Submission to the Productivity Commission Draft Report on the National Access Regime

July 2013

1. KEY POINTS

The Queensland Government agrees with the Productivity Commission's (the Commission) draft recommendation that Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the National Access Regime) should continue, with a further review in ten years. It also agrees with the Commission that the broad architecture of the regime remain the same but that some reforms are worth consideration.

The Queensland Government:

(i) notes the Commission's discussion around the declaration criterion (b) and the case for a return to a natural monopoly test as opposed to a private profitability test;

(ii) seeks further justification of the Commission's proposal to amend the public interest test under declaration criterion (f);

(iii) supports the Commission's certification proposals: establishing a formal mechanism for the revocation of certifications; and removing the requirement to have state gas and electricity access regimes certified;

(iv) considers there are benefits which can arise from a framework which allows for user funded infrastructure and declaration of greenfield facilities that are being developed but are not yet operational.

2. DECLARATION CRITERIA AND PROCESS

A stable and workable set of declaration criteria is a central element of an effective access regime. The criteria must properly test for monopoly power while respecting private property rights and avoiding being a disincentive to investment.

Criterion (a) (competition test)

Criterion (a) requires the designated Minister to be satisfied that access (or increased access) to the service would promote a material increase in competition in a dependent market.

Queensland supports the Commission's approach to considering whether there is a need to reframe the test for criterion (a) so that it focuses on whether declaration (as opposed to access) would promote a material increase in competition in a dependent market.

Reframing the test to focus on the effect that declaration will have on competition is a more accurate encapsulation of what the criterion should require, particularly given that it should better recognise the fact that third party access may already be provided to the service through commercial (unregulated) arrangements. This may encourage infrastructure service providers to be more proactive in negotiating reasonable third party access arrangements with access seekers, so as to avoid possible declaration under a formal access regime.

However, while some deference to existing third party access arrangements is appropriate, it is important that declaration should not be prevented where existing access arrangements are provided on inadequate or unreasonable terms and conditions.

The Commission's recommendation represents an incremental approach to reforming criterion (a) and is preferable to making the more fundamental changes considered by the Commission, such as replacing the competition test with one of efficiency, which could

increase complexity in assessing declaration and create larger disruptions to existing legal and regulatory precedent.

Criterion (b) (uneconomic to duplicate test)

Criterion (b) requires the designated Minister to be satisfied that it would be uneconomical for anyone to develop another facility to provide the service.

The Commission's draft recommendation is to restore a natural monopoly test for criterion (b) under the National Access Regime. As indicated in Queensland Treasury and Trade's submission (March 2013) on the Commission's Issues Paper, application of a natural monopoly test under this criterion is consistent with Queensland's original legislative intent for the corresponding criterion (b) under the *Queensland Competition Authority Act 1997* (QCA Act) (i.e. to focus application of the regime on natural monopoly infrastructure).

The Queensland Government notes the Commission's finding that a natural monopoly test is better targeted at the underlying economic problem and promotes more certain efficiency outcomes in dependent markets than the private profitability test.

The Government also notes the Commission's finding that a private profitability test would be the more difficult of the two tests to apply in practice. Application of the private profitability test would depend on a number of factors and assumptions, including deciding a sufficient rate of return and reasonably forecasting likely market conditions to determine whether the relevant market can support a duplicated facility. While these factors may be commonly applied in commercial business decisions, this usually involves a well-defined and actual project, as opposed to a more hypothetical case when considering an access proposal. It would be difficult for a regulator (or the deciding Minister) to reconcile potential information disputes on these matters and be satisfied about whether or not a facility is profitable to duplicate.

On the inclusion of efficiency costs under criterion (b), Queensland agrees that some consideration of these costs is reasonable, particularly in the context of infrastructure developed on a single user basis.

Queensland also supports the Commission's recommendation that, if the private profitability test is retained under the National Access Regime, the term 'anyone' in criterion (b) should be amended to exclude the incumbent facility operator from consideration.

Criterion (c) (national significance test)

Criterion (c) requires that the designated Minister be satisfied that the facility is of national significance, having regard to (i) the size of the facility, (ii) the importance of the facility to constitutional trade or commerce, or (iii) the importance of the facility to the national economy.

The Queensland Government notes the Commission's consideration of criterion (c) and agrees with its conclusion that no changes to this criterion are warranted.

Criterion (e) (subject to effective access regime)

Criterion (e) provides that access to the service must not already be subject to a regime that has been certified as an effective access regime, unless there have been substantial

modifications to the regime or the *Competition Principles Agreement* (CPA) since the regime was certified.

The Queensland Government supports the Commission's recommendation to remove criterion (e) from the declaration criteria and establish it as a threshold issue that is considered before the declaration criteria can be applied. This is a practical reform which should avoid unnecessary consideration of the declaration criteria if a service is already subject to an effective access regime.

Criterion (f) (public interest test)

Criterion (f) requires that access to the service would not be contrary to the public interest.

