proposed section 119(4)(a) of the QCA Act.

[98] See clause 32 of the Bill set out in Annexure 2 and, in particular, the proposed section 119(4B)(a) of the QCA Act.

[99] See clause 32 of the Bill set out in Attachment 2 and, in particular the proposed section 119(4B)(b) of the QCA Act.

(iii) the terms of access must take into account the costs to be paid by the parties for the extension and the benefits to the parties resulting from the extension[100]; or

(b) where the approved access undertaking is not in response to the submission of a voluntary access undertaking then the requirement set out in section 119(5) must be satisfied which provides that an access determination may only be made if the QCA is satisfied that the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility, the legitimate business interests of the owner and operator are protected and that the access provider does not pay the costs of extending the facility.

In addition section 137 of the QCA Act provides that an access undertaking may include terms relating to extending the facility. In this regard, the Access Undertaking provides that QR Network may undertake extension in certain circumstances[101]. If QR Network decides not to undertake an extension then QR Network must permit the extension by providing access to land and entering into a Rail Connection Agreement. If the parties cannot agree upon the terms of the Rail Connection Agreement, then the Access Undertaking provides for the resolution of disputes which would cover disputes in respect of extensions.

The owner's legitimate business interests must be taken into account in any access determination (as discussed above).

Summary

The Regime provides that the owner of a facility may be required to extend the facility where the extension is technically and economically feasible and consistent with the safe and reliable operation of the rail network. The owner's legitimate interest must also be taken into account. Finally, the terms and conditions of access must take into account the costs to be paid by the parties for the extension and the benefits to the parties resulting from the extension and, where the access undertaking is a mandatory access undertaking, the access provider cannot be made to pay the costs of extending the facility.

Accordingly, the Regime satisfies the clause 6(4)(j) principles.

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[100] Section 119(6) of the QCA Act.

[101] Clause 7.4.1(n) of UT2 and clause 7.5.1 of UT3.

16. Clause 6(4)(k): material change in circumstances

Clause 6(4)(k): dealing with a material change in circumstances

If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change of circumstances. Then NCC Guidelines state that the NCC is reluctant to interpret this clause in a way that would compromise the certainty of contractual arrangements[102].

The Regime incorporates this principle in the following ways:

(a) a declaration may be revoked where there is a material change in circumstances, such that the access criteria are no longer satisfied[103];

(b) the proposed amendments set out in Attachment 2 include a provision which allows for an access determination to be varied or revoked where there is a material change in circumstances[104];

(c) the Access Undertaking may be amended with the approval of the QCA to deal with a material change in circumstance[105]; and

(d) the Standard Access Agreement contains the usual terms such as force majeure to deal with some material changes in circumstances.

Summary

The Regime provides mechanisms to deal with a material change in circumstances.

Accordingly, the Regime satisfies the clause 6(4)(k) principle.

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[102] NCC Guidelines at [3.181-3.182].

[103] Subdivision 5 of Division 2 of Part 5 of the QCA Act.

[104] Clause 34 of the Bill in Attachment 2 and, in particular, the insertion of the new Subdivision 4, Division 5 of Part 5 of the QCA Act.

[105] Subdivision 2 Division 7 of Part 5 of the QCA Act.

17. Clause 6(4)(l): compensation

Clause 6(4)(l): compensation

The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

The NCC Guidelines state that the NCC does not consider that clause 6(4)(l) means that an access regime need allow a dispute resolution body to impede existing rights. However, where the dispute resolution body has the power to impede existing rights it must also be empowered to consider and, if appropriate, determine compensation[106].

There are a number of protections for existing users in the Regime, including:

(a) Sections 119(2)(a) and 119(3) of the QCA Act provide that the QCA may not make an access determination which reduces the amount of the service able to be obtained by an access provider unless the QCA considers and, if appropriate, makes an award of compensation that is factored into the price of access; and

(b) Section 138(2)(e) of the QCA Act provides that the QCA in approving a draft access undertaking must take into account when assessing the interests of persons who may seek access to the service; whether adequate provision has been made for compensation if the rights of users of the service are adversely affected.

Summary

The Regime provides mechanisms for the consideration and award of compensation if the existing rights of an access provider or user is impeded.

