QUEENSLAND GOVERNMENT

COMMENTS ON

THE INDUSTRY COMMISSION'S

BLACK COAL INQUIRY
DRAFT REPORT

PREPARED BY THE QUEENSLAND GOVERNMENT
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ABOUT THIS DOCUMENT

This document has been compiled by the Department of Mines and Energy on behalf of the Queensland Government. Contributions have been received from Queensland Treasury, Department of Premier and Cabinet, and the Department of Transport.

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EXECUTIVE SUMMARY

The Queensland Government supports the general thrust of the main findings/recommendations in the Industry Commission's (IC) draft report.

However, there are several areas where the Queensland Government disagrees with the IC's position and the reasons for this are outlined in the following comments.

Briefly, the main areas of disagreement are:

1. Implementation of National Competition Policy (NCP) in Queensland

The IC's draft report (mainly in chapters 7 and 8) is critical of aspects of the Queensland Government's implementation of NCP in Queensland. Some of the draft report's criticisms in this respect could benefit from additional information about the Queensland Government's approach to National Competition Policy implementation, particularly in relation to third party access and rail. In addition to comments provided, a summary paper of Queensland's third party access regime is at Attachment 1 for the IC's information.

It should also be noted that the Government announced on 25 April 1998 the removal of the exemption in relation to access to Government coal carrying services on the Queensland rail network.

In respect of recommendation 3 of the draft report, the Queensland Government is proceeding with preparation of an application to the National Competition Council for certification of its rail access regime.

2. Royalty arrangements

The IC suggests (page 255) that it is time to review the merits of a resource rent royalty (RRR) for black coal. However, the IC notes that a key issue is the complexity and cost for governments and companies of administering and complying with such a royalty. The IC also notes that Queensland's ad valorem royalty system is superior to that of NSW and suggests that the NSW Government consider adopting an ad valorem system similar to Queensland's.

However, adoption of a RRR for black coal is not on the Queensland Government's agenda at the moment. The Queensland Government carried out a comparative analysis between a RRR and an ad valorem royalty approach as part of the review of Queensland's royalty and rail freight arrangements in the early 1990's.

Adoption of an RRR was rejected mainly on the grounds of unacceptably high administrative costs and potential revenue instability associated with profit based arrangements such as a RRR.

At a more general level, royalty is a return on the use of a community's asset. There is a strong argument that royalty needs to be tied to the production of that asset. Moreover, changing to a RRR regime in a projected environment of greater competition in coal markets and possibly lower industry profits would not ensure the required adequate return on the exploitation of a community's asset.

3. Government regulation and safety

Generally, the package of occupational health and safety measures proposed by the Commission is supported with, however, the following objections.

The commission suggests that 'coal inspectors may provide advice on a full fee for service....'. This prospect should be vigorously opposed as it represents a conflict of interest. Inspectors might withhold vital safety information while waiting for commercial arrangements to be put in place. Inspectors who run prosecutions would be discouraged from visiting mines.

It is essential that the mines Inspectorate remains completely independent and is seen to be independent particularly by mineworkers. The proposal that inspectors provide paid advice to mines should be strongly resisted.

INTRODUCTION

In 1998 the Australian Government Treasurer asked the IC to inquire into, and report on, the international competitiveness of the Australian black coal industry.

The Queensland Government submitted its submission to this inquiry in November 1997.

The IC released its draft report in April 1998.

This document represents the Queensland Government's response to that draft report.

The Queensland Government's comments focus on national competition policy, royalty regimes for coal and occupational health and safety.

Following are comments on the IC's draft report.

OVERVIEW

Page XXXII

The second dot-point indicates that Queensland Rail (as a State rail authority - in QR's case a Government Owned Corporation) has a lower productivity performance than the better overseas rail operations. It could also be pointed out that on page 154, the Industry Commission explains the difficulties in comparing Australian with foreign rail systems. Notwithstanding these difficulties, QR is required to reach world's best practice in its rail freight operations by the year 2000.

In the paragraph before Recommendation 3, replace the word "stall" with "defer".

Page XXXIII

The first paragraph notes concerns that price setting by Queensland Rail (as a State rail authority) is not transparent. In this regard, and in relation to Recommendation 5 (page XXXIV), it should be noted that both QR and the Port Authorities, as corporatised entities with a mandate to operate on a commercial basis, are required to follow normal commercial practices.

The last paragraph states that problems in Newcastle reflect poorly on Australia's reputation as a supplier of coal. We consider that, since there are no throughput problems in Queensland's coal export ports, it does not impact on Queensland's reputation and so "Australia's" should be replaced by "NSW's".

CHAPTER 7 - COAL RAIL TRANSPORT

The National Competition Policy (NCP) aspects of the IC's draft report that affect the Queensland Government relate to the Government's progress on introducing competition to the provision of coal freight. The report's assessment centres on the implementation of third party access to Queensland Rail's infrastructure and, to a lesser extent, prices oversight of port authorities. Discussion of these aspects is largely confined to Chapters 7 and 8 of the report. Accordingly, comments are only provided in relation these two chapters.

Chapter 7 emphasises that there are significant opportunities to improve productivity and efficiency in coal rail transport if competition is introduced by way of third party access to rail infrastructure. The Queensland Government agrees with this assertion and is committed to achieving this aim. However, the Report indicates that the Queensland Government has been slow in progressing an effective access regime for a number of reasons, including:

- Reliance by the Government on the exemption on access to "Government coal carrying services" provided in section 78 of the Competition Policy Reform Act 1997.

- A decision not to structurally separate the infrastructure (below track) and freight (above track) operations of Queensland Rail.

- Adoption of a "bare bones" approach to the rail access regime to be submitted for certification to the National Competition Council.

In relation to these points and in the interests of providing a more balanced perspective, the Report could benefit from additional information about the Queensland Government's approach to third party access and rail:

(i) Section 78 exemption

- This exemption was inserted in the Commonwealth Act in order to protect de facto royalty revenue.

- However, as the report indicates, these "royalties" will be phased out by 2000 as a result of the renegotiation of contracts upon a commercial basis. This phasing out of royalties has resulted in less significance attaching to the exemption in section 78 and, given the declining importance of the exemption, it is planned to scale down the Government's involvement in the Minerals Council appeal to the Australian Competition Tribunal. **Indeed, the Government announced on 25 April 1998 the removal of the exemption in relation to access to Government coal carrying services on the Queensland rail network.**

- The removal of this exemption, combined with the recent declaration (under the State based third party access regime) of rail transportation services provided by the whole of the QR network (with exception of interstate track infrastructure), evidences the Government's commitment to an effective third party access regime for the entire rail

network and removes many of the potential problems associated with the exemption raised in the Report.

(ii) Structural separation

It is noted that the report concludes that, on balance, structural separation is preferred in relation to Queensland Rail. However, the Queensland Government has considered the advantages and disadvantages and considers that an integrated structure has greater benefits at this stage. The QR structure is also based on permitting the third party access regime a chance to deliver first on what it is designed to achieve.

The advantage of a vertically integrated structure is that it permits decisions on infrastructure investment and operations to be both technologically and managerially integrated. This has the potential to maximise the efficiency of the railway system as a whole. The major disadvantage of structural separation is the additional contracting and potential litigation costs associated with the formal contractual arrangements which would need to be put in place between a separate track owner and operator(s). In addition, there are transitional costs in moving to a formal contract based regime.

