Queensland Competition Authority

File ref: 2022203

20 June 2024

The Hon. Cameron Dick MP
Deputy Premier, Treasurer and
Minister for Trade and Investment
GPO Box 611
Brisbane Qld 4001

Dear Deputy Premier

Energy Queensland competitive neutrality complaint

On 22 February 2024, I notified you of the Queensland Competition Authority's (QCA) investigation of a complaint about an alleged failure by Energy Queensland Limited (Energy Queensland) and/or its subsidiaries to comply with the principle of competitive neutrality.

Under s. 10(f) of the *Queensland Competition Authority Act 1997* (QCA Act)[1], one of the QCA's functions is to 'receive, investigate and report on complaints about the alleged failures of government agencies to comply with the principle of competitive neutrality'. More specific powers are conferred by Part 4.

We are required to provide a written report to you about our investigation and its results (under s. 49(1)). Our report is set out below.

Complaint

The complaint of Persal & Co Power Pty Ltd (Persal) was that Energy Queensland and/or its subsidiaries, Ergon Energy Corporation Limited (Ergon Energy) and Yurika Pty Ltd (Yurika), have not complied with the principle of competitive neutrality as set out in s. 38 of the QCA Act (Principle) in conducting relevant business activities in the market for the construction of high voltage powerlines and related infrastructure in Queensland (Complaint). Specifically, Persal alleged that it has been adversely affected in that:

- it competes with Yurika in the construction of high voltage powerlines and related infrastructure
- Yurika is not complying with the Principle in competing for projects, as it uses (and does not properly account for the benefit of) resources received from its related entity, Ergon Energy (i.e. there is cost shifting).

[1] Unless otherwise stated, any reference to a section or Part herein is a reference to the QCA Act.

Investigation

We commenced our investigation of the Complaint on 7 March 2024 and, on 14 March, we issued a notice requesting information from Energy Queensland pursuant to s. 48.[2] The request related to specific information (and documents) relevant to the Complaint.

On 19 April 2024, we received correspondence from Minter Ellison, solicitors acting for Energy Queensland and its subsidiaries, within which it was essentially asserted that:

- The Principle (as reflected in s. 38) does not apply to Yurika. This is because, for the purposes of Part 4, Yurika is a government agency, but it does not carry on a significant business activity – as it is neither a government owned corporation (GOC), only a wholly-owned subsidiary of a GOC, nor has it been designated as a significant business activity in accordance with s. 39(1). We understand that these assertions would also apply to Ergon Energy.
- Even if the Principle were to apply to Yurika, the Complaint does not allege that Yurika enjoys a competitive advantage over its competitors or potential competitors *solely* because its activities are not subject to one or more of the matters listed at ss. 38(1)(a) to (c).
- The Complaint was made only against Energy Queensland.[3] Although Energy Queensland is a GOC, and thereby subject to Part 4, the Complaint does not meet the requirements for a valid competitive neutrality complaint under s. 41 in that it was inadequately particularised– for example, it does not allege that Energy Queensland enjoys a competitive advantage over competitors by reference to the criteria set out in s. 38.
- Save in relation to one matter, Energy Queensland did not accept that the questions raised within the QCA's information request of 14 March 2024 are within scope of the complaint pertaining to it. It therefore did not provide us with the information requested.

Results of investigation

Principle of competitive neutrality

Section 40 provides that a competitive neutrality complaint is:

> a complaint about the alleged failure of a government agency to comply with the [Principle].

Section 38(1) defines the scope of the Principle as:

> 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

[2] The information request was issued to Energy Queensland, but matters raised therein related to Energy Queensland as well as its subsidiaries.

[3] Although it was acknowledged that the Complaint also references matters pertaining to Energy Queensland's subsidiaries, Yurika and Ergon Energy.

> subject, including, for example, requirements about the protection of the environment and about planning and approval processes.

