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Queensland Government Gazette

EXTRAORDINARY

PUBLISHED BY AUTHORITY

ISSN 0155-9370

Vol. 389]

THURSDAY 17 MARCH 2022

[No. 41

Queensland Competition Authority Act 1997

NOTICE OF DECISION NOT TO DECLARE A SERVICE UNDER SECTION 84(1)(c) AND 85(1)(a)

I, the Honourable Cameron Dick MP, Treasurer and Minister for Trade and Investment, as Minister administering the *Queensland Competition Authority Act 1997 (QCA Act)* have decided not to declare the use of the Carmichael Rail Network as a service under section 84(1)(c) and 85(1)(a) of the QCA Act.

The "Carmichael Rail Network" means a railway connecting Queensland's Galilee Basin to rail infrastructure operated by Aurizon Network Pty Ltd and ultimately the North Queensland Export Terminal (at Abbot Point).

HON. CAMERON DICK MP
Treasurer
Minister for Trade and Investment

16 March 2022

STATEMENT OF REASONS CONCERNING THE DECISION NOT TO DECLARE THE SERVICE PROVIDED BY THE CARMICHAEL RAIL NETWORK

Queensland Competition Authority Act 1997, sections 84(1)(c) and 85(1)(b)

1 Background

1.1 Request for declaration

1.1.1 On 6 September 2021 the Queensland Competition Authority (**QCA**) received a request from Mr Michael Swifte seeking a recommendation that the service provided by the Carmichael Rail Network (**CRN**) be declared for access under Part 5 of the *Queensland Competition Authority Act 1997 (QCA Act)*.

1.1.2 In this statement of reasons, the service provided by the CRN will be referred to as the **CRN service** and the facility used to provide the service will be referred to as **CRN**.

1.2 QCA Recommendation

1.2.1 Under section 80 of the QCA Act, the QCA:

- (a) must recommend that a service be declared by the Minister if the QCA is satisfied about all of the access criteria for the service (under section 80(1));
- (b) must recommend that a service not be declared by the Minister if the QCA is not satisfied about all of the access criteria for the service (under section 80(2)); or
- (c) may recommend that a service not be declared by the Minister if the QCA considers the request for declaration was not made in good faith or is frivolous (under section 80(3)).

1.2.2 On 17 December 2021 the QCA provided me, as the Minister administering the QCA Act, with its recommendation in relation to the CRN service (**QCA Recommendation**).

1.2.3 In the QCA Recommendation, the QCA stated that it considers that Mr Swifte's request was not made in good faith within the meaning of section 80(3) of the QCA Act, and recommended that the CRN service not be declared.¹

1.2.4 Prior to making the QCA Recommendation, the QCA advised **Adani**² of Mr Swifte's request and consulted both Mr Swifte³ and Adani⁴ regarding the request, including whether Mr Swifte's request was not made in good faith or was frivolous.

1.2.5 The QCA did not conduct public consultation in relation to the request for declaration of the CRN and did not invite submissions from any other stakeholders.

1.3 Role of the Minister

1.3.1 Under section 84(1) of the QCA Act I am required, after receiving the QCA Recommendation, to do one of the following:

- (a) declare the service;
- (b) declare part of the service, that is itself a service; or
- (c) decide not to declare the service.

1.3.2 Under section 86 of the QCA Act I must:

¹ QCA Recommendation, 17 December 2021, page 1.

² Submissions were made to the QCA by Mr Lucas Dow of "Adani Australia" on "Adani" and Carmichael Rail Network Pty Ltd letterhead. For the purposes of this statement of reasons, all relevant Adani Group entities are referred to collectively as "Adani".

³ References to submissions made by Mr Swifte are identified as "Michael Swifte" with the date of the submission and page number.

⁴ References to submissions made by Adani are identified as "Adani" with the date of the submission and page number.

- (a) declare the CRN service if I am satisfied about all of the access criteria in section 76(2) of the QCA Act (**Access Criteria**) for the service (under section 86(1));
- (b) decide not to declare the CRN service if I am not satisfied about all of the Access Criteria for the service (under 86(2)).

1.3.3 The Access Criteria consist of four separate criteria set out in section 76(2)(a)-(d) of the QCA Act, which are referred to as Criterion A, B, C and D in this statement of reasons.

1.3.4 I may declare part of the CRN service if I am satisfied about all of the Access Criteria for the part of the service (under section 86(3)).

1.3.5 If I declare the CRN service, or part of the service, I must decide the expiry date of the declaration under section 84(4) of the QCA Act.

2 Decision

2.1.1 For the reasons set out below, I am not satisfied about all of the Access Criteria for the CRN service. Accordingly, I have decided not to declare the CRN service.