The Commission has recommended several changes to this criterion:

- reframing the criterion to centre on the effect of declaration (rather than access);
- introducing a non-exhaustive list of factors that the decision maker must have regard to when assessing the criterion; and
- reversing the onus of the criterion so that it establishes an affirmative public interest test (i.e. the decision maker must be satisfied that declaration promotes the public interest).

Of the recommended changes, establishing an affirmative public interest test is the most significant change to criterion (f). The Queensland Government has some reservation about this recommendation and requests that the Commission consider further the potential implications of establishing an affirmative public interest test under criterion (f).

Queensland is concerned that, by putting the onus on an access seeker to prove a net public benefit, an affirmative public interest test may have the effect of setting too high a threshold for satisfying criterion (f). A particular concern would be whether the expected costs of declaration may be given more weight or significance than the likely benefits of declaration, as the benefits may be harder for an access seeker to readily express or quantify than the costs.

The inclusion of the non-exhaustive list of factors to which the decision maker must have regard to as recommended by the Commission has merit. However, if an affirmative public interest test is to be established, the Commission should consider whether there would be utility in including any additional factors that draw specific consideration of the benefits that declaration might bring (e.g. the benefits that result from increased competition). While it is recognised that this is intended to be a non-exhaustive list, the inclusion of such a factor might be appropriate to provide balance to the list given the different focus of criterion (f) under an affirmative public interest test.

Aligning the Competition Principles Agreement (CPA) with the recommended declaration criteria

There may be merit in amending the coverage principles set out under clause 6(3) of the CPA to more closely align with a revised set of declaration criteria under the National Access Regime.

Adopting a more consistent set of declaration criteria would promote increased consistency in the scope of access regulation across the national, state and industry-specific access

regimes, and also avoid ambiguity and uncertainty caused by differences in the precise language used across the access regimes and the CPA.

The adoption of a consistent set of drafting for criterion (b) would be of the most benefit. This would ensure that there is no doubt about the intended application of this criterion across access regimes, particularly if criterion (b) of the National Access Regime is amended to restore a natural monopoly test.

The Queensland Government is open to amending the coverage principles under the CPA for greater consistency with the corresponding criteria under the National Access Regime. However, any changes to the CPA must be in the State's best interests. Accordingly, Queensland will need to assess the Commission's final recommendations for the declaration criteria (and the drafting ultimately adopted by the Commonwealth Government) before committing to any changes to the CPA.

However, the Commission's suggestion that the CPA should directly reference the declaration criteria under the National Access Regime (i.e. so that any future changes made to the declaration criteria under the *Competition and Consumer Act 2010* (Cth) (CCA) would be automatically carried over to the CPA) is not supported.

While it is desirable for there to be greater consistency between both sets of criteria, Queensland considers that, as a COAG agreement, it is appropriate that any changes to the coverage principles should only be made by specific amendment of the CPA itself.

On a more practical level, carrying over criterion (c) of the National Access Regime to the CPA would require the application of a test of national significance to state access regulation. This would represent a substantial policy change (and increase in the declaration threshold) for state access regimes to conform to the CPA, as they are currently only required to cover "services provided by means of significant infrastructure facilities" (clause 6(3)(a) of the CPA).

Deemed Ministerial decisions

Queensland notes the Commission's recommendation that deemed Ministerial decisions on declaration applications should follow the National Competition Council's declaration recommendation, rather than constitute a refusal to declare the service as is currently the case under the National Access Regime.

The declaration process under the QCA Act does not provide for deemed Ministerial decisions for access declarations, with Ministers required to make a declaration decision within 90 days of receiving a declaration recommendation from the QCA (section 85 of the QCA Act). The Queensland Government considers that Ministers are well placed to decide matters in the public interest and, without a deeming provision, the onus is on the Ministers to make the decision within statutory time frames.

3. CERTIFICATION

Certification has an important function in promoting greater consistency in the principles underpinning the access regimes across jurisdictions. It can also serve to provide greater regulatory certainty by preventing the declaration of a service covered by a certified state regime under the overarching National Access Regime.

Queensland has two certified access regimes:

- the Queensland rail access regime, covering the Central Queensland Coal Network and the intrastate rail network operated by Queensland Rail; and
- the Dalrymple Bay Coal Terminal access regime.

Formal revocation mechanism

There is currently no formal mechanism to revoke certification of an access regime, which means that the status of a certification may only be formally tested as part of a declaration application.

The Commission's recommendation to establish a formal mechanism to revoke the certification of a regime is a worthwhile reform and is supported. Decoupling the separate questions around whether there has been a substantial modification of a certified access regime (or the CPA) and whether the service meets the declaration criteria could lead to greater regulatory certainty, as declaration under the National Access Regime could only be sought where certification has first been formally revoked.

Queensland supports the Commission's recommended threshold for revoking the certification of a regime. That is, there has been a substantial modification to the certified regime or the principles in clause 6 of the CPA, such that the regime no longer meets the principles in clause 6 of the CPA.