It is the Government's view that separation should occur only where there is a net public benefit. This public benefit test should address, first, whether or not the industry can operate within a more formal contractual arrangement and second, whether such a change should occur now.

Independent consultants engaged to comprehensively review the rail industry found that there was no evidence to suggest that the likely number of third party operators would justify incurring the potential costs of separation.

Further, there was no evidence to indicate that the proposed third party access regime would not be successful, particularly given the recommendations to have:

- QR internally separates its infrastructure business.
- The QR track group treat internal and external parties on the same basis; and
- QCA develop independent guidelines on key financial issues such as asset valuation and rate of return.

With the third party access regime in place, QR will need to develop more formal contractual arrangements in any case. The approach taken in Queensland relative to NSW, for example, allows for a more considered treatment of the transitional problems that may arise due to the fundamental changes that are currently occurring within the rail industry.

The report states that the failure to establish a separate access unit outside QR raises concerns about transparency and fairness if there are no independent controls. The report quotes from several submissions in support of this view. It is submitted that there is an independent "arbiter" - the QCA - which is able to check any bias by way of the compulsory dispute

resolution process in the Act and by way of the competitive neutrality complaints mechanism. There is also provision in the Act for the QCA to require QR to produce cost allocation manuals or impose ringfencing arrangements by way of an access undertaking (refer to comments below in (iii)).

(iii) Certification application - need for a comprehensive regime.

The Report states the need for an access regime to be "comprehensive, transparent clearly equitable to all parties and have appropriate appeal mechanisms" (page 178).

In this respect, the Report notes concerns that the regime which the Queensland Government has submitted to the National Competition Council for certification is a "bare bones" regime which will be subject to the influence of QR when it comes to "designing the final playing field".

It is submitted that the Queensland regime (which is comprised of the Act and the regulation declaring the service in question) provides for a regime which is similar and, in many respects, more comprehensive than the Commonwealth regime (set out in Part IIIA of the Trade Practices Act 1974). The key features of the State regime are set out in Box 7.2 (refer to amendments to Box 7.2) and in the paper at Attachment 1, "Summary of the Queensland Third Party Access Regime". The regime provides for:

- A declaration process to determine whether services ought to be potentially subject to access claims.
- "Access codes", which provide a means of "tailoring" the generic regime to specific classes of infrastructure.
- The capacity for the QCA to require owners of infrastructure providing services that are declared under the regime to submit to it draft undertakings for declared services; and
- A compulsory dispute resolution procedure.

There are two stages of third party access, notably the *declaration process* (whereby services are nominated to be subject to the regime which triggers third parties gaining a legislative right to negotiate access with the infrastructure owner) and *compulsory dispute resolution* (where the QCA assumes the role of an independent arbitrator when parties cannot agree on terms or conditions of access for declared services).

The aim of the regime is to provide a framework for effective commercial negotiation. Quite clearly, this means that information must be made available to both access seekers and access providers, especially information about prices and pricing principles. It should not, however, be prescriptive in terms of setting prices. In this respect, as noted above, the regime provides for access undertakings to be prepared which will address these issues, amongst others. For example, undertakings may also address how spare capacity is to be worked out; accounting requirements to be satisfied by the owner; terms relating to extending the facility; and, arrangements to be made by the owner to separate the owner's operations concerning the

service from other operations of the owner concerning another commercial activity. Clearly, undertakings may provide for ringfencing, pricing principles, and for information provision in the negotiation process.

While an undertaking will enhance the general regime, it is important that the regime be maintained as generic as possible in order to ensure that major elements of the regulatory framework applying to all natural monopoly industries (eg rate of return, asset valuation) are addressed on a common and consistent basis.

It should be noted that the QCA is the body which approves (or not) an access undertaking prepared by an access provider. The State Government has no role, over and above any other interested party (eg a mining company or the NCC), in developing an undertaking. Accordingly, the assertion by BHP (extracted on page 178 of the Report) that "the State [is] subsequently responsible for developing the detailed undertaking in conjunction with Queensland Rail and under the authority of the Queensland Competition Authority. " is incorrect. Accordingly, QR is in no special position to influence the "design of the final playing field".

Monopoly rents

Chapter 7 also discusses the impact of implicit royalties on pricing for coal freight and concludes that the practice of extracting these monopoly rents has in the past significantly affected the productivity and efficiency of the industry. The Report also states (on page 170) that this factor is now largely historical due to the renegotiation of contracts upon a commercial basis and the phasing out of de factor royalties by 2000. Perhaps, this could be mentioned at the commencement of this section rather than at the end in order to give the appropriate flavour of the current and future impact of this factor on the industry.

Price setting for rail access

Section 7.7 deals with pricing issues. These are matters which should be dealt with, as a last resort (ie if commercial resolution is unsuccessful), by an independent price regulator - in Queensland's case, the Queensland Competition Authority - in determining both access pricing principles and ensuring prices charged by government businesses are not monopoly prices.

Box 7.2: Queensland Competition Authority

There are some inaccuracies in this box. Suggested amendments are:

First paragraph : Second sentence could read: "The purpose of the Act is to create the QCA as an independent regulatory authority with powers and functions to:

- administer a third party access regime;
- ...etc" as per existing second paragraph.

Under heading of “Access to essential infrastructure”, replace text with:

“The regime set out in the Act is similar to the Commonwealth access regime. The regime provides for:

- a declaration process to determine whether services ought to be potentially subject to access claims;
- "access codes", which provide a means of "tailoring" the generic regime to specific classes of infrastructure, where necessary;
- the capacity for the QCA to require owners of infrastructure providing services that are declared under the regime to submit to it draft undertakings for declared services; and
- a compulsory dispute resolution procedure for seeking access to declared services.

There are two stages of third party access, notably the *declaration process* (whereby services are nominated to be subject to the regime which triggers third parties gaining a legislative right to negotiate access with the infrastructure owner) and *compulsory dispute resolution* (where the QCA assumes the role of an independent arbitrator when parties cannot agree on terms or conditions of access for declared services).

Access undertakings establish specific principles for access providers and access seekers to negotiate access. The Act provides for the QCA to require an access provider to submit an undertaking or for the QCA to prepare an undertaking (should an access provider fail to submit an undertaking in accordance with a request from the QCA).”

Note: The last paragraph under this heading, as currently drafted, is incorrect in that the QCA cannot prepare access codes - these are subordinate legislation and are thus prepared by the Ministers responsible (ie the Premier and Deputy Premier and Treasurer).

Specific comments are as follows.

Page 151

The preamble to Chapter 7 could note that on 8 April 1998, the Queensland Government signed a development agreement with SUDAW Developments Ltd to develop a feasibility study over a period of 12 months for a privately owned merchant railway from the Surat Basin coalfield to a Queensland export coal port.

In the third paragraph replace "stall" with "defer".

Page 153, 7.2 The coal rail freight task

The last sentence in the third paragraph implies that QR does not have an independent Board. Indeed, QR has had a Board since 1995.

Page 154, 7.3 Efficiency and prices of coal rail freight services

The dot-point comparison with other rail systems could also note that in regard to the gauge of the railway, a narrow gauge rail system, such as that operated by Queensland Rail, also has constraints on axle loads and train lengths.

Page 160

In the second paragraph, the IC reports 1993-94 data on the differences between QR and NSW freight operations and world's best practice. The IC should include more timely data to indicate the present situation, and how matters have progressed.

