

# **Queensland Productivity Commission Bill 2015**

**Report No. 15, 55<sup>th</sup> Parliament**  
**Finance and Administration Committee**  
November 2015



## Finance and Administration Committee

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### Acknowledgements

The Committee thanks those who briefed the Committee, made submissions, gave evidence and participated in its inquiry.

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## Abbreviations

AGCNCO	Australian Government's Competitive Neutrality Complaints Office
AIA	<i>Acts Interpretation Act 1954</i>
AMMA	Australian Mines and Metals Association
APC	Australian Productivity Commission
CCIQ	Chamber of Commerce and Industry Queensland
FAC	Finance and Administration Committee
FLP	Fundamental Legislative Principles under the <i>Legislative Standards Act 1992</i>
LGAQ	Local Government Association of Queensland
OQPC	Office of Queensland Parliamentary Counsel
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997</i>
QCU	Queensland Council of Unions
QFF	Queensland Farmers' Federation
QNU	Queensland Nurses' Union
QPC	Queensland Productivity Commission
QRC	Queensland Resources Council
RIA	Regulatory Impact Analysis
SCRC	Sunshine Coast Regional Council
WCRAQ	Waste Contractors and Recyclers Association Queensland
WRIQ	Waste, Recycling Industry Association (Qld)

## Glossary

Acts	All Acts referred to in this report refer to Queensland Acts unless otherwise specified.
the Bill	<i>Queensland Productivity Commission Bill 2015</i>
the Commission	Queensland Productivity Commission
the Committee	Finance and Administration Committee
the department	Queensland Treasury

All webpage references used in this report are current as at 30 October 2015.

## Chair's Foreword

This report presents a summary of the committee's examination of *Queensland Productivity Commission Bill 2015*.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, whether it has sufficient regard to rights and liberties of individuals and to the institution of Parliament.

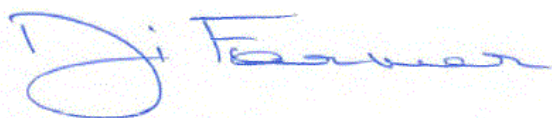
The public examination process allows the Parliament to hear views from the public and stakeholders, which should make for better policy and legislation in Queensland.

The aim of the Bill is to establish a Queensland Productivity Commission as an independent economic advisory body with the intention of lifting productivity, improving living standards and driving economic growth.

On behalf of the Committee, I would like to thank those who took the time to provide submissions, who met with the Committee and provided additional information during the course of this inquiry. The Committee very much appreciates all of the assistance provided.

I would also like to thank the departmental officers for their cooperation on in providing additional information to the Committee on a timely basis.

Finally, I would like to thank the other Members of the Committee for both their active involvement and their determination to critically address the issues examined in the Bill.



Di Farmer MP  
Chair

November 2015



## Recommendations

Standing Order 132 states that a portfolio committee report on a Bill is to indicate the Committee's determinations on:

- whether to recommend that the Bill be passed
- any recommended amendments
- the application of fundamental legislative principles and compliance with the requirements for Explanatory notes.

The Committee has made the following recommendations:

### **Recommendation 1**

**3**

The Committee recommends that the *Queensland Productivity Commission Bill 2015* be passed.



## 1 Introduction

### 1.1 Role of the Committee

The Finance and Administration Committee (the Committee) is a portfolio committee established by the *Parliament of Queensland Act 2001* and the Standing Orders of the Legislative Assembly on 27 March 2015.<sup>1</sup> The Committee's primary areas of responsibility are:

- Premier, Cabinet and the Arts; and
- Treasury, Employment, Industrial Relations, Aboriginal and Torres Strait Islander Partnerships.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each Bill and item of subordinate legislation in its portfolio area to consider –

- a) the policy to be given effect by the legislation;
- b) the application of fundamental legislative principles to the legislation; and
- c) for subordinate legislation – its lawfulness.

Standing Order 132(1) provides that the Committee shall:

- a) determine whether to recommend that the Bill be passed;
- b) may recommend amendments to the Bill; and
- c) consider the application of fundamental legislative principles contained in Part 2 of the *Legislative Standards Act 1992* to the Bill and compliance with Part 4 of the *Legislative Standards Act 1992* regarding Explanatory notes.

Standing Order 132(2) provides that a report by a portfolio committee on a Bill is to indicate the Committee's determinations on the matters set out in Standing Order 132(1).

Standing Order 133 provides that a portfolio committee to which a Bill is referred may examine the Bill by any of the following methods:

- a) calling for and receiving submissions about a Bill;
- b) holding hearings and taking evidence from witnesses;
- c) engaging expert or technical assistance and advice; and
- d) seeking the opinion of other committees in accordance with Standing Order 135.

### 1.2 Referral

The Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships introduced the *Queensland Productivity Commission Bill 2015* (the Bill) into the Legislative Assembly on 15 September 2015. The Bill was referred to the Committee. The Legislative Assembly agreed to a motion requiring the Committee to report to the Legislative Assembly by Monday 2 November 2015.

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<sup>1</sup> *Parliament of Queensland Act 2001*, s88 and Standing Order 194

### **1.3 Committee process**

The Committee's consideration of the Bill included calling for public submissions, a public departmental briefing and a public hearing. The Committee also sought additional written advice from the department and other stakeholders.

The Committee considered expert advice on the Bill's conformance with fundamental legislative principles (FLP) listed in Section 4 of the *Legislative Standards Act 1992*.

### **1.4 Submissions**

The Committee advertised its inquiry into the Bill on its webpage on 18 September 2015. The Committee also wrote to stakeholder groups inviting written submissions on the Bill.

The closing date for submissions was Tuesday 6 October 2015. The Committee received nine submissions. A list of those who made submissions is contained in Appendix A. Copies of the submissions are published on the Committee's website and are available from the committee secretariat.

### **1.5 Public departmental briefing**

The Committee held a public departmental briefing on the Bill with officers from Queensland Treasury on Wednesday 14 October 2015. A list of officers who gave evidence at the public departmental briefing is contained in Appendix B. The transcript of the briefing has been published on the Committee's website and is available from the committee secretariat.

### **1.6 Public hearing**

On Wednesday 14 October 2015, the Committee held a public hearing on the Bill with representatives from organisations which provided submissions. A list of representatives who gave evidence at the hearing is contained in Appendix C. A transcript of the hearing has been published on the Committee's website and is available from the committee secretariat.

### **1.7 Policy objectives of the Bill**

The Bill establishes the Queensland Productivity Commission (the Commission).

The Explanatory notes outline that the Bill implements a policy proposal made by the current Queensland Government in its pre-election campaign.

The aims of the Bill are to:

- facilitate, encourage and promote productivity in Queensland;
- hold public inquiries about matters relating to productivity, economic development and industry in Queensland, as directed by the Minister; and
- advise the Minister about matters relating to productivity, economic development and industry in Queensland.<sup>2</sup>

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<sup>2</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 2

## 1.8 Outcome of Committee deliberations

Standing Order 132(1)(a), requires that the Committee examine the Bill and determine whether to recommend that the Bill be passed.

The Committee supports the Bill and recommends it be passed.

### Recommendation 1

The Committee recommends that the *Queensland Productivity Commission Bill 2015* be passed.

## 2 Background

### 2.1 Introduction

The establishment of the Commission was announced during the 2015 election campaign. The explanatory notes identify that it was intended to be established as an:

*...independent economic advisory body with the broad objective of lifting productivity, improving living standards and driving economic growth.*<sup>3</sup>

In performing its functions, the Commission may have regard to:

- the benefits to be gained from increasing the productivity and efficiency of the Queensland economy;
- living standards, employment, real wages, industry development, regional development, environmental sustainability and fiscal sustainability, in Queensland; and
- the public interest.

