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Letter No: 481906

12th March 2003

Mr. E.J. Hall,
Chief Executive,
Queensland Competition Authority,
G.P.O. Box 2257,
BRISBANE. Q.4001

Email: ralph.donnet@qca.org.au

ATTENTION: Ralph Donnet

Dear Mr. Hall,

Re: Burdekin Assessment – Final Consultation on QCA BRIA Draft Report

Thank you for your letter of 25th February 2003 inviting further comment from stakeholders on views formed in response to stakeholder comments on the Authority's draft report. It is acknowledged the Authority's views are outlined in its responses to stakeholder's comments. In responding, the writer, on behalf of the Council, has reviewed the Position Papers prepared on key issues and the QCA's comments thereon.

Background

The Burdekin Shire Council as the representative voice of the Burdekin community, has historically supported moves by BRIA Irrigators for fair and equitable irrigation charges in the Burdekin River Irrigation Area (BRIA).

The Mayor Cr. Woods and the writer were part of a community group which made representations to Cabinet Ministers on the occasion of community consultations on Sunday, 15th July 2001 in advance of the Community Cabinet Meeting in Ayr on Monday, 16th July 2001 hosted by the Burdekin Shire Council.

In Council's submission of 15th March 2002, your Authority was advised that Council had been fully briefed on all aspects of the Burdekin Irrigators case, including research carried out on behalf of the Irrigators comparing this district's charges with other areas. At the time, Council was satisfied that given National Competition Principles were followed in determining fairness and equity in developing charging policies for irrigation areas in Queensland by SunWater, clearly on the figures provided to Council, Burdekin Irrigators were paying above full cost recovery for irrigation water supplies.

Council supported the Burdekin Irrigators submission and did not wish to compromise any facts and circumstances relied on by the Irrigators in supporting a review of their water charges.

Current Position of Burdekin Shire Council

Prior to and following the release of your report on 25th February 2003, Council has maintained contact with members of the Burdekin River Irrigation Area Committee to ascertain their satisfaction or otherwise with the report.

The Council shares the concerns of the Committee in being disappointed with the extremely short timeframe allowed for stakeholder comment in the knowledge the QCA required four months to respond to the submissions. This should not be interpreted as a criticism of the QCA as it is acknowledged your Authority was not provided with any additional time by Government to produce its final report. For this reason, a detailed analysis of the entire report was not possible and the writer has picked up on some issues of considerable importance to Burdekin Irrigators and also the Burdekin community.

The Council, prior to your deadline of Wednesday, 12th March 2003, received a copy of the Burdekin River Irrigation Area Committee submission.

The Burdekin Shire Council, as the representative voice of the Burdekin community, fully supports the response from the Burdekin River Irrigation Area Committee to the Queensland Competition Authority's Draft Report.

Council wishes to provide further comments on the Draft Position Paper by either expanding further on responses by the Burdekin River Irrigation Area Committee or providing comments on the QCA's commentary on stakeholder comments.

Draft Position Paper No. 1 – Capital Contribution Principles and Commonwealth Funding to the Burdekin Scheme

The Draft Position Paper No. 1 (clause 3 – Commonwealth Funding) provides a comprehensive history of the dealings between the Commonwealth Government and State Governments for funding the Burdekin Falls Dam and associated infrastructure. It is acknowledged that the QCA has provided its analysis and interpretation on the history and letters to the Authority by the Honourable Warren Truss MP, Minister for Agriculture, Fisheries and Forestry, of 21st November 2002 and 3rd January 2003.

The Burdekin Shire Council shares the concern of the Burdekin River Irrigation Area Committee in relation to the QCA's interpretation of what constitutes a capital contribution.

Clearly, the Council places a different interpretation on the QCA's expectations on what constitutes water affordability to users, even though this may not have been specifically documented in pre COAG agreement times.