Page 163, 7.4.1 Current structures

In the third paragraph Rio Tinto is reported to have commented on QR's commercialisation. QR has not been commercialised, but corporatised.

The organisation chart for QR's new structure (see fourth paragraph) is at Attachment 2.

Page 169, 7.5.2 Queensland

In the first paragraph, the IC reports a quote from the QMC which states that the setting of CSO's [by the Queensland Government] is obscure. The implication could be made here that CSO's are given for coal freight. This is not the case, and the comment does not have any relevance to the matter of coal haulage by rail.

Page 180, 7.7.1 Asset valuation

It is worth observing in regard to paragraph two, that asset valuation here is not for the purposes of selling assets but to enable an access price to be calculated. The method of asset valuation chosen needs to result in an access price which allows for the ongoing maintenance and renewal of the asset over time. The use of historical cost may not achieve these ends.

It should be noted in this regard that Queensland Rail is required to follow State Government guidelines in respect of asset valuation.

Page 186

The last paragraph refers to cross-subsidies from coal freight to other freight. In Queensland, there are no implicit cross-subsidies from coal to other freight.

CHAPTER 8 – THE COAL WATERFRONT

Chapter 8 essentially recommends prices oversight of port authorities. There is currently provision in the QCA Act for prices oversight to be instigated in relation to GOCs such as port authorities.

The State based monopoly prices oversight regime provides for a process whereby government businesses[1] may be identified and declared as government monopoly business activities and, thus, made subject to investigation by the QCA as to their pricing policy and practices.

The QCA recommends certain government businesses[2] for declaration by the Ministers[3] who, if they accept the recommendation of the QCA, will declare the business as a government monopoly business activity. Once declared, the business may be referred by the Ministers to the QCA for investigation. If referred, the QCA must report to the Ministers who then decide whether to accept or reject the QCA's recommendations regarding the business's pricing practices. The Ministers, in conjunction with the relevant portfolio Minister, are then responsible for implementing those recommendations, which have been accepted.

As yet the Government has not received any recommendations and has not been approached by any person concerning the pricing activities of the port GOCs.

Specific comments are as follows.

Page 189, The Coal Waterfront

In the third paragraph, there are no major coal port throughput problems in Queensland and so "Australia's" should be replaced by "NSW's".

Page 193, 8.2.2 Competition among Australian coal ports

Paragraph two commences with the statement that there is generally no competition between Australian coal ports. However, there is the potential for competition between terminals in two-terminal ports like Hay Point.

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[1]It should be noted that the prices oversight jurisdiction of the QCA will be extended, in the case of the water industry, to the private sector.

[2]In accordance with the QCA Act, the QCA have developed and gazetted criteria for identifying government monopoly business activities. These criteria are applied by the QCA in determining which government businesses should be recommended for declaration.

[3]The Premier and Deputy Premier and Treasurer are jointly responsible for the QCA Act.

Page 194, 8.3.1 Difficulties with productivity and price comparisons

The final sentence which runs onto the top of page 195 is obscure. The Industry Commission needs to explain what is meant by "...coal ports are generally more homogeneous than coal rail systems."

CHAPTER 9 – GOVERNMENT REGULATION AND SAFETY

Section 9.1 – Black Coal Industry's Safety Record

The use of the Lost Time Injury Frequency Rate (LTIFR) as a means of comparing industry performances is questionable. Professionals in the area generally agree that days lost per million hours worked is a much more reliable statistic. The changing practices on rehabilitation programs have affected the LTIFR. Similarly, using the total cost of compensation would be a more reliable indicator that number of cases (but costs should be indexed to inflation).

Section 9.4 - Problems With The Current Approach

The IC invited comments on the following questions (page 229).

1. **Should Australian Inspectorates recognise overseas standards and standards set by another state in relation to coal mining equipment?**

Currently the Queensland Coal Inspectorate recognises Australian Standards, and if none are available, then British Standards are generally used. Where neither are available, the Chief Inspector of Mines may determine another (including overseas) standard is applicable. (Section III, clause 9 of the Underground Coal Mines Electrical Rules)

2. **Should we recognise an overseas standard where an existing Australian Standard covers the same subject?**

The Standards Australia organisation tends to adopt IEC standards (sometimes completely, sometimes with changes) which are considered among the best international practice. It can be argued that other standards shouldn't be recognised unless they can be shown (through the opinion of a recognised testing authority) to be at least as good as any Australian Standard on the particular subject.

Australian Standards (eg. the AS 2380 and AS 2381 series) form the cornerstone of both the Queensland and NSW **hazardous area (explosion risk zones) electrical equipment** certification scheme, operating through testing stations at SIMTARS, Queensland and Londonderry, NSW. Hazardous area electrical equipment certificated through the QAS scheme at either station is used in both states, however, requirements of different State mining

legislation sometimes prevents equipment being used interchangeably in both states. This situation will probably improve with the introduction of new Coal legislation in Queensland.

We should tread carefully when looking at recognising **other standards covering Explosion risk zones electrical equipment**. Consultation with testing stations would be necessary.

3. Could companies assume more responsibility for assessing the appropriateness of equipment for their circumstances, as part of their overall duty of care?

Under the proposed new Queensland Coal legislation companies will have much more flexibility when purchasing equipment. Excepting electrical equipment required for use in explosion risk zones the responsibility will rest with companies on the type of equipment to be used.

Electrical equipment to be used in Explosion risk zones must continue to conform with the certification scheme currently in use.

Section 9.4 – Safety Regulations

Mine owners who argue that the industry's poor performance is the result of the current safety regulation regime should not be taken seriously as the Industry Commission's draft report shows that several other more important factors affect industry performance. Most mine owners would accept that the legislation is a community standard put in place as a minimum requirement to protect mine workers. Moreover, if mine management were serious about safety, the standards they put in place would be expected to far exceed those required under legislation.

The conclusion of both the recent Inquiry in W.A Mining Fatalities and the Inquiry into the Moura No 2 Mine Explosion found the competency of management to be wanting in respect of mine safety.

Section 9.5 – Alternative Regulatory Approaches

One of the failures of the modern accounting systems is to properly account for the full costs of health and safety. Costs of compensation and replacement were mentioned but there are many more. A standard to implement full economic costing might change the operators and government attitudes to resource allocations and management focus in the health and safety area.

Package of OHS measures proposed by Industry Commission(page 237)

Generally the package of OHS measures proposed by the Commission is supported, with, however, the following objections.

The commission suggests that 'coal inspectors may provide advice on a full fee for service....'. This prospect should be vigorously opposed as it represents a conflict of interest. Inspectors

might withhold vital safety information while waiting for commercial arrangements to be put in place. Inspectors who run prosecutions would be discouraged from visiting mines.

It is essential that the mines Inspectorate remains completely independent and is seen to be independent particularly by mineworkers. The proposal that inspectors provide paid advice to mines should be strongly resisted.

In regard to the abolition of statutory management positions, the proposed new Queensland Coal mining Safety and Health Act eliminates all statutory positions for surface mining operations (open cuts) except a new position of site senior executive. A site senior executive must be appointed for all mining operations.

For Underground coal operations, although the positions of Underground Manager, person in charge of a shift and person in charge of activities being undertaken in an explosion risk zone (Deputies) are being retained in the proposed legislation, the respective duties defined for each position are far less prescribed than in the existing Coal Mining Act.

The existing Coal Mining Act prescribes quite onerous specific tasks and duties to each position as well as detailed arrangements to cover absences of permanent statutory position holders.