The explanatory notes state that the Commission's role is advisory only. In addition:

*...it will have no decision-making capacity. Any policy action arising from the recommendations of the Commission will ultimately be a matter for government.*<sup>4</sup>

The department advised:

*...the bill will give effect to a commitment taken by government to the 2015 state election. The government's policy document emphasised the need for an independent advisory body to work with the community, business, universities and other key stakeholders to develop policy solutions to lift the state's productivity, improve living standards and drive growth. At the core of the policy is a proposition that an economic advisory body focused on improving productivity should be a central feature of the state's economic governance.*<sup>5</sup>

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<sup>3</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 1

<sup>4</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 2

<sup>5</sup> Mr Tonks, Queensland Treasury, Public Departmental Briefing, 14 October 2015: 1

## 2.2 Interim Commission

On 28 April 2015, the Treasurer and Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships, Hon Curtis Pitt MP, announced the establishment of an interim Commission. In a media statement on 20 August 2015, the Treasurer announced Mr Kim Wood had been appointed as Principal Commissioner of the interim Commission and would commence on 1 October 2015. He advised that Mr Wood had extensive knowledge of regulated industries and commercial operations and brings a strong set of capabilities to the role.<sup>6</sup>

The interim Commission has been referred two public inquiries. The first public inquiry is into electricity pricing.<sup>7</sup> The second is the public inquiry into solar feed-in-pricing.<sup>8</sup>

The department advised:

*The first task of the Commission, which has been underway in the background for some months now, is an inquiry into electricity prices and the Commission has also commenced a concurrent inquiry into a fair price for solar. To allow the electricity inquiries to commence, an interim Commission was established on 1 May this year by a Departmental Arrangements Notice under the Public Service Act 2008, and I am pleased to report that the interim Commission's issues paper has been released this morning on the electricity price inquiry. The interim report of the Commission is due to be provided to government in January next year with a final report in the first half of 2016. The QPC Bill will establish the Commission as an independent statutory body to formalise its operational independence, functions and governance framework. Like its federal counterpart, the core function of the Commission will be independent public inquiries at the request of government using open and transparent processes informed by widespread public consultation. The Treasurer has already foreshadowed possible areas of inquiry including housing affordability, clean energy, industry and consumer regulation, regional development and Indigenous economic development.<sup>9</sup>*

## 2.3 Alternative ways of achieving policy objectives

The explanatory notes indicate the policy objectives could only be achieved by legislation to establish the Commission.<sup>10</sup>

## 2.4 Stakeholder consultation

The explanatory notes state there was no community consultation on the Bill as it implements a clear election commitment.<sup>11</sup>

The explanatory notes also state:

*...extensive consultation will be undertaken by the Commission as part of each public inquiry.<sup>12</sup>*

<sup>6</sup> Hon C Pitt MP, Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships, Media Release, *New QPC head to drive productivity improvements for Queensland*, 20 August 2015: 1 <http://statements.qld.gov.au/Statement/2015/8/20/new-qpc-head-to-drive-productivity-improvements-for-queensland>

<sup>7</sup> The terms of reference are available at: <http://www.qpc.qld.gov.au/inquiries/public-inquiry-into-electricity-pricing/>

<sup>8</sup> The terms of reference are available at: <http://www.qpc.qld.gov.au/inquiries/public-inquiry-into-solar-feed-in-pricing/>

<sup>9</sup> Mr Tonks, Queensland Treasury, Public Departmental Briefing, 14 October 2015: 1

<sup>10</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 2

<sup>11</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 2

<sup>12</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 3

## 2.5 Estimated cost of government implementation

The explanatory notes state that:

*The Commission will be funded through a combination of base funding (in part through the re-allocation of existing government resources and associated funding) and industry and other contributions for specific inquiries.*

*As part of the 2015-16 Budget, the Government allocated funding of \$300,000 in 2015-16 and \$2.5million per annum from 2016-17.<sup>13</sup>*

A number of submitters raised concerns regarding the proposed funding of the Commission. Both the Queensland Farmers' Federation (QFF) and the Queensland Council of Unions (QCU) raised concerns regarding industry contributions funding the Commission.<sup>14</sup>

QFF advised:

*It is understood that the Queensland Government is providing base funding (including reallocation of existing resources), but industry and other contributions are to be sought for specific enquiries 'as appropriate'. It is unclear how external funding for specific enquiries is to be organised. In particular, how will industry contributions be sought and will industries likely to be affected be consulted about proposed inquiries and funding issues?<sup>15</sup>*

With regard to funding arrangements, the Waste, Recycling Industry Association (Qld) (WRIQ) advised the Committee that:

*...if it is found to be an inquiry worthy of pursuit, the expense and the costs incurred by the party bringing the action on their side to present the arguments—and we had to involve lawyers and solicitors and all that sort of stuff—we funded all that of that. We did not fund the QCA to actually hold the inquiries. I do not think that would be fair upon us, because that is the whole purpose. But any costs incurred by ourselves were borne by us and the costs were borne by council in that case.<sup>16</sup>*

Chamber of Commerce and Industry Queensland (CCIQ) advised the Committee that:

*...any funding from industry could be perceived as compromising the neutrality of an independent objective review by the Commission.<sup>17</sup>*

The department advised:

*...there will be no power of compulsion to require industry to contribute. The funding at the moment is a combination of consolidated funds...we will see occasions, for instance, where departments may contribute funding to an investigation within their area of portfolio responsibility. At this state there is the consolidated fund base.<sup>18</sup>*

The Committee sought further information from the department regarding the reasons for the proposed funding arrangements and the issue of the perception that industry contributions may compromise the independence of the Commission.

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<sup>13</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 3

<sup>14</sup> Queensland Farmers' Federation, Submission 7: 3 and Queensland Council of Unions, Submission 6: 2

<sup>15</sup> Queensland Farmers' Federation, Submission 7: 3

<sup>16</sup> Mr Ralph, WRIQ, Public hearing transcript 14 October 2015: 8

<sup>17</sup> Mr Behrens, CCIQ, Public hearing transcript 14 October 2015: 10

<sup>18</sup> Mr Tonks, Queensland Treasury, Public departmental briefing transcript 14 October 2015: 4

The department advised that the rationale for industry contributions is based on state budget policy, which indicates the need to keep calls on the State's budget from new proposals strictly limited. They advised that funding arrangements for the Commission are not a feature addressed in the Bill and funding arrangements for the Commission or for individual inquiries are a matter for the Commission to resolve with Government, via its administering department. They advised that while there may be circumstances where funding contributions are sought from relevant external parties with a policy interest, this would be managed centrally with the Commission having no involvement and the Commission should be indifferent as to the funding source, whether it is budget funded or from other contributions.<sup>19</sup>

With regard to the concerns about the independence of the Commission, the department advised:

- *Queensland Treasury considers that there is little possibility that industry contributions will lead to bias or the perception of bias. This view is based on two considerations:*
  - *the total set of provisions of the Bill and the stress they place on independence; and*
  - *practical experience with industry contributions in Queensland.*
- *The Bill makes clear that independence is a core feature of the Commission in performing its functions. The purpose of the Act as stated at clause 2 is to establish the Commission 'to provide independent economic and policy advice to the State ... '. The Bill expressly provides that the Commission is to perform its functions with 'independence, rigour, responsiveness, transparency, equity and effectiveness'.*
- *Any departure from this requirement would be a fundamental failure of the board in fulfilling its obligations under the Act. It would raise questions about the suitability of the Commissioners to continue in their roles. It is expected that Government would take extremely seriously any real or perceived bias, and take necessary actions to ensure that public confidence in the Commission is not compromised.*
- *Practical evidence is that it is longstanding practice for the Queensland Competition Authority (QCA) and other independent regulators (e.g. Australian Energy Regulator) to fund parts of their operation by industry contribution, and without controversy*
- *In 2013-14, the QCA received nearly \$12 million from both public and private regulated entities. This equates to about 60 % of the QCA's funding. There has been no suggestion that these fees in any way compromise the independence of the QCA or its ability to effectively perform its functions. Given the QCA makes binding regulatory decisions, independence and impartiality are an essential characteristic of the Authority.*
- *There has been no suggestion of bias or perceived bias about the QPC's electricity pricing inquiry, which is funded by industry contributions. Insofar as it has no statutory power to levy fees or contributions, the Commission will be further removed than the QCA from any industry funding contributions.*<sup>20</sup>

## 2.6 Consistency with legislation of other jurisdictions

The explanatory notes outline that the Bill is specific to Queensland. However, it has been modelled on the Australian Productivity Commission (APC), established under the *Productivity Commission Act 1998* (Cth).<sup>21</sup>

<sup>19</sup> Correspondence from Queensland Treasury to FAC dated 30 October 2015: 4

<sup>20</sup> Correspondence from Queensland Treasury to FAC dated 30 October 2015: 4

<sup>21</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 3



The role of the APC is to provide independent research and advice to the Australian government on a range of economic, social and environmental issues affecting the welfare of Australians. It conducts public inquiries at the request of the Australian Government on policy or regulatory issues bearing on Australia's economic performance and community wellbeing.<sup>22</sup>

### **3 Examination of the *Queensland Productivity Commission Bill 2015 – Part 1* (Clauses 1 to 5 and Schedule 1)**

Clause 2 states that the main purpose of the Act is to establish the Queensland Productivity Commission to provide independent economic and policy advice to the State with the goal of increasing productivity, driving economic growth and improving living standards in Queensland.