2.1.1 For the purposes of making this decision, I have been provided with:

- (a) the QCA Recommendation;
- (b) briefing papers from Treasury which summarise issues, contentions and submissions made by Mr Swifte and Adani; and
- (c) access to all the submissions made by Mr Swifte and Adani.

2.1.2 In this instance, the QCA Recommendation is that the service not be declared on the basis that it considers that Mr Swifte's application was not made in good faith under section 80(3) of the QCA Act. However, I am unable to decide not to declare the CRN service on that basis. I must decide whether or not to declare the CRN service under section 86 of the QCA Act. Accordingly, I have decided to not give the QCA Recommendation any weight in making this decision and have considered whether or not the Access Criteria are met based on the evidence before me.

3 Reasons

3.1.1 The reasons for my decision are set out below.

4 Criterion B – Meet total foreseeable demand at least cost

4.1 Overview

4.1.1 Criterion B (section 76(2)(b) of the QCA Act) requires that I consider whether the facility for the service could meet the total foreseeable demand in the market—

- (a) over the period for which the service would be declared; and
- (b) at the least cost compared to any 2 or more facilities (which could include the facility for the service).

4.1.2 Under section 76(3) of the QCA Act, if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, I may have regard to the facility as if it had that expanded capacity. Section 76(4) of the QCA Act provides that the cost referred to in paragraph 4.1.1(b) above includes all costs associated with having multiple users of the facility for the service, including costs that would be incurred if the service were declared.

4.2 Is the facility capable of declaration at this time?

- 4.2.1 The submissions made by Adani raise an initial question of whether the relevant facility is capable of being considered for declaration under the QCA Act at its current state of development, if it is accepted that the relevant facility is the CRN.
- 4.2.2 Adani submitted that as the CRN remains under construction and has not been commissioned (and is therefore not yet operational), it is not a facility that is sufficiently developed to be capable of supplying a service of the kind contemplated for declaration under the QCA Act.⁵
- 4.2.3 Mr Swifte, in response, referred to the definition of service in section 72(1) of the QCA Act, which specifically includes “a service provided, or to be provided, by means of a facility” (emphasis supplied). Mr Swifte submitted that a declaration application in relation to an anticipated facility provides the QCA with ample time to investigate to help deliver robust regulation to support competition.⁶
- 4.2.4 Advice provided to Adani by Mr Shane Doyle QC supports this line of reasoning stating that:
- [t]he Act does not preclude a request being made in respect of a facility yet to enter into service... section 72 refers to a service provided or to be provided by means of a facility. While this does not expressly refer to a future facility (but rather refers to a future service to be provided by a facility) the request for recommendation is one made with respect to a service and thus, in my view the [QCA] Act would allow for a request to be made in relation to a service not yet provided once a facility is fully developed.⁷*
- 4.2.5 I accept the submissions made by Mr Swifte and in Mr Doyle’s advice that the QCA Act permits declaration of a service that is anticipated or a future service or a service associated with an anticipated or future facility. For this reason, I do not accept Adani’s submission that the application for declaration cannot be assessed in relation to the CRN service/facility as it is not sufficiently developed.

4.3 Standing to make application

- 4.3.1 Adani’s submissions could be interpreted to suggest that, as Mr Swifte is not a coal producer or potential user of the service, he does not have standing to apply for declaration of the service.⁸
- 4.3.2 As stated in Mr Doyle’s advice,⁹ the QCA Act imposes no qualification requirement on the maker of a request for application, which I accept. For this reason, I do not accept the underlying implication of Adani’s submissions that an applicant for declaration of the service must be a potential user of the service or a dependent service.

4.4 Definitions of service, facility and market

- 4.4.1 I did not consider it necessary to form views on Mr Swifte’s and Adani’s submissions in relation to the definitions of service, facility or market as I consider that, even if these matters are capable of being defined, there is insufficient evidence for Criterion B to be satisfied, for the reasons set out in sections 4.5 and 4.6 below.

4.5 Meeting total foreseeable demand

- 4.5.1 I consider that there is insufficient evidence to estimate total foreseeable demand in the relevant market over any period, regardless of how the relevant market, relevant service and facility are defined.
- 4.5.2 I consider that in order to assess total foreseeable demand in a relevant market it is necessary to identify:

⁵ Adani, 15 September 2021, page 1.

⁶ Michael Swifte, 4 October 2021, pages 2-3.

⁷ Adani, Mr Doyle’s Advice, 8 October 2021, para 35, page 8.

⁸ Adani, 5 October 2021, pages 4-5.