The proposed Queensland Coal Mining Safety and Health Act basically only specifies that certain functions must be under the control of persons with prescribed competencies with their duties being covered under the general duty of care principles.

A feature of the new Coal Mining Act is a provision to review the need for a Board of Examiners. This provision states that 18 months after the new Act comes into force a review must begin to consider the effectiveness of any alternate systems set up by industry to ensure the competencies of persons carrying out statutory duties.

Even if statutory positions are abolished it is essential that certain positions (e.g. underground mine manager) at mines must have minimum prescribed competencies. (Recommendations - Moura Task Group 3)

Section 9.6 – Other Functions (page 241)

The Commission suggests that private providers could handle pre-employment and health assessments. However, the Commission does not appear to have recognised the importance of a centralised health, exposure and injury register. This is the basis for the development of health standards. The centralised register also allows for the transportability of health assessments as people move from site to site including interstate transfers. The trend, particularly in Queensland, of increasing the role of contractors has recently seen a sharp increase in the calls for health assessments to be passed from site to site.

CHAPTER 10 – ROYALTY ARRANGMENTS

Review of royalty arrangements for black coal

The draft report recommends a review of current royalty arrangements with a view to determining the merits and practicality of moving to a resource rent royalty.

The Queensland Government would not support the use of a resource rent royalty for Queensland coal – at least not in the foreseeable future because:

(a) An in-depth, comparative analysis of alternative royalty arrangements undertaken during 1991 to 1993 explicitly rejected the option of a resource rent royalty in favour of an ad valorem arrangement; and
(b) Of the successful operation of the ad valorem royalty implemented in 1994 for domestic coal and in operation since 1974 for export coal. [Note: domestic coal is defined as coal sold within Queensland and export coal is that which is sold outside Queensland (including to other States)].

These two factors are discussed below.

(a) Comparative analysis of alternative royalty arrangements

As part of the early 1990's major review of Queensland royalty and rail freight arrangements, the Queensland Government undertook a detailed comparative analysis between a resource rent royalty and one based on an ad valorem approach. The clear conclusion at that time was to phase in an ad valorem royalty for domestic coal and phase in an increase in the existing ad valorem rate for export coal (in conjunction with the progressive commercialisation of rail freights.) Two key factors in reaching that conclusion were the unacceptably high administrative cost and potential revenue instability associated with profit based arrangements such as a resource rent royalty.

At a more general level, royalty is a return on the use of a community's asset. There is a strong argument that royalty needs to be tied to the production of that asset. Moreover, changing to a resource rent royalty regime in a projected environment of greater competition in coal markets and possibly lower industry profits would not ensure the required adequate return on the exploitation of a community's asset.

A more detailed discussion of that review process is outlined below.

The review was aimed at determining an appropriate balance between gaining an acceptable return for the community, as owners of the coal resources, and minimising any adverse impacts on investment and production decisions of the Queensland coal industry.

The review involved a detailed investigation of the various royalty options. Such options included specific, ad valorem, accounting profit, resource rent as well as various hybrid systems involving selected combinations of the above. The review activity included:

- Extensive financial modelling.
- Assessment of theoretical issues associated with each option; and
- Consideration of practical issues including transitional arrangements and existing contractual arrangements.

In particular, an evaluation was undertaken of each royalty option against criteria including *equity, economic efficiency, administration and revenue effects*. The investigation concluded that no single royalty option was superior to the others under all of the evaluation criteria. A choice of a particular royalty therefore inevitably involved some trade-off between conflicting objectives.

Resource Rent Royalty

Specifically, the major reasons a resource rent royalty was not chosen were:

- The data requirements of the royalty were seen as an intrusion into confidential commercial matters of industry.
- Higher administration and compliance costs involved.
- Low predictability of revenue flows; and
- The difficulty in determining the appropriate asset base for existing mines and the treatment of subsequent capital investments.

Whilst, the resource rent royalty was found to have superior economic efficiency than other options (ie. minimal impact on investment and production decisions), this did not appear to outweigh the increased administrative and compliance costs and impact on Government revenue stability.

For the Queensland coal industry, the information requirements of a resource rent royalty would be substantial. There are currently 44 coal mining projects in operation in Queensland with several more projects in the development stage. To further complicate matters, various consortia of companies own many of these projects with head offices in other states. Supplying and verifying cost data would be a large administrative burden on both industry and Government. In particular, it would be administratively difficult and costly to determine relevant assessable profit (particularly due to cost allocation issues in many instances) and verify costs for vertically integrated enterprises. In addition, the royalty system may be open to manipulation by producers to reduce the royalty payable through creative accounting and by changing the timing of expenditures.

The resource rent royalty has the potential to provide revenue in a very sporadic, irregular manner. In contrast, the ad valorem royalty provides a very stable, predictable source of Government revenue (see Chart 1 below). From 1991-92 to 1996-97, **export** royalties as a percentage of total royalties collected by the Government were 57.7%, 57.5%, 57.4%, 56.5%, 58.5% and 58.7%. This stability of revenue flows enhances the Government's planning abilities regarding its expenditure.

In 1996-97, total coal royalties were $168m, which represents 64% of total royalties received by the Government. With the implementation of the recent changes, this is roughly estimated to rise to $279m by the year 2001/2. Any changes to this revenue source, could seriously jeopardise the services provided to the people of Queensland and would not be supported by the Queensland Government.

We acknowledge that the Commonwealth has found that a resource rent royalty is the most appropriate to apply to the offshore petroleum industry. However we note that the administrative costs in their situation are much less than the Queensland situation as the offshore petroleum industry has currently only 8 operators paying royalty.

Ad valorem Royalty

The ad valorem royalty was favoured for its administrative simplicity, sensitivity to market price and revenue stability. However, the Queensland Government investigated its disadvantages of possibly sterilising marginal coal deposits and stifling investment. We could find no known cases of this happening in practice. Through quantitative analysis, we found that a 7 percent ad valorem royalty would not substantially impact on investment and production decisions of the Queensland industry players and the community would receive an adequate return. Because this ad valorem rate was not considered excessive, the relative advantages of a resource rent royalty were unlikely to outweigh the increased administrative complexity and the need for industry to open its books. At the time, it was also found that the 7 percent rate compared favourably with coal royalties elsewhere, particularly Indonesia, Colombia, and New South Wales (open-cut).

(b) Operational experience of the current ad valorem royalty

The ad valorem royalty has worked well for coal since it was first introduced for export coal in 1974 and domestic coal in 1994. It provides a relatively stable, predictable, and administratively simple revenue stream for the Queensland Government without the need for interpretation and lengthy discussion in relation to profit determination.

The current royalty/rail freight arrangements are well over mid-way in the process of phase-in to full implementation – any major changes such as a move towards an alternative royalty arrangement during and for some time after this phase-in would involve major sovereign risk implications.

On its introduction, the previous Government committed to undertake a mid-term progress review of the royalty arrangements (currently underway) to determine any adverse impacts that the system may have on producers and major users of **domestic** coal.

As part of the review, the Government is currently addressing issues raised by the Queensland domestic coal industry/users. Proposals for changes to the current system would need to be supported by hard evidence, particularly if it is believed that the current arrangements relating to domestic coal are inefficient or inequitable or are jeopardising the commercial viability and conduct of operations.

The proposals received in response to this mid-term review argue primarily for lowering of the level of the ad valorem royalty rate rather than changing the royalty system itself. The review has recently been completed and at this stage the outcome is still confidential.