Accordingly, the Regime satisfies the clause 6(4)(l) principle.

[106] NCC Guidelines at [3.186].

18. Clause 6(4)(m): hindering access

Clause 6(4)(m): hindering access

The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

Clause 6(4)(m) requires that an effective access regime prohibit conduct for the purpose of hindering access.

This principle is enshrined in section 104(1) of the QCA Act which prohibits an access provider from engaging in conduct for the purposes of preventing or hindering access to a declared service.

Section 104(2) of the QCA Act specifically deals with the issue of vertical integration and provides that an access provider engages in conduct for preventing or hindering a user's access if the access provider provides (or proposes to provide) access to the declared service to an affiliated entity on more favourable terms than the terms on which the access provider provides (or proposes to provide) access to the declared service to a competitor.

Section 104 of the QCA Act makes it very clear that the prohibition applies to conduct prior to the entering into of an access agreement, by using the phrase "or proposes to provide". Section 104(3) of the QCA Act also makes it very clear that the prohibition applies to unfair discrimination in respect of both:

(a) the fees, tariffs or other payments to be made for access to the declared service by the access provider and the competitor; and

(b) the nature and quality of the declared service provided, or proposed to be provided, to the access provider and competitor.

The provisions of section 104 of the QCA Act in respect to access agreements are replicated in section 125 of the QCA Act in respect of access determinations.

Sections 104 and 125(4) provide that, an access provider or user, or a related body corporate of either party, may be held to have engaged in conduct for preventing or hindering access even if that purpose is only ascertainable by inference from their conduct.

The pricing principles in relation to a declared service under section 168A of the QCA Act and under the Access Undertaking are discussed in further detail below under the clause 6(5)(b) principle and include an obligation on QR Network not to differentiate access charges between access seekers or between access seekers and access holders within a relevant market, subject to limited exceptions.

In addition, section 100(2) of the proposed amendments to the QCA Act prohibits discrimination between access seekers in negotiating access agreements or amendments to access agreements in circumstances where the access provider is a related access provider[107]. The proposed amendments under section 168C further reinforce that a related access provider must not unfairly discriminate between users of the service in providing access[108].

The Access Undertaking also provides numerous protections for downstream competitors to QR Network's affiliated body corporate who provides above rail services. For example the Access Undertaking provides that:

(a) in developing Access Agreements with its affiliate QR Network will not establish access charges for the purposes of preventing or hindering access of an access seeker into any market in competition with the affiliate[109];

(b) in deciding which access holder is allocated a contested train path, QR Network will ensure that, over time, no access holder is favoured over another[110];

(c) in allocating capacity QR Network is obliged to provide all access seekers with a consistent level of service and opportunity to obtain access[111]; and

(d) QR Network will not unfairly discriminate between access seekers in negotiating for the provision of access or between access holders in providing access, including in relation to any decision relating to whether QR Network will undertake an expansion.[112]

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[107] Clause 30 of the Bill in Attachment 2.

[108] Clause 46 of the Bill in Attachment 2.

[109] Clause 6.1.2 of UT2 and clause 6.1.3 of UT3.

[110] Appendix 1 to the Network Management Principles in Schedule G of UT2 and clause 2.2(a)(iii) of UT3.

[111] Clause 7.4.1(a) of UT2 and clause 2.2(a)(ii) of UT3.

[112] Clause 2.2(a)(i) of UT3.

The Access Undertaking sets out an explicit obligation on QR Network to make determinations in a consistent manner where the decision will, or has the potential to, materially and adversely affect an access seeker's or an access holder's rights by applying the following principles:

(i) the decision is made by an identified decision maker responsible for the relevant type of decision; and

(ii) the decision is made in a manner that is consistent between access seekers and/or access holders in the same circumstances[113].

An audit of QR Network's compliance with its obligations, including whether a decision(s) of QR Network has resulted, or may result in a material adverse effect on an access seeker's or access holder's rights under this Undertaking or an access holder's access, is conducted annually[114]. Results of these audits return findings that:

(a) the state that the decision makers are well aware and understand their responsibilities in making a fair decision on matters which will or has the potential to materially and adversely affect an access seeker and/or access holder[115]; and

(b) QR Network has complied with its obligations under clauses 3.3, 3.4 and 3.5.1 of the Access Undertaking including, specifically:

(i) the establishment of a ringfencing register;

(ii) the establishment and maintenance of separate registers by each relevant QR business group;

(iii) the provision of ringfencing training and awareness to employees having access to confidential information; and

(iv) the establishment of a decision making register and decision making procedures[116].