⁹ Adani, Mr Doyle’s Advice, 8 October 2021, para 19, page 5.

- (a) the customers in that market;
- (b) a reliable indication of their foreseeable demand; and
- (c) the period over which their demand can be foreseen.

4.5.3 Mr Swifte's submissions did not:

- (a) identify any potential users or customers for the facility other than a general statement made about proposed coal mines in the Galilee Basin;¹⁰
- (b) provide any estimate about the demand for the facility other than a general statement that demand "will be high";¹¹ and
- (c) identify the period for assessing demand but rather referred to the period as the "foreseeable future".¹²

4.5.4 For these reasons, I accept Adani's submissions¹³ that Mr Swifte has not identified the likely future demand in the market for the service (however defined).

4.5.5 There is no further information in the submissions that remedies this deficiency.

4.5.6 Without evidence in relation to these matters, I consider it is not possible to assess the foreseeable demand in the relevant market over any period, regardless of how the relevant market is defined.

4.5.7 Having accepted Adani's submission that no likely future demand has been identified, it is not possible to assess whether the facility can meet foreseeable demand in the market (regardless of how facility and market are described). For this reason, I do not consider it necessary to assess the capacity of the facility or give any weight to Adani's submissions in relation to whether the capacity of the facility can be assessed at this time¹⁴ in reaching the view that it is not possible to assess whether the facility can meet foreseeable demand.

4.6 At least cost compared to two or more facilities

4.6.1 I consider that there is insufficient evidence to establish that the relevant facility could meet foreseeable demand in the relevant market at least cost.

4.6.2 I consider that an assessment of whether the facility can meet total foreseeable demand in the market at least cost requires information in order to enable a comparison between:

- (a) the cost of the relevant facility meeting total foreseeable demand in the market for the service (including costs associated with having multiple users of the facility for the service); and
- (b) the cost of any two or more facilities (which could include the relevant facility) meeting total foreseeable demand in the market for the service.¹⁵

4.6.3 While Mr Swifte has submitted that the facility will meet demand at a lower cost given alternative routes have been rejected as prohibitively expensive,¹⁶ he has not provided any information or evidence to assess that claim or made any submissions in relation to any of the other matters in paragraph 4.6.2.

¹⁰ Michael Swifte, 6 September 2021, page 2.

¹¹ Michael Swifte, 6 September 2021, page 2.

¹² Michael Swifte, 6 September 2021, page 2.

¹³ Adani, 5 October 2021, page 6.

¹⁴ Adani, 5 October 2021, pages 1 and 8.

¹⁵ QCA "Final recommendations, Declaration Reviews: Aurizon Network, Queensland Rail and DBCT", March 2020, sections 2.3.8-2.3.9.

¹⁶ Michael Swifte, 6 September 2021, page 2.

4.6.4 Adani has not provided any of this information and has stated that it is not available at this time.¹⁷ In the absence of this information, I consider that it is not possible to assess whether the facility could meet foreseeable demand in the market at least cost compared to two or more other facilities.

4.7 **Conclusion – Criterion B**

4.7.1 I consider that even if definitions of relevant service, relevant facility and relevant market were identified, it is not possible for me to consider that Criterion B is satisfied as there is insufficient evidence available to determine:

- (a) total foreseeable demand in the market; and
- (b) whether the facility could meet total foreseeable demand in the market over any period at least cost compared to any more facilities.

4.7.2 I therefore find that Criterion B is not satisfied.

5 **Criterion A – promote a material increase in competition**

5.1 **Overview**

5.1.1 Criterion A (section 76(2)(a) of the QCA Act) provides that one of the criteria about which I must be satisfied in order to declare the service is that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia) other than the market for the service (referred to the dependent market).

5.2 **Dependent markets**

5.2.1 When asked by the QCA to specify a relevant dependent market or markets, Mr Swifte initially submitted that:

- (a) the Port of Abbot Point is dependent on supply via rail. Its ownership is tied to Adani; and
- (b) this raises concerns that Adani is building monopoly infrastructure.¹⁸

5.2.2 However, Mr Swifte also made further submissions in relation to Criterion A that could be interpreted to submit that the market for above-rail haulage services on the CRN is a dependent market.¹⁹

5.2.3 In relation to the dimensions of that market, Mr Swifte submitted that “existing market operators of above rail services like Pacific National and Aurizon have chosen not to/have not been offered the opportunity to tender as haulage providers”.²⁰ Mr Swifte submitted that Bowen Rail Company Pty Ltd (**BRC**) was an Adani-owned entity providing rail freight services on the CRN.²¹ Adani submitted (in a different context) that BRC was the above-rail haulage service provider on the CRN.²²

5.2.4 Adani’s submissions in response were that:

- (a) Mr Swifte’s application does not provide the QCA with sufficient information to determine any other markets that may be impacted by the terms of access to the CRN;²³ and
- (b) no attempt is made by Mr Swifte to define any dependent markets.²⁴

¹⁷ Adani, 5 October 2021, page 1.