This definition of the Principle was adopted into the QCA Act in 2000, pursuant to s. 19 of the *Queensland Competition Authority Amendment Act 2000*. The *Explanatory Note* to the amending Act describes the policy objectives for the amendment, as follows:

> The amendments to s.38 provides clarification for the QCA as to what the Government's intentions are in relation to the application of the principle of competitive neutrality to government significant business activities.
>
> The QCA will be able to investigate a competitive neutrality complaint where allegedly a government agency enjoys an advantage over its competitors solely because it is not required to pay debt guarantee fees, or where it is not subject to tax equivalent regimes, or where it enjoys procedural and regulatory advantages.4

Having considered this matter, we are not satisfied that the matters by which the complainant is aggrieved fall within the scope of the Principle, as it is defined for the purposes of Part 4. The QCA's investigatory function is limited to consideration of competitive advantages accruing to government agencies related solely to taxation neutrality, debt neutrality and regulatory neutrality. By contrast, the matters set out in the Complaint appear to relate to concerns over benefits derived by Yurika associated with not having to achieve a commercial rate of return on assets and other aspects of pricing. We note that in certain other jurisdictions, the scope of competitive neutrality complaints is more broadly defined than under the QCA Act. For example, the Australian Government Competitive Neutrality Complaints Office—in enforcing the *Commonwealth Competitive Neutrality Policy Statement* (1996)— primarily focuses on competitive advantages enjoyed by government businesses that are widespread and relatively easy to observe and correct including taxation neutrality, debt neutrality, regulatory neutrality and commercial rate of return requirements. (See Australian Government Competitive Neutrality Complaints Office, Investigation no. 18 (2022), p. ix).

Jurisdiction

Energy Queensland has asserted that:

- The Principle does not apply to its subsidiaries—it accepts that each of its subsidiaries meet the definition of a 'government agency' for the purposes of s. 38, but not that they 'carry on' a 'significant business activity', as required pursuant to s. 39.
- While the Principle is applicable to Energy Queensland (as a GOC), the Complaint does not appear to meet the requirements for a valid competitive neutrality complaint (under s. 41), particularly as it does not allege that Energy Queensland enjoys a competitive advantage over competitors by reference to the criteria set out in s. 38.[5]

Because we have determined that the issues set out in the Complaint are not subject to the Principle, we consider it unnecessary to substantively address Energy Queensland's comments regarding our jurisdiction to investigate this matter. However, we consider that if Energy Queensland's interpretation of application of the Principle is accepted, and Part 4 is deemed not to apply to the activities of a GOC's subsidiaries, it would potentially limit the scope of the Principle to

[4] Explanatory Note, p.5.
[5] Energy Queensland specifically states that while Yurika competes for work related to construction of high voltage powerlines and related infrastructure, Energy Queensland does not. By implication, Energy Queensland is asserting that it cannot be said to be in breach of the Principle in this instance.

GOCs in a manner that may not fully align with other competitive neutrality objectives and outcomes.

To the extent it is considered that the jurisdictional matters raised by Energy Queensland give rise to uncertainty over application of the Part 4 complaints regime to GOCs and their subsidiaries, consideration should be given to either:

- appropriate amendment to the QCA Act—possibly to the definition for 'government agency' and/or to clarify the scope of 'government owned corporation' in Schedule 2
- the designation of all GOC subsidiaries as 'significant business activities' pursuant to s. 39(1).

Further information on our views in this regard can be provided to your department, if required.

Other regulatory processes

Although we consider that there is no breach of the Principle in this instance, matters the subject of the Complaint may be relevant to other regulatory processes (should the complainant wish to pursue them), namely:

- Energy Queensland and its relevant subsidiaries are required to comply with the provisions of the *Electricity Distribution Ring-fencing Guideline* (Guideline) issued by the Australian Energy Regulator (AER) under the National Electricity Rules.[6] The Guideline imposes obligations on Distribution Network Service Providers (DNSPs) targeted at, among other things, cross-subsidisation with provisions that aim to prevent a DNSP from providing other services that could be cross-subsidised by its distribution services. The AER may, at any time, require a DNSP to provide a written response to a complaint or concern the AER raises with the DNSP about its compliance with the Guideline.
- The Australian Competition and Consumer Commission may investigate complaints regarding alleged misuse of market power (by a corporation that has a substantial degree of power in a market) pursuant to s. 46 of the *Competition and Consumer Act 2010* (Cth).

Further steps

Section 50 requires you to provide a response to this report. After your response is received, the report will be published on our website (pursuant to s. 51).

Please let me know if you have any queries or would like to discuss this matter. Alternatively, your staff are invited to contact our CEO, Charles Millsteed (charles.millsteed@qca.org.au ; 07 3222 0543).

Yours sincerely

[redacted]

Professor Flavio Menezes
Chair

cc: Dennis Molloy, Deputy Under Treasurer, Economics and Fiscal

[6] Ring-fencing guideline (electricity distribution) | Australian Energy Regulator (AER)