The Queensland Resources Council (QRC) noted in their submission that:

*As drafted, the purpose of the Act seems to assume that independent economic advice can drive economic growth. QRC suggests that rather than “driving economic growth”, the purpose should be to “enable” economic growth or to “remove impediments to” economic growth.*<sup>23</sup>

In response, the department advised that the Bill was drafted to reflect the objectives and functions as approved by government. They advised that the provisions were drafted in consultation with the Office of the Queensland Parliamentary Counsel (OQPC) and while there were many options considered they are satisfied with the final approach.<sup>24</sup>

Clause 3 states that all persons are bound by the Act. However, nothing in the Act makes the State liable to be prosecuted for an offence. Clause 4 sets out that the Act applies as far as possible beyond the limits of Queensland.

Clause 5 provides for the dictionary which is contained in schedule 1.

### **4 Examination of the *Queensland Productivity Commission Bill 2015 – Parts 2 to 4* (Establishment, Inquiries and Advice and Research)**

#### **4.1 Part 2, Division 1 – Establishment of the Commission (Clauses 6 to 8); Division 3 – Powers (Clause 13); Division 5 – Staff (Clause 22)**

The Bill establishes the Commission as a body corporate, which may sue, or be sued. The Bill also provides that the Commission represents the state and has the status, privileges and immunities of the state. Clause 13 provides that the Commission has all the powers of an individual and these powers may be exercised inside and outside Queensland, including outside of Australia.

Clause 22 provides that the Commission also has power to employ staff who would be employed under the Act and not the *Public Service Act 2008*. The department advised:

*Staff will be employed under the new legislation rather than the Public Service Act, which is the same approach as the QCA, and gives flexibility for the Commission to determine appropriate employment arrangements. The state industrial relations regime under the IR Act still applies.*<sup>25</sup>

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<sup>22</sup> Australian Productivity Commission, *About the Commission*, <http://www.pc.gov.au/about>

<sup>23</sup> Queensland Resources Council, Submission 4: 1

<sup>24</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 2

<sup>25</sup> Mr Tonks, Queensland Treasury, Public Departmental Briefing, 14 October 2015: 2

#### 4.2 Part 2, Division 2 – Functions (Clauses 6 to 12)

The functions proposed for the Commission are set out in clause 9 of the Bill as follows:

- facilitate and promote productivity in Queensland;
- undertake inquiries about matters relating to productivity, economic development and industry as directed by the Minister;
- advise the Minister about matters relating to productivity, economic development and industry;
- conduct research and analysis of matters relating to productivity, economic development and industry;
- advise government agencies about complying with the principle of competitive neutrality;
- receive, investigate and report on complaints about alleged failures of government agencies to comply with the principle of competitive neutrality; and
- promote public understanding of matters relating productivity, economic development and industry.

Whilst the submissions received by the Committee were generally supportive of the Bill, the QRC considered that the functions did not seem to align precisely with the purpose of the Bill. They considered that:

*While the purpose describes the “goal of increasing productivity, driving economic growth and improving living standards in Queensland”, the function is couched in terms of “productivity, economic development and industry”. Noting QRC’s suggestion to amend section 2, QRC suggests that sections 9(a)-(d) should reflect the redrafted section 2.<sup>26</sup>*

In its submission, the AMMA expressed the view that the new Queensland Productivity Commission (QPC) not duplicate the work of the APC. They stated:

*The depth and breadth of possible inquiries is extremely broad and the nexus to Queensland can be direct or indirect. It is therefore essential that the proposed QPC does not duplicate any of the core functions already well served by the APC. To minimise possible duplication and redundancy, AMMA proposes two broad guiding principles be adopted, namely:*

- a. *Where the subject matter of an inquiry or research project is generally subject to primary regulation at a Commonwealth level, that should be considered a federal matter and within the purview of the APC. The Queensland Treasurer should undertake consultations, as appropriate, with the Federal Treasurer, before issuing any written direction under section 23, and take into account current and completed APC inquiries in the same area of regulation before instigating any Queensland inquiry.*

<sup>26</sup> Queensland Resources Council, Submission 4: 1

- b. *Even where the subject matter is generally subject to regulation primarily at the state level (Queensland state laws or local government), the Queensland Treasurer should ideally consult with the Australian Treasurer to determine whether the scope of the work would be beneficial to other states/territories generally, and consideration given to a federal inquiry by the APC. This would not preclude or bind the Queensland Minister directing the QPC to undertake a complementary or conduct research under the terms of the Bill, but developing and publishing some clear guidelines would minimise risks of duplication and overlap.*<sup>27</sup>

Whilst admitting there was potential for duplication, the department advised that when referring an inquiry to the QPC, the Treasurer will be able to work out what is on the APC's agenda and make a decision accordingly, whether the QPC should undertake a particular inquiry given that the APC may have done or be doing an inquiry.<sup>28</sup>

The Property Council of Australia was supportive of the establishment of the Commission. They stated:

*The Property Council considers the creation of an independent statutory body with the powers and resources to conduct self-referred economic investigations, as a positive long-term development for the Queensland economy. The statutory mandate to self-initiate investigations is comparable to the Commonwealth Government's Productivity Commission and is the preferred model to provide independent economic advice.*<sup>29</sup>

Clause 10 provides for matters to which the Commission may have regard in performing its functions.

The Queensland Nurses' Union (QNU) was also generally supportive of the Bill stating:

*The QNU has been an active participant in many reviews undertaken by the Australian Productivity Commission. These inquiries provide an opportunity for us to represent our members in matters related to productivity, economic development, industry and social engagement. While we recognise the Australian Productivity Commission operates federally and therefore has a potentially wider range of issues to canvas, we believe that both Commissions have an obligation to consider 'productivity' within its social context. Although the term 'productivity' appears to serve the interests of 'the economy', its impact is much wider.*<sup>30</sup>

However, they highlighted that clause 10 (1) (b) of the Bill recognises that, in performing its functions, the Commission may give regard to living standards, employment, real wages, industry development, regional development, environmental sustainability and fiscal sustainability in Queensland. They submitted that clause 10(1)(b) should be amended to include social well-being. They stated:

*We welcome the bill's recognition of the environment, however, in our view, the Commission should also take into account the impact on social well-being when undertaking its functions.*<sup>31</sup>

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<sup>27</sup> Australian Mines and Metals Association, Submission 5: 3 and 5

<sup>28</sup> Ms Dunne, Queensland Treasury, Public Departmental Briefing, 14 October 2015: 5

<sup>29</sup> Property Council of Australia, Submission 1: 1

<sup>30</sup> Queensland Nurses' Union, Submission 2: 3

<sup>31</sup> Queensland Nurses' Union, Submission 2: 3

In response, the department advised that clause 10(1)(c) provides that the Commission may have regard to the public interest which encompasses other social considerations. They considered the term 'social well-being' may create ambiguity and that to define the term with sufficient clarity would be problematic. The department also noted that while the clause was not exhaustive, it will be open to government to:

*...specify other matters for consideration (including social issues) in its referrals to the QPC.<sup>32</sup>*

Clause 11 provides that the Commission may establish committees to assist it in performing its functions. The membership and functions of these committees may be decided by the Commission.

Clause 12 provides that the Minister may give a written direction to the Commission. However, the ministerial direction must not be about the conduct of an investigation of a competitive neutrality complaint or the content of advice or a report prepared by the Commission.

#### **4.3 Part 2, Division 4 – Board (Clauses 14 to 21)**

A maximum three member board is proposed for the Commission. Clause 16 of the Bill provides that the board consists of the principal Commissioner and the other Commissioners, if any, appointed by Governor-in-Council. Commissioner's terms are not longer than three years and a Commissioner can be re-appointed. The Governor-in-Council decides the remuneration. Commissioners must disclose if they have a direct or indirect financial or personal interest in a matter which could conflict with the proper performance of their duties.

The department advised:

*In terms of the board, a principal Commissioner and up to two other Commissioners can be appointed for a period of up to three years and the appointment and remuneration are decided by the Governor-in-Council following usual cabinet consideration. The principal Commissioner acts as the board if there are no other Commissioners which provides flexibility given the, let us say, potentially lumpy nature of the Commission's work or the scale of inquiries that it is asked to conduct.<sup>33</sup>*

Both the QCU and the AMMA raised concerns regarding the appointment of Commissioners to the board. In particular, the submitters supported appointment of Commissioners of the highest standing.