To be fair, in the final paragraph (page 5 of clause 3 – Commonwealth Funding – Draft Position Paper No. 1) the Queensland Competition Authority acknowledges that Burdekin users do not have the capacity to pay a rate of return on any Government funding, including the Commonwealth funding.

Chapter 4 – Other BRIAC Comments, are outlined in the Draft Report with detailed commentaries on the submission provided by the QCA.

The QCA (opening paragraph page 7 – chapter 4 – Other BRIAC Comments) comments that it is a matter of Government policy how it funds various infrastructure projects and whether it seeks to recover its costs from users of the infrastructure or from taxpayers generally.

Of particular interest to Local Government in Queensland is the statement, QUOTE – *"In this regard, full cost recovery (including a rate of return) is sought from the users of a variety of Government infrastructure, including coal rail lines, electricity generation, distribution and transmission systems,*

some port infrastructure and some roads and bridges (toll roads and bridges). Users also pay fully for a variety of Government recurrent services." – UNQUOTE.

The State Government recently made significant changes to *The Local Government Act 1993* with *The Local Government Legislation Amendment Bill 2002* passed by Parliament without amendment on 25th February 2003. It is expected the Bill will be assented to by Friday, 7th March 2003. The Legislation has been promoted as providing Local Governments with appropriate flexibility in revenue raising, improving the accountability of Local Governments in revenue raising areas. One of the amendments provides Local Government with an ability to make commercial charges separated from the power to fix regulatory fees e.g. the issuing of a permit. The Legislation provides a new head of power for the fixing of regulatory fees by resolution or by Local Law. The policy intent is that regulatory fees should recover no more than the cost of administering a regulatory regime. These amendments replace the provisions relating to general charges.

The point the Council wishes to make is that QCA in its final report should seek answers on why Local Government is able to introduce regulatory fees, but only to cover the cost of administering a regulatory regime, when the same principles do not apply to the State Government or SunWater in a management and administration of water pricing policies.

The Burdekin Shire Council calls on the QCA in preparing its final report to call on the State Government to adopt the same principles in developing a fair and equitable water pricing policy for irrigators as will apply to Local Government under new Local Government Legislation which provides that if Local Governments introduce commercial charges, they may do so, but that regulatory fees should recover no more than the cost of administering a regulatory regime.

The Burdekin Shire Council does not have a problem with the State Government's ability to recover fair and equitable irrigation charges in the Burdekin River Irrigation Area (BRIA). At a time when the QCA acknowledges in the draft report that, QUOTE – *"In the current circumstances, Burdekin users do not have the capacity to pay a rate of return on any Government funding, including the Commonwealth funding"* – UNQUOTE, it is clear that the QCA has a responsibility in its final report to acknowledge that the current charging regime is not cost reflective and clearly well above NCP principles for full cost recovery.

The Council agrees that BRIA farmers are entitled to a full statement of reasons if their comprehensively presented arguments are to be rejected, as requested in their submission of 25th November 2002.

Statutory Declarations by individuals closely involved with the establishment of the BRIA Scheme

The Burdekin Shire Council shares the concerns expressed by the Burdekin River Irrigation Area Committee at the QCA's dismissal of statutory declarations by individuals closely involved with the establishment of the BRIA Scheme and charged with communicating the State Government's financial targets by saying the QCA is unable to verify their content.

In relation to the statutory declarations by Ross Noel Chapman, Lindsay George Russell Hall, Leslie John Searle (former Councillor of Burdekin Shire), James Timothy Smith (former Regional Engineer for the Department of Natural Resources), and John Lawson Wassmuth, the Burdekin Shire Council can vouch for the accuracy of the declarations made by persons with full knowledge of the Burdekin Dam Scheme and the Burdekin River Irrigation Project.

The Department of Natural Resources and its agents prided itself in the comprehensive nature of documentation provided to potential purchasers of land in the Burdekin River Irrigation Area for all 22 Auctions conducted in the period from Friday, 25th March 1988 to 25th June 1998.