It is also worth noting that the Queensland Government made a decision after a review of the base and precious metals royalty system to eliminate the profit based royalty component applying thereto.

Commission's suggestion to move NSW to an ad valorem royalty

Clearly Queensland sees the royalty arrangements applying in NSW as a matter for that state. However, it could be argued that it would be more advantageous from an industry perspective if the royalty arrangements for coal were consistent across Australia.

In the event that NSW decided to move to an ad valorem arrangement as operating in Queensland, this Government would be happy to share its experiences in implementing such a transition.

ATTACHMENT 1

Summary Paper

Queensland Competition Authority Act 1997

Queensland third party access regime

1. Background and Purpose

The Competition Principles Agreement (CPA) provides for third party access for services provided by essential infrastructure to be regulated under Part IIIA of the *Trade Practices Act 1974* (the "Commonwealth access regime"), unless the services are covered by a State or Territory access regime that complies with the requirements of that Agreement. Unless and until a State based regime is established, the Commonwealth regime applies.

The Queensland Government has passed the *Queensland Competition Authority Act 1997* (the Act). The Act provides for the creation of a new independent body, the Queensland Competition Authority (QCA). This body administers a State based third party access regime, which is also established under the Act.

This paper provides a brief summary explaining certain sections of the Act and discussing essential elements of the regime.

2. Rationale for Third Party Access

The application of third party access is intended to address market failure in relation to the services provided by a limited class of facilities referred to as "essential" infrastructure. This class of facility has certain distinguishing economic features including:

- natural monopoly characteristics (ie the infrastructure facility meets market demand at less cost than two or more facilities);

- "bottleneck" characteristics (ie the infrastructure occupies a strategic position in an industry such that access to the facility is a prerequisite for businesses to be able to compete in another market); and

- economic significance.

The problem that occurs in markets characterised by such "essential" facilities is that the facility owners are able either to charge monopoly prices for their services and restrict access to the facility's services. Where the infrastructure owner is involved in related links in the service chain (ie a vertically integrated firm) it may offer access to the facility to competitors on less favourable terms and conditions than itself.

The rationale behind a third party access regime is that it provides an opportunity for a legislative right to be granted to access seekers to negotiate access terms and conditions with access providers on commercial grounds. As a result, the "essential" infrastructure also becomes better utilised to the benefit of the wider community.

It is recognised that Commonwealth legislation has been established to provide a third party access regime. However, there are many reasons for utilising a State based access regime, including:

- **State based regime can provide for greater certainty** - the regime increases certainty for all interested parties, including owners of infrastructure potentially subject to third party access claims, and those who might wish to gain access to this infrastructure.

  For example, a legislative right to third party access is only granted with respect to *declared* services. Certainty regarding the declaration process is therefore critical to all at parties. To minimise the potential for the process to become bogged by lengthy delays in the declaration stage, the State based regime provides for an "up front" declaration mechanism[4];

- **A State based regime provides streamlined processes** - the regime features a number of mechanisms designed to provide a more streamlined process resulting in third party access issues being able to be resolved quickly and cost effectively. For example, the regime provides for:

  (1) an enlarged role for undertakings to allow undertakings to be made for declared services and to allow the QCA to request undertakings be prepared for declared services. This expanded role for undertakings assists in providing greater certainty to all parties.

  (2) a single application process for each service which avoids parties having to endure repeated and lengthy application processes should an application be made too widely.[5]

- **A State based regime allows for the uninterrupted and guaranteed continuance of Community Service Obligation arrangements** - the regime enables the Government to implement third party access in harmony with existing microeconomic reform initiatives and ensure the delivery of community service obligations is not jeopardised.

- **A State based regime allows for limited capacity to establish transitional arrangements should the need arise** - for example, third party access may be able to be staged into effect through mechanisms such as the threshold reduction strategy in the electricity industry.[6]

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[4] Refer to the explanation of the "declaration process" in section 3.3 of this summary paper.

[5] Refer to the explanation of "applications for declaration" in section 3.3 of this summary paper.

[6] Refer to the explanation of "service" in section 3.1 of this summary paper.

3. Outline of State Regime

The key features of the State based access regime include:

- a declaration process to determine whether services ought to be potentially subject to access claims;

- "access codes", which provide a means of "tailoring" the generic regime to specific classes of infrastructure;

- the capacity for the QCA to require owners of infrastructure providing services that are declared under the regime to submit to it draft undertakings for declared services; and

- a compulsory dispute resolution procedure.

Figure 1 illustrates the process for gaining access to services provided by significant infrastructure under the State based access arrangements. It shows that there are two stages of third party access, notably the *declaration process* (whereby services are nominated to be subject to the regime which triggers third parties gaining a legislative right to negotiate access with the infrastructure owner) and *compulsory dispute resolution* (where the QCA assumes the role of an independent arbitrator when parties cannot agree on terms or conditions of access for declared services).

Before considering these features in greater detail, it is useful to first explore the reach of the regime, that is the services to which it applies.

3.1 What does the Regime apply to?

Service

The definition of "service" is set out in section 72. This definition is important because it defines the scope of the State based third party access regime.

Paragraph 72(2)(a) excludes the supply of goods from the definition of service. Accordingly, whilst water infrastructure may become subject to third party access (potentially giving third parties the right to gain access to water infrastructure on a commercial basis), it will not give third parties a right to be provided with a water entitlement.

Paragraph 72(2)(c) allows for regulations to exempt certain services from the third party access regime. For example, a regulation upon commencement of the QCA Act specifically exempt QR's coal carrying services from third party access until 6 November 2000. This exemption is consistent with the *Trade Practices Act 1974*.

Paragraph 72(2)(c) also provides the vehicle through which the Government can adopt a threshold reduction strategy in applying third party access to a particular industry. A threshold reduction strategy is a transitional arrangement whereby, for example, different classes of users progressively become eligible to apply for third party access over time (eg only users of certain thresholds are able to gain third party access at a particular point in time). The electricity industry is a case, which has utilised a transitional mechanism of a threshold reduction strategy in applying third party access as part of deregulation of that industry.

The definition of "service" does not discriminate between publicly owned and privately owned infrastructure. However, the intention underlying the regime is that it be applied predominantly to public infrastructure whilst retaining the flexibility to apply the State based access regime selectively to the services provided by private facilities. Accordingly, it is necessary to draw a distinction between publicly owned and privately owned infrastructure under the Act. This distinction is drawn in the definition of "candidate service".

Candidate Service

The definition of "candidate service" must be read in conjunction with the definitions of "private facility" and "public facility" in the Schedule Dictionary. The term "public facility" refers to facilities owned by the Crown (ie the State Government). Accordingly, the term "public facility" does not include infrastructure owned by another Government (be it State, Local or Federal). These facilities, along with privately owned infrastructure fall within the definition of "private infrastructure".

"Private infrastructure" can be made subject to the State based regime by specifically including it by way of regulation[7]. However, such a regulation would not mean that the services provided by the infrastructure would automatically be subject to third party access. This is because the threshold test would still need to be satisfied.[8]

The definition of "candidate service" thus allows for the application of third party access to infrastructure owned by parties other than the State Government, ie Local Governments or private owners. In the Act (and this discussion paper) any owner other than the State Government is deemed a "private" owner. Accordingly, should Local Government be made subject to the State based regime, Local Government infrastructure would be classified "private" infrastructure under the Act.