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[113] Clause 3.4(a) of UT2 and clause 3.4(a) of UT3.

[114] Clause 3.5.2(b) of UT2 and clause 3.6(a) of UT3.

[115] BDO Kendalls, 'External Audit of QRs compliance with its obligations under clause 3.4 and subclause 3.5.2(b) of the QR Access Undertaking being an audit of the Decision Making Procedures of QR – Audit Report for the year ended 30 June 2007'; 21 December 2007.

[116] BDO Kendalls, 'External Audit of QRs compliance with its obligations under clause 3.3, 3.4 and subclause 3.5.1 of the QR Access Undertaking being an audit of QR Network's Management of Confidential Information

Enforcing the prohibition against the hindering of access

To enhance the effectiveness of this prohibition, the QCA has specific information gathering powers under sections 105 and 126 of the QCA Act to investigate possible breaches of sections 104 and 125 of the QCA Act respectively. Under these sections, the QCA can require an access provider to provide information about the arrangements under which access to a service is provided, or proposed to be provided, to itself or a related body corporate. A failure to provide the requested information, without reasonable excuse, can result in a maximum penalty of 500 penalty units or six months imprisonment.

Additionally, the prohibitions on preventing or hindering access under sections 100(2), 104, 125 and 168C can be enforced by the orders outlined in section 153 of the QCA Act[117]. The orders available to the court are listed in section 153(2) and include:

(a) the granting of an injunction to restrain or compel the conduct of the obstructer;

(b) the awarding of compensation to be paid to the aggrieved party for loss or damage suffered because of the contravention; and

(c) another order the court considers appropriate.

Furthermore, if the court has power to grant an injunction under section 153(2), then the court may make any other order, including granting an injunction, it considers appropriate against any other person involved in the contravention[118].

Summary

The Regime prohibits conduct hindering access and has a number of protections to ensure that QR Network does not unfairly discriminate against competitors to its related company.

Accordingly, the Regime satisfies the clause 6(4)(m) principle.

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and Complaints Handling Arrangements, and QR Network's Decision Making Principles – Audit Report for the year ended 30 June 2008'; 31 October 2008. See similar points outlined in the External Audits of BDO Kendalls, Audit Report for the year ended 30 June 2004; BDO Kendalls, Audit Report for the year ended 30 June 2005; BDO Kendalls, Audit Report for the year ended 30 June 2006; and BDO Kendalls, Audit Report for the year ended 30 June 2007.

[117] Section 153 of the QCA Act and Clause 44 of the Bill in Annexure 2.

[118] Section 153(3) of the QCA Act.

19. Clause 6(4)(n): separate accounting

Clause 6(4)(n): separate accounting

Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

Division 9 of Part 5 of the QCA Act sets out the regime to be applied in respect of accounting procedures for declared services.

Section 159 of the QCA Act provides for the preparation of a cost allocation manual. The QR Costing Manual was approved by the QCA on 9 September 2004 (**Attachment 11**).

Section 162 of the QCA Act provides that the access provider must keep the books of account and other records necessary to comply with the cost allocation manual. Section 163 of the QCA Act then provides that the access provider must keep, in a form approved by the QCA, accounting records relating to other operations of the access provider.

Ring fencing

Section 137(2)(ea) provides that an access undertaking may include details of the arrangements to be made by the owner or operator to separate the owner's, or operator's, operations concerning the service, from other operations of the owner or operator concerning other commercial activity.

The Access Undertaking details a number of ring fencing measures relating to organisational structure, accounting and confidentiality arrangements[119]. Specifically, QR has established its organisational structure to facilitate the separation of the management of its above rail (QR Operational Business Groups) and below rail (QR Network) businesses[120]. Any changes to QR's organisational structure require QR Network to submit a draft amending access undertaking to the QCA for approval[121].