The QCU stated:

*...the overall efficacy of the Productivity Commission requires it to perform its functions with "...independence, rigour, responsiveness, transparency, equity, efficiency and effectiveness".*

*This means that those appointed to the positions of Commissioner should have skills, qualifications and experience that will allow them to objectively analyse evidence from the full suite of stakeholders in each context and make considered, balanced recommendations. In this context, we note several aspects of the Bill that may require refinement.<sup>34</sup>*

The AMMA submitted:

*There should be a process of consultation with relevant key stakeholders (such as the Chamber of Commerce and Industry Queensland) prior to the appointment of the Board, QPC Chair and individual Commissioners.<sup>35</sup>*

<sup>32</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 2

<sup>33</sup> Mr Tonks, Queensland Treasury, Public Departmental Briefing, 14 October 2015: 2

<sup>34</sup> Queensland Council of Unions, Submission 6: 1

<sup>35</sup> Australian Mines and Metals Association, submission 5: 5

The AMMA recommended that:

*...appointees, including board members have considerable commercial experience, be highly regarded by the business community, and have credentials in delivering measurable productivity reform or commercial results.*<sup>36</sup>

In response, the department advised:

*The credentials of appointments to the QPC Board will be based on the work program of the QPC. Given the range of matters on which the Commission may be required to investigate and report, defining a particular set of skills in legislation would be difficult and potentially restrictive.*<sup>37</sup>

In addition, the department advised that all government bodies are also subject to strict intra-government consultation requirements which requires the Minister to raise all proposed appointments with the Premier in writing before appointments are made. The written advice to the Premier outlines the current membership of the board, attaches the proposed appointee's curriculum vitae, notes confirmation that suitability checks have been carried out, confirms the Minister has taken into consideration the diversity of nominations including gender equity and any other government policies considered necessary.<sup>38</sup>

#### **4.4 Part 3, Division 1 – Direction to undertake inquiry (Clause 23)**

The explanatory notes state that:

*...the core business of the Commission is to conduct formal public inquiries, reviews and investigations into complex economic and policy issues as referred to it by direction of the Treasurer, as responsible Minister.*<sup>39</sup>

Clause 23 of the Bill provides that the Minister may direct the Commission to undertake an inquiry on a matter relating to productivity, economic development or industry in Queensland. The Commission must comply with the direction. The direction may state the process the Commission must adopt in undertaking the inquiry. For example, the Commission may be required to:

- have regard to particular matters
- undertake a particular type of public consultation
- publish a preliminary report at a particular stage of the process
- give a report about the inquiry to the Minister within a stated period; or
- include recommendations in the Commission's report to the Minister about the matter.

The explanatory notes state the Commission must comply with the direction, and pursuant to section 24AA of the *Acts Interpretation Act 1954*, the Minister may withdraw or amend the direction at any time before the Minister receives the report.<sup>40</sup>

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<sup>36</sup> Australian Mines and Metals Association, submission 5: 5

<sup>37</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 2

<sup>38</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 3

<sup>39</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 1

<sup>40</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 7

The QRC identified that clause 23 suggests the Minister can amend or withdraw the direction at any time before the Minister receives the report under section 24AA of the *Acts Interpretation Act 1954*. They iterated their concern that:

*...as this power is not readily apparent by reading the Bill, many stakeholders may not be aware of the Minister's latitude to revise or withdraw a direction. In the absence of a clear process to justify changes to a direction, this power could serve to undermine the Commission's independence and credibility. QRC suggests that the Committee consider recommending the development of such a framework for managing changes in directions which have already been issued to the Commission. The Productivity Commission Act 1998 (section 11(3)) specifically notes that the Minister may withdraw or amend the reference at any time before receiving the report.<sup>41</sup>*

In response, the department advised:

*The QPC Bill does not specifically include this provision based on the following considerations:*

- *For consistency, the Queensland drafting preference is that provisions of general operation contained in the AIA are not repeated in new legislation;*
- *Compliance with the Queensland Government's commitment to reduce the regulatory burden.*

*It is envisaged the Government would only withdraw or amend directions if it was critical or would assist the QPC inquiry in some way.<sup>42</sup>*

The QFF noted their concern that there is no provision for the Commission to release their draft report to the Minister for public comment before it is finalised. They recommended there should be an opportunity for public and stakeholder submissions on QPC draft public inquiry reports.<sup>43</sup>

The department confirmed that:

*Clause 23 of the QPC Bill allows the Minister to direct the QPC to undertake an inquiry, and clause 23(2) states that the direction may state the process the QPC must adopt in undertaking the inquiry.*

*Depending on the complexity and timing of an inquiry, Ministerial Directions can outline matters such as reporting requirements and inquiry timeframes (e.g. as required in the electricity pricing inquiry). The ability to tailor reporting and inquiry timeframes as appropriate on a case-by-case basis was considered preferable to including detailed reporting and timing requirements in legislation.<sup>44</sup>*

#### **4.5 Part 3, Division 2 – Notice of inquiry and public consultation (Clauses 24 and 25)**

Clause 24 provides that the Commission must publish a direction to undertake an inquiry by the Minister on its website. Clause 25 requires the Commission to undertake public consultation in relation to the inquiry.

<sup>41</sup> Queensland Resources Council, Submission 4: 2

<sup>42</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 4

<sup>43</sup> Queensland Farmers Federation, Submission 7: 3

<sup>44</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 4

The QCU raised concerns about the Minister's power to direct who the Commission may consult with. They stated:

*Division 2 Function, 12(2) indicates that a Ministerial direction must not direct the conduct of investigations and/or the content of advice or reports generated by the Commission and that Part 3, Division 1, section (2) (b) indicates that the Minister may specify the form of public consultations to be undertaken. In keeping with the goal of obtaining information from multiple sources, it may be useful to incorporate an additional clause that prevents the Minister from prescribing or limiting the bodies or individuals with which the Commission may consult during its research and investigations.<sup>45</sup>*

In response the department advised:

*Public consultation is a key element of the QPC's inquiry function. The QPC is required to undertake public consultation for all inquiry's (clause 25).*

*Clause 23(2)(b) of the QPC Bill provides that the Minister may specify a particular type of public consultation as part of the inquiry process (e.g. public hearings, workshops, briefings etc.).*

*Unless specified by the Minister, the QPC will have the flexibility to determine the most appropriate type of public consultation based on the subject matter of the inquiry, key stakeholders/interested parties and review timeframes.*

*Also, public inquiries will be advertised on the QPC's website (the Ministerial direction must be published by the QPC) and, as such, interested parties are able to provide a submission to the QPC.*

*The QPC Board must ensure the QPC performs its functions with independence, rigour, responsiveness, transparency, equity, efficiency and effectiveness.<sup>46</sup>*

#### **4.6 Part 3, Division 3 – Report on inquiry (Clauses 26 to 28)**

Clause 26 requires the Commission to prepare a written report on an inquiry and give it to the Minister. The Minister must provide a written response to the Commission's report within six months of receiving it.

Submitters raised concerns regarding the six month timeframe for the Minister's written response to an inquiry report.

The QRC stated:

*...delaying the release of the Commission's report for up to six months while the Minister prepares a written response seems inconsistent with the Commission's aims of transparency and independence. Further, this delay risks undermining the extensive consultation which QRC expects to be a hallmark of the Commission's work...<sup>47</sup>*

The QRC highlighted the *Productivity Commission Act 1998 (Cth)*<sup>48</sup> requires the Minister to table a copy of a Productivity Commission report within 25 sitting days after receiving it.