From the sale of 186 prime agricultural parcels of land with an area of 13,433.4 hectares in the Burdekin River Irrigation Area, it is accepted that the State Government should expect a fair rate of return on the land which was sold over the ten-year period. For each Auction the State Government and its agencies were open and transparent in the provision of documentation provided to potential purchasers for each of the 22 Auctions. Buyers at Auctions bid with "their eyes wide open" in the knowledge that the State Government had carefully considered the market in terms of upset prices for each parcel of land sold. By any objective assessment with the aggregate of upset prices totalling $41,818,480 and realized prices of $67,030,220 - a return above upset prices to the Government of $25,211,740 (source – letter dated 5th November 2001 from SunWater with comprehensive details of farms sold at public auctions within the Burdekin) that the State Government and Queensland taxpayers would have been pleased with the return. Again, based on SunWater's figures, the return to Government at land sales in respect of total water allocations for these 186 farms was $23,016,100.

The point of this detailed explanation is to provide the QCA with accurate data from the Burdekin Shire Council which was the constructing authority for the Department of Natural Resources for infrastructure for the 186 farm developments. Also during that ten-year construction period, the Council, its Senior Engineers, and the writer, worked closely with Mr. James Timothy Smith, the Regional Engineer for the Department of Natural Resources. His statements are an accurate reflection of his understanding of the financial arrangements between the Commonwealth and State Governments during the ten-year construction period.

Burdekin Shire Council recommends that the QCA review its attitude to the statutory declarations provided by key personnel involved in the Burdekin River Irrigation Project and the background information provided by the Burdekin Shire Council as constructing authority for the Department of Natural Resources by disclosing in its final report the rate of return to the State Government for this major farm development in the Burdekin area as further evidence that the current pricing regime for BRIA areas is not fair and equitable and provides a return to the State Government well above NCP principles for full cost recovery.

Issue currently not covered in Draft Report – Supreme Court decision following Burdekin Shire Council's success in defending challenge by SunWater against Burdekin Shire Council's Revenue and Differential Rating Policies

The Council considers it is extremely important to provide the Queensland Competition Authority with background information on a recent judgement given by Justice Cullinane in the Supreme Court, Townsville on 18th December 2002, following a challenge by SunWater to Council's decisions on the fairness and equity on rates levied on SunWater's land.

The information contained hereunder is relevant as Council would be extremely concerned if SunWater or the State Government used the judgement to pass on increased water charges to Burdekin River Irrigators. Based on a document prepared by the Water Reform Unit which is attached (appendix A), Council is satisfied that in respect of the operation and maintenance of the Burdekin Irrigation Area, in the period from 1997/1998 to 2004/2005 that SunWater has factored in taxes, including land and rates, well in excess of the rates levied on SunWater properties for the 2000/2001, 2001/2002 and 2002/2003 financial years. In other words, the judgement will not in any way impact on SunWater's cost structures.

For the purpose of preparing the Authority's final report, I provide a brief summary/background on the Supreme Court judgement.

Summary/Background

SunWater is a non-exempt Government Owned Corporation (GOC) and therefore liable for the payment of Local Government rates on land it occupies under Section 957 of *The Local Government Act 1993*.

Legal advice obtained by the Local Government Association of Queensland to member Councils in October 2001 indicated that once valuations have been issued on former State land vested in SunWater, rates could be levied retrospectively from 1st October 2000. Councils were entitled to levy rates on a pro-rata basis from 1st October 2000 to 30th June 2001 and for a full year from 1st July 2001 to 30th June 2002 based on the rates made at their 2000/2001 and 2001/2002 budget meetings, under the authority of Section 1009 and 1028 of *The Local Government Act 1993.*

Prior to the Budget Meeting, Council adopted its Revenue Policy documenting Council's Differential Rating Policies and the basis/criteria for the introduction of seven (7) differential rating categories, including the new Category G – Commercial Water Business.