No application of the regime to private infrastructure (as defined in the Act) will occur without prior consultation with the affected owner and users.[9]

The definition of "private infrastructure" also provides a mechanism to apply the State based third party access regime to services provided by interjurisdictional infrastructure (ie infrastructure straddling State or Territory borders).

Interjurisdictional Operation

The inclusion of services provided by interstate infrastructure can occur through the definition of "candidate service" outlined in the Schedule Dictionary. Under subsection (b) of this definition of "candidate service", interjurisdictional infrastructure falls within the scope of the definition of "private facility". This is because such infrastructure is not a "public facility" since it is not owned by the Queensland Government. Provided it is specified by a regulation

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7 Sub-clause 97(2) and definitions in Schedule Dictionary.

8 There are two ways in which services can be "declared" under the regime. The first way is by "Ministerial declaration" which involves the application of a threshold test. The second method is by way of a "regulation based declaration", although only the services provided by new private infrastructure can be declared in this way; ie. existing private infrastructure cannot be subject to "up front" or regulation based declaration under the State based regime (refer clause 97).

9 Consistent with the requirements of the *Statutory Instruments Act 1992*, Regulatory Impact Statements (RIS) are required as part of the legislative process in relation to significant subordinate legislation (ie regulations). Consultation is a necessary step in the process for creating subordinate legislation. Accordingly, this means that there is an absolute requirement for consultation to occur before private infrastructure is brought under the regime. RIS provide an avenue for consultation processes to occur.

to be a candidate service, a service provided by another jurisdiction's infrastructure can be classified a candidate service and is subsequently able to be made subject to the regime.

The exclusion of interjurisdictional infrastructure can also occur through the definition of "facility" in paragraph 70(2)(b) or the definition of "service" in paragraph 72(2)(c). A regulation may exclude a particular facility or a particular service from the application of the Queensland regime. Thus, the part of a facility straddling a border sited in Queensland can be specified by regulation to be a facility to which the QCA Act does not apply[10].

These declaration mechanisms ensure that a single access regime, be it the Queensland regime or otherwise, can be applied to the service provided by interjurisdictional infrastructure. Consultation with affected owners and users, and the other jurisdiction involved will be required.[6]

There are no current proposals for interjurisdictional application of the regime, and consultation would be required before any action was contemplated.

Access Provider

The term "access provider" is used in certain sections of the Act in recognition that an infrastructure owner *per se* need not always be the person from whom a third party seeks access.
"Access provider" is defined in the Schedule Dictionary and refers to either the "owner", or the entity to which access has been granted under an access agreement (for example a user or an operator). The term "access provider" is wider than the term "owner" and is used to facilitate the efficient utilisation of infrastructure through the trading of access in secondary markets.

In contrast to a primary market where access is sold directly by the infrastructure owner, secondary markets refer to the sale of access by existing infrastructure users. Thus, a business wanting to use infrastructure services may approach an existing user which is not utilising all of its existing entitlement, and seek to buy a portion of that user's entitlement.

Whilst secondary markets are facilitated by the term access provider, there are certain sections of the Act which specifically require an access provider *be* the owner of the facility. This occurs in provisions regarding the extension of a facility. Obviously, only a facility owner can

[10] These arrangements give the State Government the flexibility to, for example, exclude either the State's electricity transmission infrastructure, or the electricity transmission services provided by this infrastructure from the State based regime so that an undertaking consistent with the National Electricity Code could be made under the Commonwealth regime.

be required to allow such extensions (although the legislation does not require an owner pay for such an extension).[11]

3.2 Application of Regime to Infrastructure in this State

The State based regime predominantly applies to the services provided by publicly owned infrastructure.

However, there are many reasons why it is appropriate to selectively apply a State based regime to privately owned infrastructure:

- Where privately owned infrastructure forms a network with publicly owned infrastructure, there is a clear case to apply one regime to the network. For example, privately owned narrow gauge rail infrastructure should be regulated under the same access arrangements as apply to Queensland Rail's existing narrow gauge infrastructure where that privately owned narrow gauge rail infrastructure either connects or is likely to connect into Queensland Rail's network. This is because the single regime will promote expeditious and cost effective access to this infrastructure for users and access providers whilst avoiding any inconsistency or uncertainty from having the two regimes applying to a single class of infrastructure; and

- The Government has State development or strategic interests in facilitating private investment in key industries. For example, even though a generic access regime would not apply to oil and gas pipelines, the amendments to the *Petroleum Act 1923* to develop access arrangements for oil and gas transmission infrastructure were driven by the need to ensure continued gas supply for this State.

If a State based regime does not apply to the services provided by privately owned infrastructure, access to those services will be regulated under the Commonwealth regime contained in Part IIIA of the *Trade Practices Act 1974*.

Clearly, if a State based regime is to potentially extend to services provided by private infrastructure, there must be absolute certainty as to which regime (be it Commonwealth or State) should apply to those. Accordingly, the State based access arrangements will apply only to privately owned infrastructure that is specifically identified or forms part of a class of infrastructure, which is specifically identified.

The declaration process for services provided by both public and private infrastructure is set out in Figure 2 and is discussed below. This raises how services, which are covered by the State, based regime become "declared" or subject to the compulsory dispute resolution mechanisms contained in the Act (ie the declaration process).

[11] Sub-sections 119(4) and (5).

3.3 Key Features of the Regime

The declaration process

What does declaration mean?

All services provided by infrastructure facilities are subject to either the Commonwealth access regime or the State based regime. However, coverage does not mean that third party access (including the compulsory dispute resolution procedures) is automatically applicable. A legislative right to negotiate access (ie the service is made subject to the provisions of the access regime) can only occur once a service has been declared.

Types of declaration

There are two ways by which services provided by infrastructure can be declared and hence subject to third party access arrangements being either:

- by regulation (ie regulation based declaration[12]); or
- by application of a threshold test (ie Ministerial declaration)[13].

Under the corresponding Commonwealth legislation, the only way for services provided by infrastructure to be declared is through application of a threshold test. However, it is considered in many instances it will be clear that services provided by certain types of infrastructure, such as bulk water pipelines or rail infrastructure, satisfy the threshold test.

Regulation based declaration

Accordingly, the State based access regime makes provision for services to be declared "up front" by regulation[14]. Only the services provided by new private infrastructure can be declared in this way; ie. existing private infrastructure cannot be subject to "up front" declaration under the State based regime[15]. The rationale behind "regulation based declarations" is that they will both increase certainty and streamline the process for infrastructure owners and users alike.

However, since it is not possible and not desirable to exhaustively specify all declarations, the legislation provides another mechanism for declaring services.

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12 Part 5, Division 3.

13 Part 5, Division 2.

14 Part 5, Division 3.

15 Section 97.

Ministerial declaration

The other way by which services can be declared under the State based access regime is through Ministerial declaration[16]. Third parties seeking access to services must first approach the QCA and request it to recommend to the Responsible Ministers (ie the Premier and Treasurer) that a service be declared[17]. The QCA makes a recommendation to the Responsible Ministers and has that recommendation published[18]. The Responsible Ministers then determine whether or not to declare the service by applying the same threshold test as that initially applied by the QCA[19]. Responsible Ministers must publish their decision[20].