In its response to the Committee, the department advised the six month timeframe for the Minister's response to an inquiry report was to ensure the government could carefully consider the results of the Commission's analysis even where controversial or at odds with government policy.<sup>49</sup>

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<sup>45</sup> Queensland Council of Unions, Submission 6: 2

<sup>46</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 5

<sup>47</sup> Queensland Resources Council, Submission 4: 2

<sup>48</sup> *The Productivity Commission Act 1998 (Cth)*: section 34

<sup>49</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 5

In addition, the department advised that by allowing a maximum period of six months for the Minister to respond, and requiring the Commission to report to the Minister before any public release, government would have the opportunity to thoroughly review and consider the Commission's report and recommendations, and consult further if required, before developing a response.<sup>50</sup>

The Committee sought additional information on this issue and was advised:

*...while on the face of it, six months seems a lengthy timeframe, it is not dissimilar to other productivity regimes in terms of releasing productivity Commission reports. Other jurisdictions have similar timeframes on the basis that productivity reports can be very detailed and complex documents, affecting numerous stakeholders in various ways.*

*Further, the six month period is the maximum timeframe for Government to respond. It should be noted that, in many circumstances, Government will be able to respond much sooner and reports will also be published within a shorter timeframe. The nature of the Government's response will depend on the size and complexity of the inquiry undertaken by the Commission. The six month period gives the Minister appropriate time to thoroughly review and consider the Commission's report and recommendations, and take into account the views of the Cabinet and further consultation with stakeholders, where appropriate.<sup>51</sup>*

The department acknowledged that similar bodies in other jurisdictions adopt shorter timeframes for the publication or tabling of reports. It is proposed that the QPC will follow the Victorian Competition and Efficiency Commission model of obliging the government to respond. They advised that, in this respect, the provisions in the Bill establish a framework conducive to the active consideration of Commission policy recommendations and findings.<sup>52</sup>

The department advised that the intent of the legislation is to allow the government to simultaneously release a QPC Final Report and a Whole-of-Government response. They advised that this approach is intended to bring discipline and coordination to the report and response process and aims to ensure the response to the QPC reports, which will usually involve up to 12 months of intensive analysis and consultation, is of equal quality as the report itself.<sup>53</sup>

#### **4.7 Part 4, Division 1 – Requests for advice (Clause 29); Division 2 – Research and analysis by Commission (Clause 30)**

Clause 29 provides that the Minister may, by written notice, ask the Commission for advice on a matter relating to productivity, economic development or industry in Queensland. The notice may require the Commission give the Minister the advice within a specified timeframe or have regard to particular matters in giving the advice. The Commission must comply and, in addition, may advise the Minister on any other matter it considers relevant to the requested advice.

The explanatory notes state that the Commission will have the mandate to initiate its own general research and analysis.<sup>54</sup> The Commission must advise the chief executive<sup>55</sup> of its decision to publish its research or analysis.

Clause 30 allows the Commission to undertake self-initiated research and analysis, however, the Commission must advise the Under Treasurer before publishing any work under this Part.

<sup>50</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 5

<sup>51</sup> Correspondence from Queensland Treasury to FAC dated 29 October 2015: 2

<sup>52</sup> Correspondence from Queensland Treasury to FAC dated 30 October 2015: 5

<sup>53</sup> Correspondence from Queensland Treasury to FAC dated 30 October 2015: 10

<sup>54</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 1

<sup>55</sup> *The Acts Interpretation Act 1954* provides the Director-General is the chief executive of the department.



The QRC and the CCIQ expressed the view that the Commission should be able to conduct self-referred economic investigations, similar to the APC. QRC stated:

*QRC strongly supports the ability of the Commission to initiate their own research and analysis. However, the Commission's ability to do justice to this work will be contingent on having sufficient resources and budget. QRC suggests that the Commission should be allocated a specific proportion of people and budget which are ear-marked for the Commission's self-directed work. In the absence of a dedicated research budget, there is a risk of the Commission's inquiry work crowding out their important research work.<sup>56</sup>*

In its response to the Committee, the department advised that the Commission's ability to initiate its own research and analysis of matters allows it to develop its expertise and knowledge of Queensland's productivity, economic development and industry, and make this available to the public where appropriate. It also allows the Commission to identify potential areas for further investigation.<sup>57</sup>

In relation to the Minister requesting advice from the Commission, the QFF raised concern that there are no formalised arrangements for consultation in regard to advice the Minister has asked the QPC to provide. The QFF recommended the Bill be amended so the Commission's report makes it clear how issues raised by the Minister have been addressed in the report published on the Commission's website.<sup>58</sup>

The department advised the Minister's capacity to request advice or research:

*...may be beneficial to inform policy deliberations at very initial stages, before public consultation is undertaken.*

*In undertaking these functions, the [QPC will still be required to operate and report independently. However, unless specified by the Minister, the QPC will have the flexibility to determine the most appropriate type of public consultation based on the subject matter of the inquiry, key stakeholders/interest parties and review timeframes. For example, requests for advice could be in the form of industry research or statistics, and inter-jurisdictional comparisons.<sup>59</sup>*

In addition, the department advised the Commission's final report will reflect issues raised by all stakeholders including, where relevant, government. The manner in which the views of stakeholders are included will be a matter for the Commission.<sup>60</sup>

#### **4.8 Committee comments – Parts 2 to 4**

The Committee found that stakeholders are generally supportive of the establishment of the QPC. The most significant concern raised by stakeholders in relation to the establishment of the QPC, was with regard to the issue of the time allowed for the Minister to respond to a Commission report.

The Committee examined this issue thoroughly with the department and whilst the Committee agrees that six months may seem excessive, it is satisfied by the advice that this will be the maximum time available for a response and that most responses would be provided in a more timely manner. The Committee considers that department should actively pursue prompt resolution of any recommendations made by the QPC.

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<sup>56</sup> Queensland Resources Council, Submission 4: 2

<sup>57</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 6

<sup>58</sup> Queensland Farmers' Federation, submission 7: 3

<sup>59</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 6-7

<sup>60</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 5

## 5 Examination of the *Queensland Productivity Commission Bill 2015 – Part 5 (Competitive Neutrality)*

### 5.1 Part 5, Division 1 – Preliminary (Clauses 31 to 33)

Part five of the Bill pertains to competitive neutrality. The Queensland Competition Authority (QCA) currently undertakes the state's competitive neutrality function. These functions will be transferred to the QPC. Clause 32 defines the principle of competitive neutrality as follows:

#### **Principle of competitive neutrality**

- (1) The **principle of competitive neutrality** is the principle that a government agency carrying on a significant business activity should not enjoy a competitive advantage over competitors or potential competitors in a particular market solely because the agency's activities are not subject to 1 or more of the following—
- (a) full Commonwealth or State taxes or tax equivalent systems;
  - (b) debt guarantee fees directed towards offsetting the competitive advantages of government guarantees;
  - (c) procedural or regulatory requirements of the Commonwealth, the State or a local government on conditions equivalent to the conditions to which a competitor or potential competitor may be subject, including, for example, requirements about the protection of the environment and about planning and approval processes.
- (2) In this section—
- significant business activity** means a business activity included in the list published under section 33(1).

The interim Commission's website summarises the principle of competitive neutrality as:

*Competitive neutrality requires that public sector business activities that are in competition with the private sector should not have competitive advantages or disadvantages, just because they are owned or controlled by government.*<sup>61</sup>

The 1997 explanatory notes for the *Queensland Competition Authority Act* provide more detail about the competitive neutrality principle and complaints:

*While competitive neutrality is desirable on equity grounds alone, it has even more significance when considered in the context of the efficient use of the economy's limited resources. That is, if government businesses operate along lines similar to the private sector, the same sorts of competitive incentives should follow. This provides a better basis for the various markets which make up the economy to function in a more productive manner.*

*Against this background, the Queensland Government has implemented a set of reforms aimed at ensuring that government businesses compete on terms which are as equal as possible to those which apply to the private sector.*

*Competitors of such government businesses must, however, be able to seek redress if they believe that they are competing at a disadvantage. Accordingly, the Bill provides for an independent mechanism which allows competitors of government businesses to lodge a complaint where they believe that the business enjoys a competitive advantage by virtue of its government ownership.*<sup>62</sup>

<sup>61</sup> Queensland Productivity Commission, <http://www.qpc.qld.gov.au/competitive-neutrality/> [21 October 2015]

<sup>62</sup> Explanatory notes, *Queensland Competition Authority Act 1997*: 3

**5.2 Part 5, Division 2 – Competitive neutrality complaints (Clauses 34 to 36); Division 3 – Investigations of competitive neutrality complaints (Clauses 37 to 38) and Division 4 – Report on investigation (Clauses 39 to 42)**

In ensuring government agencies comply with the principle of competitive neutrality, the Bill provides for the Commission to:

- receive and investigate complaints from a person that is, or could be, in competition with a government agency in a particular market and from a person that is, or could be, adversely affected by a competitive advantage the person alleges is enjoyed by a government agency; and
- report to the Minister and publishes its findings.