During negotiations, including before an access application is submitted, an access seeker or QR can be required to enter into a confidentiality deed[122]. QR Network, access seekers

[119] Clauses 3.1-3.3 of UT2 and clauses 3.1-3.3 of UT3.

[120] Clause 3.1(a) of UT2 and clause 3.1(a)-(b) of UT3.

[121] Clause 3.1(d) of UT2 and clause 3.1(d) of UT3.

[122] Clause 3.3(c) of UT2 and clause 3.3(c) of UT3.

and access holders also undertake at all times, to keep confidential and not disclose any confidential information to another party (including individuals employed by or engaged by any of the parties)[123]. To further ensure the separation of its operations with respect to confidentiality, the undertaking specifically restricts QR Network from sharing confidential information with other QR Operational Business Groups or external parties advising QR Operational Business Groups[124].

The proposed amendments to the TIA set out in Attachment 2 include a requirement that:

(a) a majority of the directors of the QR Network board must be independent in the sense that:

  (i) they are not (and have not in the previous 3 years been) employees of, or consultants (in any material respect) to, a member of the QR National group; and

  (ii) whether individually or through a company or partnership, they do not have a material contract with, or more than a 5% shareholding in, such a group member.

(b) QR Network must not enter an access agreement with another member of the QR National group unless the QR Network board has approved the agreement, which the board must only do so if it is reasonably satisfied that the agreement is on arms length terms.

Apart from segregating access-related functions from other functions ring fencing arrangements, the Regime includes measures to[125]:

(a) protect confidential information disclosed by an access seeker to the access provider from improper use and disclosure to affiliated bodies, and

(b) establish staffing arrangements between the access provider and affiliated bodies that avoid conflicts of interest.

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[123] Clause 3.3(d) of UT2 and clause 3.3(d) of UT3.

[124] Clause 3.3.1 of UT2 and clause 3.3.1 of UT3.

[125] As required under NCC Guidelines at [3.197]. We note here that the Regime provides for separation in the preparation of annual financial statements which separately identify the Central Queensland Coal Region from the rest of the network under clause 3.2.1 of UT2 and 3.2.1 of UT3.

Confidential Information

Under the Access Undertaking disclosure to each recipient, being a third party group member within QR, is limited to the extent necessary for the purpose of responding to an application for access, and negotiating or administering an access agreement[126].

The Access Undertaking provides a mechanism to allow an access seeker to give notice to QR Network that it does not wish QR Network to disclose its confidential information to any one or more of the QR operational business groups[127]. In this instance, upon receipt of a notice from an access seeker, QR Network is prohibited from disclosing any confidential information to the groups so noted in the request. QR Network will then be required to make reasonable efforts to suggest a reasonable alternate mechanism whereby QR Network can obtain the information it requires to respond to the access application.

Staffing Arrangements

The Access Undertaking also provides that QR Network will not, where reasonably practicable, disclose an access seeker's or access holder's confidential information to a QR employee (or an employee of a related party of QR) where that person is advising one of the QR operational business groups in relation to the same or a related matter[128].

The Access Undertaking also provides a number of constraints on employee arrangements to ensure that appropriate ringfencing mechanisms around the internal flow of confidential information are preserved. These include:

(a) an obligation on QR Network to ensure that all QR employees (including employees of a related party) receiving, or having access to an access seeker's or access holder's confidential information, are aware of QR Network's obligations relating to of confidential information management and have undergone ringfencing training and awareness session[129];

(b) a requirement that QR Network employees who leave QR Network to work elsewhere in QR (or a related party of QR), will undergo a debriefing process regarding QR Network's obligations relating to the management of confidential

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[126] Clause 3.3.2(b) of UT2 and clause 3.3(b) of UT3.

[127] Clause 3.3.2(c) of UT2 and clause 3.3.2(c) of UT3.

[128] Clause 3.3.2(f) of UT2 and clause 3.3.2(f) of UT3.