Certification of gas and electricity regimes

The Queensland Government supports the Commission's preliminary view to remove the requirement from the *Australian Energy Market Agreement* for jurisdictions to seek certification of state and territory electricity and gas access regimes.

These regimes provide a generally consistent basis for third party access and are of benefit to these industries. While certification is a generally beneficial process, and removal of regulatory risk desirable, in recent years a number of jurisdictions participating on the Standing Council on Energy and Resources have been concerned that certification of the energy access regimes will not deliver the intended benefits of market certainty and streamlined regulation.

Queensland considers that, in this instance, the regulatory burden and associated costs of seeking certification of these regimes would significantly outweigh the likely benefits that certification will provide. On this basis, Queensland supports removing the certification requirement for these regimes.

4. INVESTMENT REFORMS

Promoting the efficient use of, and investment in, infrastructure is a key policy issue for the Queensland Government. Queensland notes the Commission's general view that the current regulatory framework provides sufficient flexibility to mitigate regulatory risks for new infrastructure investment and that the recommended declaration criteria may reduce regulatory uncertainty by refining the potential scope for declaration.

Queensland considers there are two areas where reforms could be made to improve access regulation: (i) extensions (and expansions) to regulated infrastructure; and (ii) declaration of greenfield infrastructure facilities.

Extensions (and expansions) to regulated infrastructure

The Commission has recommended that amendments be made to the CCA to confirm that, when arbitrating an access dispute, the Australian Competition and Consumer Commission (ACCC) can require an expansion to a facility (as well as geographic extensions to the facility). The Queensland Government notes that the QCA Act was amended in 2010 to similarly clarify the power of the Queensland Competition Authority (QCA) in this regard. This was achieved by defining an extension of a facility as including "an enhancement, expansion, augmentation, duplication or replacement of all or part of the facility."

The Commission has also sought submissions on whether the restrictions placed on the ACCC's power to require an extension to a facility in an access determination should be revised.

Section 44W of the CCA sets out the restrictions on access determinations made by the ACCC. Relevantly, these restrictions include preventing the ACCC from making a determination that:

- results in a third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;
- requires the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility (or interconnections to the facility).

These restrictions are also found under section 119 of the QCA Act in relation to the QCA's ability to make access determinations.

The Queensland Government recognises that the issue of extensions to regulated infrastructure is of increasing importance in Queensland, given capacity constraints in export supply chains and the need for new infrastructure to support emerging mining and resource projects. In this regard, it is important that monopoly power or other impediments to efficient investment do not delay or affect the viability of infrastructure development and associated projects.

Queensland considers that it is a strong principle that extensions to facilities are commercially negotiated between parties, rather than being imposed by the regulator. Queensland will consider the Commission's analysis of this issue but considers that any recommended changes must not compromise the legitimate business interests of the service provider or inappropriately interfere with their private property rights.

An alternative to revising these restrictions would be through facilitating other external funding arrangements for extensions to infrastructure. Introducing contestability of funding options for extensions can also act as an effective cap on the negotiating power that a service provider may have in relation to extensions. It can facilitate extensions to infrastructure where a service provider may be unwilling, or unable, to invest in an extension. These arrangements offer a less intrusive option for facilitating extensions to infrastructure.

The Queensland Government supports the development of workable external funding arrangements and notes the work of the QCA, Aurizon Network and industry on the development of a Standard User Funding Agreement for extensions (which includes

upgrades) to the Central Queensland Coal Network regulated under the Queensland rail access regime.

The Commission should consider whether external funding arrangements (including user funding options) are a more viable alternative to facilitate infrastructure extensions than revising the legislative restrictions on access determinations.

The Commission should examine the National Access Regime for any regulatory impediments that may impair the implementation of workable external funding arrangements.

Declaration of a service to be provided by a facility that is not yet operational

The Commission should also consider the merits of making specific provision for the declaration of a facility that has not yet been constructed or commenced operation.

In the context of greenfield infrastructure, there is merit in access seekers negotiating with an infrastructure proponent at an early stage in the development of a facility to settle access issues upfront and provide certainty for all parties about the terms and conditions of access going forward.

However, access seekers may face difficulties negotiating access to these facilities and may wish to seek recourse to the 'negotiate-arbitrate' framework provided under an access regime. It is doubtful whether it is possible to declare a facility that is being developed (but not yet operational) under the current declaration provisions of the National Access Regime.

Declaration at an earlier stage would allow access seekers to negotiate with prospective access providers with the benefit of the legislated negotiation protections under the regime. Even the possible threat of declaration may have an effect in promoting negotiation between parties at the early stages of the development of greenfield infrastructure.

While individual jurisdictions' planning legislation and project approval processes have a role in promoting the development of greenfield infrastructure on an open access basis, these do not provide the legislated negotiation framework an access regime provides.

There would be practical issues with declaring facilities before they are constructed, most critically, the appropriate point in the development of a facility at which it should be eligible for declaration. However, the Commission should consider whether there is merit in enabling the declaration of facilities under these circumstances and, if so, how such a process could be developed.