In its submission, the WRIQ raised concerns that only affected persons can make a complaint about competitive neutrality to the Commission. In particular, WRIQ highlighted that industry association groups were precluded from making complaints on behalf of their members.<sup>63</sup> They advised:

*A secondary weakness contained in the bill is the retention of the mechanism that prescribes only affected persons (by definition an individual or single business) can refer complaints to the Commission on matters of Competitive Neutrality. This is a clear failure as it exposes any individual and/or company to retribution by the Agency to wit the complainant wishes to take action. The current provision excludes all access for any groups of complainants ie members of an Association or registered body such as industry groups to refer matters for investigation where 'Competitive Neutrality' challenges have been identified.<sup>64</sup>*

The WRIQ provided the Committee with an example of where this has been an issue. They advised:

*As demonstration to this argument and proof of the errors in design WRIQ provides a live and current problem whereby an investigation conducted by the Queensland Competition Authority found the Sunshine Coast Council to be in breach of the Competitive Neutrality principles and despite this finding Council still maintains the operations to which it was found to be in breach and no action by any level of Government has been taken.*

*Had Council not referred the complaint of WRIQ to the QCA, result WRIQ challenging Council, the anti-competition activities respect to Waste Management Services Council is conducting would never have been investigated because of that wording. WRIQ was not to represent a group of affected parties as the Act excludes this action. [sic]<sup>65</sup>*

The WRIQ advised that:

*In early 2011 WRIQ approached the Queensland Competition Authority (QCA) seeking its intervention to investigate our complaint. As a result this approach on 14 April 2011, the Sunshine Coast Regional Council referred itself to the QCA for investigation of the matter.*

*In July 2011, the QCA found our complaint worthy of investigation and started its formal investigation. The QCA inquiry took 12 months, was very extensive, finding that the SCRC's Waste and Resources Management business does have a competitive advantage over potential competitors as result of its local government ownership and the QCA recommended that this advantage should be removed. It provided Council with a pathway to remove this anti-competitive action with a range of options for adoption.*

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<sup>63</sup> Waste, Recycling Industry Association (Qld), submission 9: 2

<sup>64</sup> Waste, Recycling Industry Association (Qld), submission 9: 2

<sup>65</sup> Waste, Recycling Industry Association (Qld), submission 9: 2

*At its 31 July 2012 the Sunshine Coast Council in a closed Council session considered the QCA report and rejected it.*<sup>66</sup>

The department advised the Committee that ‘person’ is defined in the *Acts Interpretation Act 1954* (AIA) to include an individual and a corporation. ‘Corporation’ is defined in the AIA to include a body politic or a corporate. ‘Person’ also includes ‘associations’ (that is, groups of individuals).<sup>67</sup>

The Committee sought further clarification on this issue and was advised that the term ‘adversely affected’ is not defined in the legislative framework. As such the Commission has discretion in the application of this requirement.<sup>68</sup>

The department advised:

*...on 14 April 2011, a competitive neutrality complaint was made against a Sunshine Coast Regional Council (SCRC) business activity by the Waste Contractors and Recyclers Association Queensland (WCRAQ) (now the Waste, Recycling Industry Association (Queensland)) on behalf of a number of its members.*

*When making its decision to investigate, the QCA considered the following, and decided to commence the investigation:*

- *WCRAQ had made a genuine attempt to resolve the dispute;*
- *The complainants represented by WCRAQ are legally entitled to provide the goods and services, and*
- *WCRAQ members would be potentially adversely affected by SCRC’s possible breach of the principle of competitive neutrality.*

*In particular, in its report, the QCA made the following comments when assessing whether the complainant was “adversely affected” by alleged breaches of the principle of competitive neutrality:*

*WRAQ is not an affected person. WCRAQ is an industry association that is not itself seeking to compete with SCRC. However, WCRAQ is acting as agent for some of its members who could potentially be in competition with the SCRC.*

*As a result, the QCA then proceeded to assess whether members were adversely affected.*<sup>69</sup>

The result of this investigation was that the QCA found SCRC’s waste and resources management business has a competitive advantage over potential competitors as a result of its local government ownership, and that this advantage should be removed.<sup>70</sup>

The department noted that while the drafting of clause 34 is slightly different, it preserves section 43 of the *Queensland Competition Authority Act 1997* and the above example sets a precedent that shows that the QCA is able to accept complaints from organisations or associations where they are affected insofar as one of their members is affected.<sup>71</sup>

Both the WRIQ and the CCIQ raised concerns that the Commission has no statutory power to enforce the recommendations of its investigation report about competitive neutrality.

<sup>66</sup> Waste, Recycling Industry Association (Qld), submission 9: 2

<sup>67</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 7

<sup>68</sup> Correspondence from Queensland Treasury to FAC dated 29 October 2015: 4

<sup>69</sup> Correspondence from Queensland Treasury to FAC dated 29 October 2015: 4

<sup>70</sup> Correspondence from Queensland Treasury to FAC dated 30 October 2015: 2

<sup>71</sup> Correspondence from Queensland Treasury to FAC dated 29 October 2015: 4

In particular, WRIQ noted the absence of enforcement hindered business confidence.<sup>72</sup> They advised:

*It is the Association's observation the Bill contains a fundamental weakness in its current design and thus provides little business confidence this policy objective can be met and that genuine reforms to matters respect to Competitive Neutrality can be achieved.*

*The error in the design centres upon provisions that prescribe the Commission will have no powers to actually enforce decisions where it finds competitive neutrality to have been compromised. This is ratified in the bill where the explanatory notes state, 'In all of its functions, the Commission's role is advisory only. It will have no decision-making capacity.'<sup>73</sup>*

In addition, CCIQ recommended that:

*...that the Commission as part of this Bill be provided with enforcement powers where it finds competitive neutrality to have been compromised.<sup>74</sup>*

In response, the department advised:

*Like its other functions, recommendations stemming from a competitive neutrality investigation are recommendatory. For State-owned businesses, the Treasurer (in consultation with the relevant portfolio Minister) does not have to accept or act on any of the QPC's findings or recommendations. This allows other considerations such as public interest to be considered more broadly by Government in the application of competitive neutrality policy. This is the same process as currently applies in the QCA Act.*

*Under the [Local Government Regulation 2012], the relevant local government must decide, by resolution, whether to implement any [competitive neutrality] recommendations contained in a QPC report. Again, the process remains the same.*

*Maintaining a recommendatory role ensures that the ultimate decision maker should remain the accountable Minister or local government, but with the assistance of an expert investigation by an independent body.<sup>75</sup>*

The Committee sought further clarification from the department on this issue. They advised:

*Clause 39 of the Bill states that if the Commission investigates a competitive neutrality complaint, it must prepare a written report about the investigations, including the results of the investigation and give the report to the Minister. Clause 41 states that the Minister must give the Commission a response to the report as soon as practicable after receiving it.*

*As the competitive neutrality regime is non-binding, there is no appeal mechanism available for complainants and any implications for local government are dependent on the decision/action the local government decides to take in regard to the competitive neutrality report.*

*The non-binding nature of the competitive neutrality regime allows State and local governments to take other overarching policy considerations into account. This may include matters such as social welfare and equity considerations, community service obligations, economic and regional development issues, employment objectives, environmental considerations, and health and safety issues.*

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<sup>72</sup> Waste, Recycling Industry Association (Qld), submission 9: 1-2

<sup>73</sup> Waste, Recycling Industry Association (Qld), Submission 9: 2

<sup>74</sup> Chamber of Commerce & Industry Queensland, submission 3: 3

<sup>75</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 7

*To make compliance with competitive neutrality recommendations mandatory could hamper a government's ability to take these considerations into account. However, the public release of all documentation relating to the competitive neutrality complaint means that government will ultimately be held accountable for the decision it makes and any resulting actions (or lack thereof).*

*As such, in most cases, a non-binding 'name and shame' regime such as the current approach generally proves very effective. This is evidenced by the fact that all Australian jurisdictions, including the Australian Government's Competitive Neutrality Complaints Office (AGCNCO), have similar non-binding competitive neutrality regimes.*

*While their recommendations are non-binding, having the Commission examine complaints offers various advantages including:*

- *the Commission is independent of government and the entities which it investigates;*
- *investigations are conducted in a confidential manner (as far as possible);*
- *the Commission is impartial and objectively considers the submissions of both the complainant and the respondent, in a manner that is fair and equitable to all parties concerned;*
- *the Commission is obliged to keep complainants regularly informed of the progress of their complains; and the public release of information on the handling and outcome of the complaint holds all parties accountable.<sup>76</sup>*

The department also confirmed that, under the legislative framework, a local government is not required to implement the recommendations of the QCA. However, it must advise the reasons for not doing so.<sup>77</sup>