[129] Clause 3.3.2(l) of UT2 and 3.3.3(a) clause of UT3.

information and must sign an acknowledgement of having undergone the debriefing process[130];

(c) an obligation on QR Network to ensure that employees do not concurrently work in a working group on a project with staff from, and are not temporarily transferred to, a QR operational business group[131]:

(i) if the activities of the working group or QR operational business group (as the case may be) affect or could affect the operations of access holders or access seekers on the Queensland network; and

(ii) unless QR Network is satisfied the employee has not had access to any confidential information regarding the operations of a access holder or access seeker on the Queensland network which, if disclosed to the QR operational business group, could provide the QR operational business group with an advantage over the access holder or access seeker; and

(d) an obligation on QR Network that in making all decisions in relation to the temporary transfer of QR Network employees to roles in QR (or a related party of QR other than QR Network), QR Network will have regard to the potential implications of any transfer on QR Network's obligations under the Access Undertaking to manage confidential information to avoid as far as practicable, the risk that confidential information will be disclosed that could affect access holders' or access seekers' operations on the Queensland network[132].

These staffing arrangements are also subject to the annual audit process discussed above. All of the audit reports have found that QR Network is in compliance with these requirements.

Summary

The Regime provides for separate accounting arrangements supported by a cost allocation manual approved by the QCA and ring-fencing arrangements to protect confidential information.

Accordingly, the Regime satisfies the clause 6(4)(n) principle.

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[130] Clause 3.3.2(m) of UT2 and clause 3.3.3(b) of UT3.

[131] Clauses 3.3.2(o)-(p) of UT2 and clause 3.3.3(c) of UT3.

[132] Clause 3.3.2(q) of UT2 and clause 3.3.3(d) of UT3.

20. Clause 6(4)(o): access to financial information

Clause 6(4)(o): access to financial information

The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

The NCC Guidelines states that an effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeals bodies) with the right to inspect all financial documents pertaining to the service.[133]

Information gathering powers at the investigation stage

Part 6 of the QCA Act sets out the provisions relating to investigations undertaken by the QCA. Under section 185, the QCA may give written notice to a person requiring that they provide to the QCA a statement setting out stated information or produce stated documents to the QCA by a reasonable date.

During investigation hearings conducted by the QCA, the QCA may give written notice to a person to appear at the hearing and give evidence or produce a stated document (section 181). A failure to comply with the notice provisions, without a reasonable excuse carries a maximum penalty of 1000 penalty units or 1 year's imprisonment.

Under section 186, when a document is produced to the QCA, the QCA may inspect and make copies of the document or take possession of the document as necessary for the investigation.

The Regime makes provision for the protection of confidential information supplied to the QCA during an investigation. Under section 187, a person may ask the QCA not to disclose the information to another person if they believe that it is confidential and that its disclosure is likely to damage their commercial activities. If the QCA is satisfied that the person's belief is justified and that disclosure would not be in the public interest, then the QCA must take all reasonable steps to ensure the information is not, without the person's consent, disclosed to another person other than those listed in section 187(3). Persons listed under this subsection include, for example, the Ministers or relevant industry-specific regulators or ombudsmen.

[133] NCC Guidelines at [3.198].

Information gathering powers at the arbitration stage

Part 7 of the QCA Act concerns the conduct of arbitration hearings by the QCA. The information gathering powers under this part substantially reflect the powers given to the QCA at the investigation stage as outlined above.

Under section 205, the QCA can give written notice to a person requiring stated information or documents to be produced to the QCA. Section 200 of the QCA Act provides that during arbitration hearings conducted by the QCA, a person may be summoned to appear before the QCA as a witness and give evidence or produce stated documents.

As is the case at the investigation stage, when a document is provided to the QCA, the QCA may inspect and make copies of the document or take possession of it while it is necessary for the arbitration[134].

Penalties of up to 1,000 penalty points or 1 year's imprisonment apply for failures to produce information without a reasonable excuse.

There is also a process for the protection of confidential information that is made available during the arbitration process. Under section 207, an applicant may ask the QCA not to disclose certain information to the other party, where they believe that the information is confidential and that its disclosure is likely to damage their commercial activities. After considering the request and any objections received from the other party, if the QCA is satisfied the applicant's belief is justified and that the disclosure would not be in the public interest, the QCA must take all reasonable steps to ensure the information is not disclosed to the other party without the applicant's consent.

Summary

The Regime provides for the QCA to obtain all relevant financial information and also provides protection for confidential information.

Accordingly, the Regime satisfies the clause 6(4)(o) principle.

[134] Section 206 of the QCA Act.