¹⁸ Michael Swifte, 6 September 2021, page 2.

¹⁹ Michael Swifte, 4 October 2021, page 2.

²⁰ Michael Swifte, 4 October 2021, page 2.

²¹ Michael Swifte, 6 September 2021, page 1.

²² Adani, 5 October 2021, page 7.

²³ Adani, 5 October 2021, pages 5-6.

²⁴ Adani, 5 October 2021, page 8.

- 5.2.5 I consider that if a generous interpretation of Mr Swifte's submissions as to the dependent markets were accepted, the dependent markets would be the market for port services at the Port of Abbot Point²⁵ and above-rail haulage services on the CRN.²⁶ Adani did not accept that Mr Swifte had provided sufficient information to identify these markets as relevant dependent markets.²⁷
- 5.2.6 As in relation to relevant service, relevant facility and relevant market, I consider that it is not necessary to determine whether these relevant dependent markets have been identified and whether these dependent markets are separate from the market for the relevant service, as even if these matters were accepted, Criterion A cannot be satisfied for the reasons set out in sections 5.3 and 5.4 below.
- 5.3 Promote a material increase in competition in the market for port services at the Port of Abbot Point**
- 5.3.1 If it were accepted that port services at the Port of Abbot Point is a dependent market, I accept, as submitted by Adani,²⁸ that there is insufficient information to form a reliable assessment of whether declaration would promote a material increase in competition in that market in order to satisfy Criterion A.
- 5.3.2 No submissions have been made about the state of competition in the market for port services provided at the Port of Abbot Point in a future either with or without declaration beyond Mr Swifte's statement that declaration "would compel Abbot Point port operators to satisfy the requirement to provide infrastructure access and services to its competitors".²⁹
- 5.3.3 While not abundantly clear, one possible interpretation of Mr Swifte's submission is that declaration of the CRN service (however described) would compel or require port operators at the Port of Abbot Point to provide access to port services at the Port of Abbot Point. I accept Adani's submission³⁰ that the application for declaration in relation to the CRN service has no relevance to port operators but only to the extent that declaration of the CRN service (however described) would not compel or require port operators to provide access to port services.
- 5.3.4 An alternative interpretation of Mr Swifte's submission on port operators is that declaration of the CRN service would improve competition in the market for port services at the Port of Abbot Point. I consider that this submission alone, without supporting information that allows an assessment of the future state of competition in that market with and without declaration, cannot be accepted as a basis for forming a view that declaration would result in access or increased access to port services at the Port of Abbot Point following declaration. For this reason, I accept Adani's submission that Mr Swifte's submission does not provide sufficient information to form a reliable view of the competitive and commercial environment that will exist in the future without declaration of the CRN service.³¹
- 5.4 Promote a material increase in competition in the above-rail haulage services market**
- 5.4.1 If it were accepted that above-rail haulage services on the CRN is a dependent market, I would also accept Adani's submission³² that there is insufficient information to form a reliable assessment of whether declaration would promote a material increase in competition in that market in order to satisfy Criterion A.

²⁵ Michael Swifte, 6 September 2021, page 2.

²⁶ Michael Swifte, 4 October 2021, page 2.

²⁷ Adani, 5 October 2021, pages 5-6 and page 8.

²⁸ Adani, 5 October 2021, pages 5-6.

²⁹ Michael Swifte, 6 September 2021, page 3.

³⁰ Adani, 5 October 2021, page 8.

³¹ Adani, 5 October 2021, page 5.

³² Adani, 5 October 2021, pages 5-6.

- 5.4.2 While Mr Swifte's submissions have identified that at present there is only one service provider for above-rail haulage services,³³ I accept Adani's submission that further information about the likely demand for the above-rail haulage service is required to assess the future state of competition in the dependent market with or without declaration of the CRN service.³⁴ This is because if it cannot be established that there is demand for the above-rail haulage service, it is not possible to establish that the future state of competition in the market for the above-rail haulage service will be affected by declaration. Without demand for the service, there can be no competition in the market for the service.
- 5.4.3 Having accepted that there is insufficient information to assess the impact of declaration on the dependent market, I consider that it is not necessary to give any weight to Adani's submissions regarding its intention to operate the CRN as multi-user common infrastructure or its intention to implement an access framework.³⁵
- 5.4.4 Having accepted that there is insufficient information to consider the future with or without declaration in either of the identified dependent markets, I consider that it is not necessary to assess:
- (a) whether Adani has the ability or incentive to exert market power in the dependent markets; and
 - (b) whether there is likely to be any third-party users in the dependent markets either with or without declaration.