With regard to the specific example raised by WRIQ, the department advised that the government has been monitoring this matter for a number of years and has committed to investigate whether any legislative or regulatory changes are needed to address the issue of uncompetitive waste practices by local government.<sup>78</sup>

They advised:

*There [are] at least two legislative options:*

1. *Amend the LGA, the LGR, the City of Brisbane Act 2010 and the City of Brisbane Regulation 2012 to make compliance with a QCA recommendation in relation to a competitive neutrality complaint mandatory; and/or*
2. *Amend the above legislation to make the payment of waste management utility charges optional rather than mandatory (i.e. a fee for a contracted service rather than a tax).*

*There are a number of complex issues associated with both options, which would require extensive consultation with stakeholders, including the Local Government Association of Queensland.<sup>79</sup>*

<sup>76</sup> Correspondence from Queensland Treasury to FAC dated 29 October 2015: 5

<sup>77</sup> Correspondence from Queensland Treasury to FAC dated 30 October 2015: 2

<sup>78</sup> Correspondence from Queensland Treasury to FAC dated 30 October 2015: 2

<sup>79</sup> Correspondence from Queensland Treasury to FAC dated 30 October 2015: 2

Part of the Queensland Competition Authority's role in regard to competitive neutrality is to accredit a government agency. The purpose of accreditation under the *Queensland Competition Authority Act 1997* (the QCA Act) is to remove doubt that a government agency carrying on a significant business activity carried on the activity in accordance with the principle of competitive neutrality. The QCA Act also provides that the QCA does not have to investigate a complaint against a government agency if it had been granted accreditation.<sup>80</sup>

The Committee noted that the Bill does not transfer the accreditation function to the Commission and sought information from the department regarding the reasons. The department advised that the accreditation function was omitted because it has never been used. They advised that the accreditation in part 4 of the QCA Act, which was introduced in 1997, was an attempt at an up-front exemption from competitive neutrality but no-one has applied for accreditation.<sup>81</sup>

The department also advised the Committee that they have simplified the detail included in the primary legislation and a lot of the statement of competitive neutrality policy and procedure will be dealt with through subordinate legislation and policies promulgated under the Act.<sup>82</sup>

### 5.3 Committee comments – Part 5

The Committee identified a number of stakeholder concerns with regard to Part 5 of the Bill. These concerns included:

- the ability of industry associations to make competitive neutrality complaints; and
- the enforcement of recommendations where the Commission finds there has been a breach of competitive neutrality.

The Committee investigated these issues to a considerable degree and is satisfied that the department is working to address these concerns.

With regard to stakeholder concern that the legislation does not allow for the QPC to accept competitive neutrality complaints from industry associations, the Committee understands that as a result of WCRAQ's approaches to both the SCRC and QCA, SCRC referred itself to the QCA to enable an investigation to occur. In its report on the matter, the QCA agreed that it did in fact have jurisdiction to investigate a complaint from an industry association.

The Committee noted the department's advice that a precedent has now been set that shows that the QPA will be able to accept complaints from organisations or associations where they are affected insofar as one of their members is affected. The Committee considers that this information needs to be clearly communicated to the QPC to ensure that future complaints are not delayed due to a technical interpretation of the provisions.

On the issue of enforcement of QPC decisions, the Committee understands the frustration felt by stakeholders when action is not taken in the manner anticipated where the Commission finds in their favour. However, it considers that the non-binding regime provides some balance in regard to competitive neutrality. The Committee understands the difficulty of balancing the requirements of both government agencies and private businesses.

The Committee acknowledges the complexities of the issues raised by WRIQ and is satisfied that the government is committed to consulting further with stakeholders and investigating the options in order to address these concerns. The Committee considers that the role of the QPC is to make recommendations and there should be other mechanisms for the implementation and enforcement of those recommendations.

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<sup>80</sup> *Queensland Competition Authority Act 1997*: Section 60

<sup>81</sup> Ms Dunne, Queensland Treasury, Public briefing transcript, 14 October 2015: 3

<sup>82</sup> Mr Tonks, Queensland Treasury, Public Departmental Briefing, 14 October 2015: 2-3

## 6 Examination of the *Queensland Productivity Commission Bill 2015 – Part 6 (Regulatory review)*

### 6.1 Part 6 – Regulatory Review (Clause 43)

The regulatory review functions of the Office of Best Practice Regulation were transferred to the interim Commission on 1 July 2015.

The QCA's website outlines regulatory review as:

*The Queensland Government developed a regulatory impact analysis system for agencies to follow to assist them in improving the quality of regulation being considered.*

*Regulatory impact analysis (RIA) is a systematic method widely used by governments to provide a more informed, objective and transparent basis for regulatory decision making.*

*The 'Regulatory Impact Statement (RIS) system' is Queensland's RIA process that sets the standard for the development and review of state regulation.*

*Regulation can impose costs that are excessive or unnecessary, and have unintended or undesirable effects.*

*It is therefore important for regulation to be subjected to a systematic process that ensures, in the first instance, that the regulation is necessary, and that if it is, that it is efficient and effective in achieving policy objectives without imposing unnecessary burdens on Queensland business, community and government.<sup>83</sup>*

Clause 43 of the Bill provides that the Minister may direct the Commission to conduct research into, or analysis of, a regulatory matter. In doing so, the Commission must make recommendations about the regulatory matter.

The explanatory notes state that:

*The Bill will achieve the policy objective of reducing the regulatory burden in Queensland by giving the Commission the responsibility to administer the Queensland Government's regulatory impact analysis requirements. This will include providing independent support and information on the quality of regulatory proposals of government agencies including regulatory impact statements.<sup>84</sup>*

In its submission, QRC noted clause 43 was drafted in very general terms. They advised that some of its members were concerned that individual projects could risk having existing approvals or administrative processes reviewed by the Commission, which would seem inappropriate.<sup>85</sup>

<sup>83</sup> Queensland Competition Authority <http://www.qca.org.au/OBPR/>

<sup>84</sup> Explanatory notes, *Queensland Productivity Commission Bill 2015*: 2

<sup>85</sup> Queensland Resources Council, submission 4: 2



In response, the department advised:

*...the Minister's direction will clearly outline the QPC's function under this section and unless directed by the Minister, the QPC will not be revisiting regulatory advice previously provided by the QPC.<sup>86</sup>*

## 6.2 Committee comments – Part 6

The Committee considered the concerns raised by stakeholders regarding the drafting of clause 43. The information provided by the department clearly articulated that the policy intent is that previous decisions would not be revisited unless directed by the Minister. The Committee considered that the explanatory notes did not provide sufficient information and were not helpful.

## 7 Examination of the *Queensland Productivity Commission Bill 2015 – Part 7 (Administration); Part 8 (Evidentiary provision) and Part 9 (Miscellaneous)*

### 7.1 Part 7 – Administration (Clauses 44 to 48)

Clause 46 of the Bill provides that the Commission, for the purposes of carrying out its functions, may require a relevant entity to give the Commission a copy of a related document or information and make a related document or information available for inspection by the Commission.

The QRC highlighted the Bill does not provide a penalty for failure to provide requested information to the Commission. The QRC contrasted the Bill against the *Queensland Competition Authority Act 1997* which provides a penalty.<sup>87</sup>

Both the QRC and the Local Government Association of Queensland (LGAQ) raised concerns there was no penalty for a breach of disclosing confidential information under clause 47.

The LGAQ raised concerns that it was essential that the Bill contained a confidentiality clause similar to that contained in section 53 of the *Auditor-General Act 2009*.<sup>88</sup> The Committee noted that section 53 of the *Auditor-General Act 2009* provides for a maximum penalty of 200 penalty units or one year imprisonment for disclosure of confidential or commercially sensitive material.

Clause 47 of the Bill provides that a person disclosing the information can request it be treated confidentially if the person believes is likely to damage the person's commercial activities. The Commission has the discretion to accept or reject the request if the Commission is satisfied the request is justified and that the disclosure of the document or information would not be in the public interest. If the Commission accepts the request, it must ensure the information is not disclosed. The Commission may however publish the document or information in a way that could not reasonably be expected to identify the party.