Council at its Budget Meeting held on Tuesday, 16th July 2002 resolved that the rate in the dollar for the unimproved capital value of all rateable land in Category G – Commercial Water Business, would be 46.289 cents in the dollar with a minimum general rate for this category of $15,000. Estimated rate collections for SunWater's rateable land for the 2002/2003 financial year was $350,000. In addition, Council rated the relevant lands for the period 1st October 2000 to 30th June 2001 in accordance with the 2000/2001 budget resolutions and for the period from 1st July 2001 to 30th June 2002 in accordance with the 2001/2002 budget resolutions.

In early September 2002, SunWater advised Council it would challenge Council's decision by way of Judicial Review proceedings in the Supreme Court unless Council reconsidered its decisions on the fairness and equity of rates levied on SunWater's lands. The day following receipt of the letter, Council received advice from SunWater's Solicitors that Supreme Court proceedings had been commenced. SunWater agreed to pay its rates within the discount period on the understanding that it would not prejudice SunWater's rights before the Court and that SunWater could claim interest against Council if SunWater's case was successful.

In summary, SunWater's substantive legal arguments were –

1. Council was not entitled to take the low valuations of the SunWater land, as compared to adjacent lands, into account as a factor justifying differential rating treatment - SunWater continually emphasised its view that that Council was influenced by its dissatisfaction with the State valuations of SunWater's land (which was true), and that this was a legally impermissible consideration ;

2. Land held by the North and South Burdekin Water Boards was used for "commercial water business" activities, which were said to be similar to those of Sunwater, so that Council had erred legally in excluding those lands from Category G;

3. The differential rate of 46.289 cents in the $ applicable to Category G was the highest rate made by the Council at its Budget Meeting, and was so much higher than the others that it could not be legally justified;

4. The minimum rate levy of $15,000 in respect of Category G land was excessive, at least in relation to smaller lots which had an unimproved value less than the level of the minimum rate;

5. Council's rating policy has led to an unfair result in terms of equitable sharing of the overall rate revenue burden.

More broadly, SunWater argued that the Court should not accept an interpretation of a local government's rating powers under the Local Government Act if the result would be to *"leave it to a local government to fix or assess what a particular individual ratepayer is to contribute"*. SunWater asserted that that Council had done just that *"under the guise of a differential general rate"*.

SunWater also claimed it had been singled out as a particular ratepayer on the basis of a perceived ability to pay (gross rates $350,000) rather than upon the basis of a particular burden on the Shire as a

whole, and that there had been arbitrary selection of a rate in respect of SunWater's land so as to raise that pre-determined gross sum.

Council presented a detailed submission identifying the criteria for arriving at the amount of $350,000 as representing a reasonable contribution to Council's service and infrastructure with one point being the indirect benefit to SunWater's business activities on the maintenance and upgrading of the road network which services and facilitates the business of SunWater's monopoly farm customers estimated at $394,000.

In a detailed judgement given by Justice Cullinane on 18th December 2002, he set aside the decision of the Burdekin Shire Council in so far as it adopted a minimum general rate of $15,000 for lands falling into Category G – Commercial Water Business and directed the Council to recalculate the general rates payable in respect of such lands the subject of a minimum general rate.

In all other respects, the application from SunWater was dismissed. The detailed judgement can be viewed on the internet by accessing www.courts.qld.gov.au/qjudgment/sc02_401.htm which is sited as SunWater vs Burdekin Shire Council [2002] QSC 433.

In summary, judgement was predominantly in the Burdekin Shire Council's favour with the key points being –

- The creation of Category G as a separate differential rating category for the SunWater Commercial Water Business lands (based upon land use, relative valuation and other general rating equity considerations) was upheld;

- The distinctions which Council had drawn between the Sunwater lands and the Water Board lands (to exclude the Water Boards from Category G) were upheld;

- The Council's decision to set a rate in the dollar of 46.289 cents was upheld;

- The Court overturned the Council's decision to set a minimum rate of $15,000 per lot on the grounds that, particularly for the lower valued lots, the relationship between the unimproved value and the minimum rates figure was unreasonable.