21. Clause 6(5)(a) and the objects of Part IIIA: promote efficiency and effective competition

A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principle:

(a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

The objects of Part IIIA of the TPA (s 44AA) are to:

(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The Regime satisfies this clause through section 69E of the QCA Act, which establishes the object of Part 5 of the QCA Act as:

> *To promote the economically efficient operation of, use of and investment in, infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

With only minor variations, this objects clause reflects the language used in the clause and the corresponding objects clause found in section 44AA(a) of the TPA.

Summary

The Regime reflects the objects clause as required by clause 6(5)(a).

Accordingly, the Regime satisfies the clause 6(5)(a) principle.

22. Clause 6(5)(b): pricing should promote efficiency

Regulated access prices should be set so as to:

(i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;

(ii) allow multi-part pricing and price discrimination when it aids efficiency;

(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(iv) provide incentives to reduce costs or otherwise improve productivity.

The Regime's pricing principles are set out in section 168A of the QCA Act, namely that the price should:

(a) generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved;

(b) allow for multi-part pricing and price discrimination when it aids efficiency;

(c) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent the cost of providing access to other operators is higher; and

(d) provide incentives to reduce costs or otherwise improve productivity.

The QCA must consider these principles when it makes an access determination[135] and when it approves access undertakings for declared services[136].

The Regime provides protections in relation to anti-competitive behaviour by a vertically integrated service provider. These are discussed above in detail in relation to clause 6(4)(m) principle. The proposed amendments to the QCA Act as set out in Attachment 2 will also require that an access undertaking of a vertically integrated access provider must include the following:

[135] Section 120 of the QCA Act.

[136] Section 138 of the QCA Act.

(a) *non-discrimination obligation* - an obligation to provide all access seekers with a consistent level of service and opportunity to obtain access rights; to not unfairly discriminate between access seekers in negotiating with access seekers, or between access holders in providing access; and

(b) *effective prohibition* - on anti-competitive cross-subsidies and margin squeezing as well as on anti-competitive cost shifting.

Summary

The Regime reflects the pricing principles as required by clause 6(5)(b).

Accordingly, the Regime satisfies the clause 6(5)(b) principle.

23. Clause 6(5)(c): merits reviews of decisions

Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:

(i) may request new information where it considers that it would be assisted by the introduction of such information;

(ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and

(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.

Merits review is not provided for in the Regime and therefore compliance with clause 6(5)(c) is unnecessary.

24. Abbreviations

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
ARTC	Australian Rail Track Corporation
CA Act	*Commercial Arbitration Act 1990 (Qld)*
Council	National Competition Council
Clause 6 Principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement (as amended to 13 April 2007).
CPA	Competition Principles Agreement
CQCN	Central Queensland Coal Network
DBCT	Dalrymple Bay Coal Terminal
IPO	Initial Public Offering
National Access Regime	The access regime set out in Part IIIA of the TPA
NCC Guidelines	National Competition Council 2009: *Certification of State and Territory Access Regimes: A Guide to Certification under Part IIIA of the Trade Practices Act*, Melbourne
Part IIIA	Part IIIA of the TPA
PN	Pacific National
QCA	Queensland Competition Authority
QCA Act	*Queensland Competition Authority Act 1997 (Qld)*
QR	Queensland Rail
QR Network	QR Network Pty Ltd
Rail Safety Act	*Transport (Rail Safety Act) 2010 (Qld)*
Reference Tariffs	Means "reference tariffs" as that term is defined in the Access Undertaking
Regime	The Queensland rail access regime as described in Chapter 4 of this Application.

QCA Regulation	*Queensland Competition Authority Regulation 2007 (Qld)* (including the proposed amended QCA Regulation)
Standard Access Agreement	The standard access agreement approved by the QCA under the Access Undertaking
TIA	*Transport Infrastructure Act 1994 (Qld)*
TPA	*Trade Practices Act 1974 (Cth)*
TPA Regulations	*Trade Practices Regulations 1974 (Cth)*
Tribunal	Australian Competition Tribunal
UT2	QR Network's Access Undertaking (2008)
UT3	QR Network's Draft Access Undertaking (2010)
WACC	Weighted Average Cost of Capital