5.5 Conclusion – Criterion A

- 5.5.1 I consider that, regardless of how the relevant service and market are defined, insufficient information has been provided to be satisfied that access (or increased access) to the relevant service, on reasonable terms and conditions, as a result of a declaration of the relevant service would promote a material increase in competition in any dependent market.
- 5.5.2 I therefore find that Criterion A is not satisfied.

6 Access Criteria C and D

- 6.1.1 Section 86(2) of the QCA Act provides that I must decide not to declare a service if I am not satisfied about all of the Access Criteria for the service. As stated in sections 4.7 and 5.5 above, I consider that there is insufficient evidence for me to find that Access Criteria A and B are satisfied, and therefore applying section 86(2) of the QCA Act, I must decide not to declare the service.
- 6.1.2 I therefore consider that it is not necessary for me to assess whether Access Criteria C and D are satisfied.

7 Human rights considerations

7.1 Overview

- 7.1.1 Section 58(1) of the *Human Rights Act 2019 (HR Act)* makes it unlawful for a public entity:
- (a) to act or make a decision in a way that is not compatible with human rights; or
 - (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.
- 7.1.2 Section 58(5) of the HR Act provides that, for section 58(1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to:
- (a) identifying the human rights that may be affected by the decision; and

³³ Michael Swifte, 4 October 2021, page 2

³⁴ Adani, 5 October 2021, pages 5-6.

³⁵ Adani, 5 October 2021, pages 5-6.

(b) considering whether the decision would be compatible with human rights.

7.1.3 I accept that the threshold for engaging a human right is low, and that for this purpose human rights must be construed in the broadest possible way.

7.1.4 In accordance with section 58(1) of the HR Act, I have considered whether the decision not to declare the CRN service would be compatible with human rights.

7.1.5 The human rights which I consider may be affected by the decision not to declare the CRN service are:

(a) the right to participate in the conduct of public affairs (HR Act section 23);

(b) the right to life (HR Act section 16);

(c) the right to equality and non-discrimination (HR Act section 15) (on the basis of intergenerational equity); and

(d) the right of children to protection in their best interests (HR Act section 26(2)).

7.1.6 I refer to the human right in 7.1.5(a) above as “taking part in public affairs”. I describe the human rights in 7.1.5(b), 7.1.5(c) and 7.1.5(d) above as “rights potentially related to climate change”.

7.2 Taking part in public life

7.2.1 The decision not to declare the CRN service may limit the human right to take part in public affairs (section 23 of the HR Act).

7.2.2 The concept of “public affairs” is a broad one and may include all aspects of public administration. Using a broad meaning, in this instance the decision not to declare the CRN may have limited the human right to take part in public affairs because no public consultation was conducted allowing individuals other than Mr Swifte to make submissions in relation to the decision.

7.2.3 I consider that any limitation would be justified under section 13 of the HR Act (and therefore compatible with that right under section 8(b) of the HR Act), for these reasons:

(a) the QCA Act does not require either the QCA or me, as the Treasurer, to undertake public consultation in relation to the decision;

(b) undertaking public consultation is not consistent with the timeframe allowed to me under the QCA Act to make the decision (90 days) and meaningful public consultation would not be able to be undertaken in that timeframe; and

(c) the decision not to declare does not prohibit other individuals from seeking declaration of the CRN under the QCA Act in the future.

7.3 Human rights potentially relating to climate change

7.3.1 Decisions which facilitate emissions contributing to climate change may conceivably limit a range of human rights, including the right to life, the right to equality and non-discrimination (on the basis of intergenerational equity) and the right of children to protection in their best interests.

7.3.2 Against that background, I have considered whether a decision under section 84 of the QCA Act not to declare the CRN service would have the consequence of materially increasing the level of coal production in Queensland over the period of the declaration. Such an increase may lead to an increase in emissions, potentially affecting climate change.

7.3.3 There is no evidence in the submissions whether the decision not to declare (or declare) the CRN service would have a material effect on the volume of coal exported and consumed overseas. This will primarily depend on market factors such as demand and price rather than third party access arrangements to the CRN.

- 7.3.4 I therefore consider that the decision not to declare the CRN would not limit any of the human rights potentially relating to climate change and would therefore be compatible with those rights under section 8(a) of the HR Act.