Overall, the outcome of the case confirmed that Burdekin Shire Council had acted correctly in respect of the development of its Revenue and Differential Rating Categories for SunWater lands not subject to the minimum rates. Importantly, it confirmed the very broad discretion which Councils have to determine the factors and circumstances which justify differential rating treatment for different classes of land, and the rate in the dollar for each category, and the very limited scope for a court to interfere with those decisions.

So long as the Council has acted in good faith for a genuine purpose of seeking to achieve an equitable outcome as between different classes of land, its decisions will almost certainly survive any legal challenge. Individual landowners may have a genuinely held (and perhaps not irrational) view that the Council's particular approach is "unfair", or that some other approach would be "better", but so long as the Council's only motivation has been to seek better rating equity, and so long as its decisions have some reasonably argued justification, (even though there may be equally rational arguments to support other approaches), the courts will not step in.

In respect of the Council's budget of $350,000 rate collections for SunWater lands for the 2002/2003 financial year, Council retained all but $33,586-55. The four lots, the subject of the minimum rate, were recalculated on the figure of 46.289 cents in the $ of valuation.

It is important to the Burdekin Irrigators, the Council and this community, that the Queensland Competition Authority and in turn SunWater and the State Government, are aware of the facts concerning the successful outcome of Council's defence of the action brought against it by SunWater in respect of its rating policies. There is no justification, under any circumstances, for SunWater to alter its charges for Burdekin Irrigators as a result of the successful Supreme Court judgement in the Burdekin Shire Council's favour.

Summary of Burdekin Shire Council's recommendations to be taken into account in preparing Final Report

1. **The Burdekin Shire Council, as the representative voice of the Burdekin community, fully supports the response from the Burdekin River Irrigation Area Committee to the Queensland Competition Authority's Draft Report.**

2. **The Burdekin Shire Council calls on the QCA in preparing its final report to call on the State Government to adopt the same principles in developing a fair and equitable water pricing policy for irrigators as will apply to Local Government under new Local Government Legislation which provides that if Local Governments introduce commercial charges, they may do so, but that regulatory fees should recover no more than the cost of administering a regulatory regime.**

3. **Burdekin Shire Council recommends that the QCA review its attitude to the statutory declarations provided by key personnel involved in the Burdekin River Irrigation Project and the background information provided by the Burdekin Shire Council as constructing authority for the Department of Natural Resources by disclosing in its final report the rate of return to the State Government for this major farm development in the Burdekin area as further evidence that the current pricing regime for BRIA areas is not fair and equitable and provides a return to the State Government well above NCP principles for full cost recovery.**

4. **It is important to the Burdekin Irrigators, the Council and this community, that the Queensland Competition Authority and in turn SunWater and the State Government, are aware of the facts concerning the successful outcome of Council's defence of the action brought against it by SunWater in respect of its rating policies. There is no justification, under any circumstances, for SunWater to alter its charges for Burdekin Irrigators as a result of the successful Supreme Court judgement in the Burdekin Shire Council's favour.**

Conclusion

The Burdekin Shire Council is pleased to have been provided with an opportunity to have further input into the issue of fairness and equity for water pricing in the BRIA area. The district is suffering from a severe downturn in the sugar industry.

The State Government needs to take into account the Queensland Competition Authority's position that Burdekin users do not have the capacity to pay a rate of return on any Government funding, including the Commonwealth funding. Whilst full cost recovery is appropriate in determining water pricing policies by the State Government, it is not appropriate (given the State Government's position on restrictions on Local Government in making regulatory fees) for SunWater or the State Government to have regulatory fees above the cost of administering a regulatory regime.

The Council waits in anticipation for the release of the final report which will hopefully provide for a fair and equitable water charging regime by SunWater for Burdekin Irrigators.

Yours faithfully,

G.J. Webb,
CHIEF EXECUTIVE OFFICER.

Enc.