In its response to the Committee, the department stated that clauses 46 and 47 of the Bill are sufficient on the following basis:

- *The QPC is an advisory body to Government and, as such, is significantly different to other bodies that handle information such as the Auditor-General or the QCA. The Auditor-General has a specific role conducting and reporting on financial performance audits, and its enabling legislation reflects this accordingly*

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<sup>86</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 5

<sup>87</sup> Queensland Resources Council, submission 4: 3

<sup>88</sup> Local Government Association of Queensland, submission 8: 1

- *The QPC is also different to the QCA in its role as an economic regulator with decision-making powers. The QCA deals with a greater range of very commercially sensitive information, and makes enforceable pricing decisions. The QPC is an inquiry body that can only make recommendations to Government. The proposed provisions are appropriate to the QPC's functions*
- *Clause 47 protects the commercially sensitive information of a government agency by allowing the government agency (or an interested party) to ask the QPC not to disclose certain information without their consent. The rationale for providing scope for commercially related confidentiality requests is that this may, on occasion, be essential for the QPC to gain access to the best available information and evidence for its inquiries, which will primarily be economic and financial in nature*
- *It should be noted that the QPC will work with agencies to deal with the confidentiality of the information provided to them*
- *Under common law, where the QPC obtains information pursuant to a statutory power, the QPC may only use the information for the purposes set out in the statute. A breach of this obligation may result in a civil action against the QPC or its officers*
- *For serious breaches, a QPC officer may be liable for an offence under section 204 of the Criminal Code 1899 for disobedience to statute law. Alternatively, disciplinary proceedings may be taken against the QPC officer for breach of their employment conditions*
- *The Information Privacy Act 2009 (IPA Act) was enacted to protect personal information. Although the Bill does not contain penalty provisions for a privacy breach, it relies more effectively on the IPA to remedy any damage arising out of the privacy breach (e.g. destroying released information and preventing further release) through [the] Information Commissioner. If a resolution cannot be reached, the complaint can be referred to the Queensland Civil and Administrative Tribunal which has the power to make a binding decision on the parties.<sup>89</sup>*

## 7.2 Committee comments – Part 6

The Committee considered the department's advice that being an economic advisory body, the Commission is significantly different to other bodies such as the Auditor-General or the QCA. The committee was satisfied additional penalties are not appropriate.

## 8 Examination of the Queensland Productivity Commission Bill 2015 – Part 10 (Transitional provisions)

Clauses 52 to 58 allow for the transitional provisions providing for the transfer of existing records, complaints, investigations and employees to the Commission. The transitional provisions also allow for the appointment of the interim commissioner.

<sup>89</sup> Correspondence from Queensland Treasury to FAC dated 20 October 2015: 9

## 9 Examination of the *Queensland Productivity Commission Bill 2015* – Amendments to other Acts

Part 11 allows for consequential amendments to the following Acts:

- *Queensland Competition Authority Act 1997*; and
- *Payroll Tax Act 1971*.

### 9.1 Amendments to the *Queensland Competition Authority Act 1997*

The QCA Act will be amended to omit functions which will now be undertaken by the Commission.

The Committee noted that in transferring the regulatory functions from the QCA to the Commission, clause 64 omits the QCA's obligation to report to the Minister on any matter relating to best practice regulation.

### 9.2 Amendments to the *Payroll Tax Act 1971*

The definition of 'commercialised business unit' has been amended to replace the reference to refer to the *Queensland Productivity Commission Act 2015*.

### 9.3 Amendments to other regulations

The following regulations will be amended to replace QCA references to that of the Commission:

- *City of Brisbane Regulation 2012*;
- *Industrial Relations Regulation 2011*;
- *Local Government Regulation 2012*; and
- *Queensland Competition Authority Regulation 2012*.

## 10 Compliance with the *Legislative Standards Act 1992*

Section 4 of the *Legislative Standards Act 1992* states that fundamental legislative principles (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

The Committee examined the Bill's consistency with FLPs. This section of the report discusses potential breaches of the FLPs identified during the Committee's examination of the Bill and includes any reasons or justifications contained in the explanatory notes and provided by the department.

The explanatory notes state:

*The Bill is has been drafted with regard to the Fundamental Legislative Principles as defined in section 4 of the Legislative Standards Act 1992 (Qld).*

### 10.1 Immunity from proceedings – Section 4(3)(h) *Legislative Standards Act 1992* – Does the Bill confer immunity from proceeding or prosecution without adequate justification?

Clause 46 provides a form of immunity for entities that comply with a section 46 notice to provide copies of documents or information (or allow access to same) to the Commission.

Subsection 5 provides that:

*The relevant entity is not liable for a breach of contract, confidence or duty for giving the Commission a copy of the related document or information, or making the related document or information available for inspection by the Commission, as required by this notice.*

'Relevant entities' are defined as government agencies, (water) distributor-retailers, local governments or local government companies prescribed by regulation.

## 10.2 Committee comment

The Committee considered whether removal of liability for breach of contract, confidence or duty might prejudice the interests of another (non-'relevant entity') party to a contract, or the interests of a person whose confidence is breached, and leave them without recourse.

The Committee also considered that whilst the removal of liability may prejudice the interests of a third party as outlined above, it is a general matter of public policy that persons or entities be granted immunity/protection from liability for actions taken in compliance with a statutory duty, as they are acting under a degree of legal compulsion (here in response to a section 46 notice).

In this case, proposed section 46(3) requires a relevant entity to comply with a document/information production notice from the Commission, unless one of the exemptions in section 46(4) applies (such as legal professional privilege, parliamentary privilege, public interest immunity, statutory prohibition or where giving the document or information could reasonably be expected to prejudice the investigation of a contravention of the law).

Given that entities are legally compelled (unless exempt) to comply with the section 46 notice, the Committee considered it appropriate that they then be protected from liability that might otherwise arise because of the disclosures they make in complying.

## 10.3 Clear and precise – Section 4(3)(K) Legislative Standards Act 1992 – Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Clause 52 prescribes the definitions for part 10. The clause 52 definition for the QCA states that QCA means "the Queensland Competition Authority established under the *Queensland Competition Authority Act 1997* section 6"; whereas it should read section 7.

Schedule 1 contains the Dictionary for the Bill, including the definition for **government agency**. Paragraph (a)(iv) of that definition refers to a government agency as (including) "a subsidiary, of a government owned corporation, under the *Government Owned Corporations Act 1993*, section 3". The correct reference is to section 2 of the Act.

Schedule 2 amends various regulations, including the Local Government Regulation 2012 (LGR), in which it replaces the "QCA and QCA Act" definitions, stated to be contained in Schedule 4 of the LGR. The definitions are in fact contained in the Dictionary of the LGR which is in Schedule 8.

## 10.4 Committee comment

The Committee wishes to draw these minor referencing errors to the department's attention.

## 10.5 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes, whilst containing the information required by Part 4, provide minimal detail and the understanding of the Bill would benefit from additional detail being included. The role of explanatory notes is to provide a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

The Committee wishes to reiterate the comments made by the former FAC (54<sup>th</sup> Parliament):

*Agencies need to be mindful that stakeholders who use the explanatory notes may not have the detailed background knowledge needed to interpret the bill. The role of explanatory notes is to assist with the understanding of the bill. When compiling explanatory notes, agencies need to put themselves in the place of a stakeholder with limited or no knowledge of what is trying to be achieved by the bill. Explanatory notes need to include sufficient detail and be presented in such a way that they can be easily understood.<sup>90</sup>*

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<sup>90</sup> Finance and Administration Committee (54<sup>th</sup> Parliament), *Report No 53: Annual Report 2013-14*, October 2014: 5

## Appendices

**Appendix A – List of Submissions**

<b>Sub #</b>	<b>Submitters</b>
001	Property Council of Australia
002	Queensland Nurses' Union
003	Chamber of Commerce and Industry Queensland
004	Queensland Resources Council
005	Australian Mines and Metal Association
006	Queensland Council of Unions
007	Queensland Farmers' Federation
008	Local Government Association of Queensland
009	Waste, Recycling Industry Association (QLD)

**Appendix B – Officers appearing on behalf of the Queensland Treasury at the public departmental briefing – Wednesday 14 October 2015**

<b>Witnesses</b>
Mr Gregory Tonks, A/Assistant Under Treasurer, Shareholder and Structural Policy Division, Queensland Treasury
Ms Louise Dunne, Principal Treasury Analyst, Shareholder and Structural Policy Division, Queensland Treasury
Ms Stephanie Ning, Legal Officer, Legal and Administrative Review Branch, Queensland Treasury



**Appendix C – Witnesses appearing at public hearing – Wednesday 14 October 2015**

<b>Witnesses</b>
Mr Nick Behrens, Director – Advocacy and Workplace Relations, Chamber of Commerce and Industry Queensland
Mr Rick Ralph, Chief Executive Officer, Waste and Recycling Industry Queensland
Mr John Martin, Research and Policy Officer, Queensland Council of Unions