Threshold Test

Section 80 requires that the QCA must recommend that a candidate service be declared by the Ministers if it is satisfied of*all* of the following matters:

(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;
(b) that it would be uneconomical to duplicate the facility;
(c) that access (or increased access) to the service would be likely to have a substantial effect on a market;
(d) that access (or increased access) to the service can be provided safely;
(e) that access (or increased access) to the service would not be contrary to the public interest.

16 Part 5, Division 2.

17 Section 77.

18 Sections 79-80.

19 Sections 84 and 86.

20 Section 85.

Under section 86, the Ministers must declare a service if they are satisfied that this threshold test is met.

The rationale behind the inclusion of each of these limbs is to ensure third party access is not applied too broadly, but that the regime focuses on natural monopoly infrastructure. It is also important that appropriate tests are incorporated to screen out insignificant infrastructure and to ensure considerations of public interest are applied. The limbs are built on similar tests advocated in the Hilmer Report and utilised in the Commonwealth regime.

Thus, limb (a) requires access to increase competition in a related market consistent with the objective of third party access to overcome problems associated with bottleneck facilities (refer to section 2 of this discussion paper) and limb (b) is intended to capture services provided by natural monopoly infrastructure[21]. Limb (c) is based on the premise that third party access should have some real impact on a market. It is necessary because the intrusion into traditional property rights that arises with third party access can only be justified if it is likely to produce a real, as opposed to trivial, impact on a market. Limb (d) prioritises safety by requiring that access only be granted if it can be provided safely.

Limb (e) introduces public interest considerations to the threshold test. If such a test is not satisfied, it is difficult to justify applying third party access to the services in question. Again, any third party access regime must have the capacity to accommodate wider public interest considerations to ensure that the regime produces outcomes that are consistent with the public interest.

Together, these limbs are necessary for the application of an effective threshold test for declaration of services.

Applications for declaration

A significant benefit of the Queensland regime is that it streamlines the application process for declarations. This is because the legislation allows *part* of a service to be declared[22]. The ability to declare part of a service means that the need for parties to duplicate the application process should an application be defined too widely will be avoided. Whilst it is acknowledged this does not discourage "wide" applications from being made, it means that time and cost efficiencies and improved certainty can be achieved through having only one declaration process for each service.

Declaration review

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21 A natural monopoly occurs where a single infrastructure facility meets market demand at less cost than two or more facilities. It is "uneconomical to duplicate the facility" in such instances.

22 Section 84.

Declarations must be able to be reviewed to ensure that the application of third party access remains valid to its objectives. At the same time, there is need to ensure certainty for infrastructure owners and users that access provisions will remain valid over the longer term. Regulation based declarations can only be reversed by revoking the regulation. Under the *Statutory Instruments Act 1992*[23], all regulations automatically expire after 10 years. Accordingly, regulation based declarations must be reviewed by the Responsible Ministers every 10 years.

Infrastructure owners are able to apply to the QCA for a recommendation to be made to the Responsible Ministers that a Ministerial declaration be revoked where it can be shown that the requirements for declaration are no longer satisfied.[24] Ministerial declarations must have an expiry date[25].

What does declaration do?

The effect of declaration is that it triggers the following aspects of the regime:

1. right to negotiate provisions (ie the access seeker has a legislative right to commercially negotiate access with the infrastructure owner);

2. compulsory dispute resolution (ie in the event that parties are unable to agree on the terms and/or conditions of access, they must seek independent arbitration from either a private arbitrator or the QCA).

These features are discussed below. However, it is first necessary to understand the regulatory arrangements (as contained in access codes) and the commercial negotiation framework (as contained in access undertakings) contained in the regime which underpin these features.

Access Codes

What are Codes?

Access codes provide a means of applying a generic regime to the peculiarities of a particular infrastructure type, such as rail infrastructure[26]. Accordingly, an access code may relate to matters such as defining safety requirements, providing information that ought to be provided to those seeking access, indicating the Government's position on what matters could be

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[23] Section 54 of the *Statutory Instruments Act 1992*.

[24] Sections 88-94.

[25] Sections 84 and 87.

[26] Part 5, Division 6.

considered to be in the public interest for the purposes of a particular service and arrangements to be made by the owner to separate the owner's operations relating to the service from other operations of the owner relating to another commercial activity[27]. For example, codes may provide a vehicle for establishing transitional arrangements or to ensure the continued provision of CSOs.

When will Codes be used?

It is not envisaged access codes would necessarily form part of the access arrangements for every infrastructure type. Rather, codes provide a means of "filling" any gaps that may arise from applying a generic regime to a particular class of services and in doing so provide further clarity to infrastructure owners and users alike. Codes are made with respect to declared services.

Why are Codes used?

The significance of access codes lies in the fact that access providers, third parties seeking access and the QCA itself are required to adhere to them. For example, the QCA when resolving disputes or accepting undertakings has to adhere to an access code if one is in force[28].

Who makes Codes?

Access codes are subordinate legislation under the Act [29] and accordingly, it is the responsible Ministers (ie the Premier and Treasurer) who make codes [30]. In practice, codes will be prepared by portfolio Departments, with the QCA able to have input into their development[31].

Difference between Access Codes and Undertakings

Access codes supplement the generic regime in tailoring it to *particular infrastructure types* (eg. water infrastructure). In contrast, access undertakings apply the regulatory framework (ie. the legislation supplemented by access codes) to a *particular service* which is subject to the regime (eg. a particular water board's infrastructure or the services provided by a particular facility owned by a water board). Accordingly, access codes provide a means of supplementing the *regulatory framework* that applies to a particular industry or sector.

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27 Section 130.

28 Sub-section 119(1).

29 Section 129.

30 Section 128.

31 Sub-section 128(2).

Access undertakings, on the other hand, are specific to the *framework of commercial access negotiation* for a particular service. Another distinction is that access codes are prepared by *Government* whereas access undertakings are prepared by the *infrastructure owner.*

Access Undertakings

What are Undertakings?

Undertakings provide the base framework from which parties commercially negotiate the terms and conditions of access. In the Queensland regime, undertakings have force in the event of dispute resolution. Otherwise, parties can negotiate above and beyond the undertaking.

Why are Undertakings used?

The purpose of access undertakings is to ensure that clear principles are established to guide access negotiations so as to increase certainty for all parties and reduce the scope for access disputes to arise. An undertaking sets out details of the terms on which an owner of a service undertakes to provide access, and other information about the provision of access. Once the QCA has endorsed an access undertaking, the undertaking sets a benchmark for parties in negotiations (although parties are free to depart from its terms if they agree to do so) because the outcomes of dispute resolution processes have to be consistent with the undertaking[32].

What do Undertakings contain?

The contents and degree of specification of undertakings will vary from service to service. Section 137 indicates that the type of matters to be included in an undertaking*may* include:

- how charges for access to the service are to be calculated;
- information to be given to access seekers and to the QCA;
- timeframes for giving information in the conduct of negotiations about access to the service;
- how the spare capacity of the service is to be worked out;
- accounting requirements to be satisfied by the owner and a user in relation to the service or separate parts of the service;

[32] Sub-section 119(1).

- arrangements to be made by the owner of a service to separate the owner's operations concerning the service from other operations of the owner concerning another commercial activity;

- the provision of the service to users otherwise than by the owner to whom the undertaking relates;

- terms relating to extending the facility;

- requirements for the safe operation of the facility;

- 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;

- provisions to be included in access agreements in relation to the service;

- the review of the undertaking.

When are undertakings used?

Undertakings may be submitted by infrastructure owners to the QCA for its endorsement irrespective of whether or not the services to which the undertaking relates have been declared[33].

The QCA can require an undertaking be submitted by an infrastructure owner in relation to declared services only[34]. Where the QCA requires an infrastructure owner provide it with an undertaking, it has the power to finally determine the terms of the undertaking where it is unable to negotiate an acceptable outcome with an infrastructure owner[35].

Can Undertakings change?

There are three triggers to a review of undertakings. First, an undertaking itself may define a review event (eg through a predefined period such as 10 years). Second, it is open to an infrastructure owner to request the QCA reconsider or amend an access undertaking[36]. Third, a review may become triggered by a change in access codes, as access undertakings need to be

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[33] Sub-section 13(2).

[34] Sections 133 and 139.

[35] Section 135.

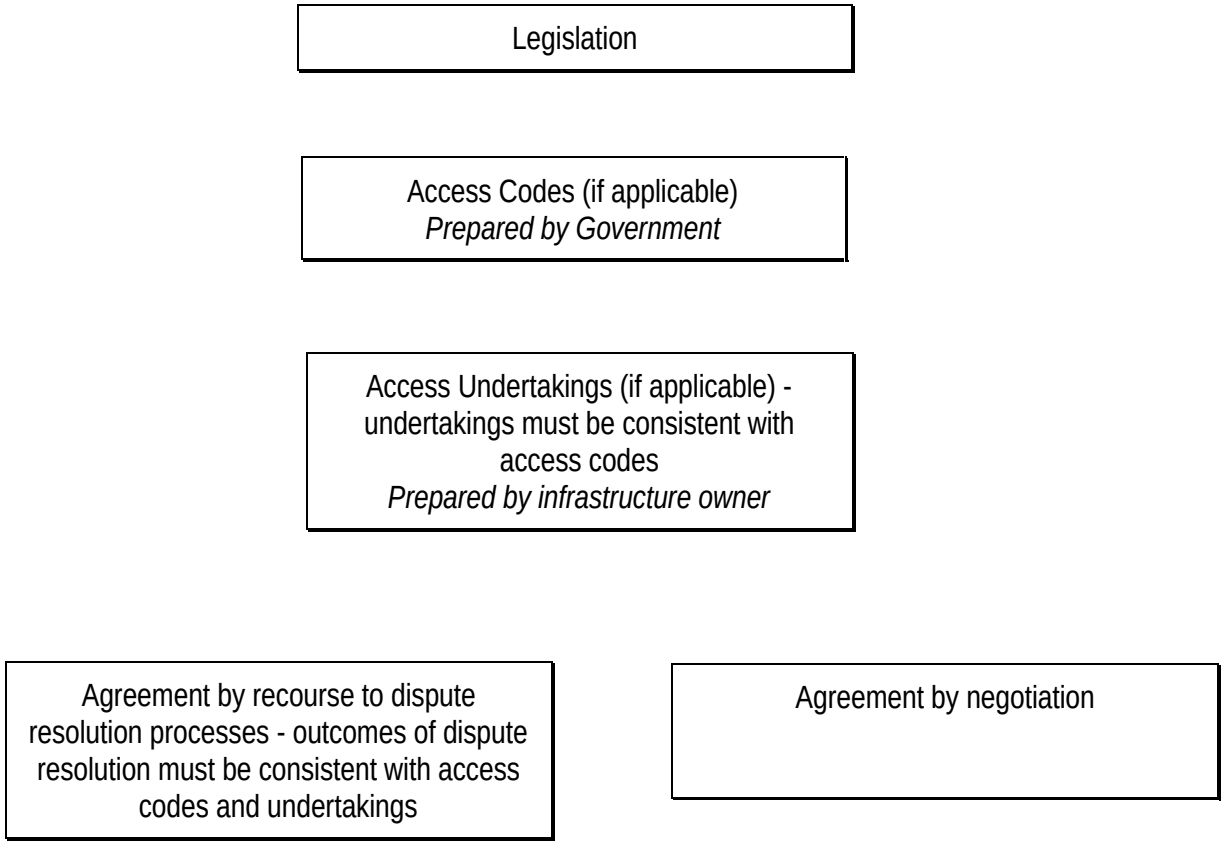
[36] Section 142.

consistent with access codes[37] (although changes in access codes will not affect pre-existing agreements[38]). Any change resulting from a review would not affect pre-existing agreements.

How do Undertakings and Access Codes fit together?

The hierarchy of various mechanisms under the proposed State based regime is as follows:

Figure 3: Hierarchy of Access Regime



[37] Section 139

[38] Regulations cannot have retrospective operation unless they are specifically given powers to do so under an Act. There is no such power contained in the QCA Act.

Dispute resolution processes

There is no restriction on parties seeking private arbitration of their disputes as part of their negotiation process[39]. The decisions of private arbitrations will be binding on parties and will not need to be vetted in any way by the QCA. However, clearly, it is imperative that effective dispute resolution procedures exist in the legislation[40] itself as it is the mandatory nature of dispute resolution procedures that will ultimately enable third parties to gain access to services provided by significant infrastructure. The effectiveness and transparency of dispute resolution processes are critical to the overall success and credibility of the State based access arrangements.

Accordingly, the statutory dispute resolution by the QCA can be easily triggered. Either party is capable of notifying the QCA of a dispute so long as it can demonstrate to the QCA that it has negotiated in good faith prior to notification[41]. The party seeking access is free to withdraw from the dispute resolution at any time (bearing in mind a premature withdrawal may attract adverse cost orders from the QCA)[42]. The access provider requires the consent of the intended user before withdrawing from the dispute resolution process[43].

The QCA has wide powers to expeditiously resolve disputes, including to set any of the terms and conditions of contracts and to require an owner to extend or permit the extension of an infrastructure facility (although the owner cannot be required to pay for such an extension)[44]. A number of issues are required to be considered by the QCA when resolving disputes including the legitimate business interests of parties, service quality, contractual obligations of parties, the economically efficient operation of the facility, and operation and technical requirements necessary for the safe and reliable operation of the facility[45].

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39 Section 111.

40 Part 5, Division 5.

41 Sections 112, 113 and 122.

42 Sections 115 and 208.

43 Sub-section 115(3).

44 Part 5, Division 5.

45 Section 120.

Users of the services provided by infrastructure declared under the regime can potentially subject themselves to access claims from third party user aspirants where their contractual entitlements are not utilised[46].

The QCA is required to initially present to the parties a draft determination, before a final determination binds both parties[47]. The QCA must maintain a register of determinations[48].

Enforcement

The Supreme Court is empowered to make orders to prevent a contravention of an access contract, including injunctions, interim injunctions or orders for compensation[49]. Such orders can be made not only against the access provider, but also against any other person knowingly involved in the contravention, or who proposes to contravene the provisions regarding the hindering of access[50]. Parties to any access contract for a declared service are also able to take advantage of these provisions, without the need to first register that contract with the QCA.

The QCA is also empowered to seek a Supreme Court order against any person it considers has breached an undertaking, including directing the access provider to comply with the undertaking, or directing compensation be paid to a person who has suffered loss or damage from the breach.

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46 Section 118 and section 3.1 of this paper discussing the use of the term access provider.

47 Sub-section 117(5).

48 Section 127.

49 Part 5, Division 8.

50 Sections 104, 125, 153.

The QCA is entitled to request a copy of any contract (whether voluntarily negotiated or entered as a result of a dispute resolution process) from an access provider[51].

[51] Section 103.