



Competitive Neutrality Complaint

**Complaint by Brisbane Hi-Load Escort
Services Pty Ltd Against ENERGEX**

Final Report

March 2001

FOREWORD

The Queensland Competition Authority decided on 22 May 2000 to investigate a complaint by Brisbane Hi-Load Escort Services Pty Ltd alleging a breach of the principle of competitive neutrality by ENERGEX. The relevant unit of ENERGEX against which the complaint was directed is the Network Services Division (NSD).

While the definition of competitive neutrality was changed following amendments to the *Queensland Competition Authority Act 1997 (QCA Act 1997)* which were effective from 26 May 2000, the Authority was required to investigate the complaint under the provisions of the *QCA Act 1997* which applied at the time the Authority decided to investigate the complaint.

The Authority has investigated the complaint and concluded that the regulatory arrangements related to scoping and safety equipment and procedures under SWP 39 allowed ENERGEX to enjoy a competitive advantage over private service providers in the market solely because of the government ownership or control of ENERGEX. Accordingly, these arrangements breached the principle of competitive neutrality. There were no reasons why the breach of competitive neutrality might have been warranted.

To remedy the breach, the Authority recommends that:

- ENERGEX put in place effective, publicly transparent and competitively neutral risk assessment procedures to determine whether an electrical escort service provider, being either a private sector entity or NSD, needs to undertake scopes before the transport of a high load; and
- public and employee safety standards for high load transport, and sanctions and remedies for non-compliance with those standards, be set and enforced by an agency which is independent of ENERGEX.

ENERGEX has advised that it has recognised a number of the issues raised in relation to SWP 39 and has recently:

- undertaken to clarify scoping requirements for all service providers so that NSD does not enjoy any additional discretion or authority compared with a private service provider; and
- implemented an internal risk assessment procedure to provide for the proper assessment of the level of scoping required for a high-load transport escort (although the Authority notes that this only applies to NSD and not private service providers).

It was noted that ENERGEX has received certification by the National Association of Testing Authorities of its safety systems to Australian Standard AS4801-2000 “Occupational health and safety management systems – Specification with guidance for use” safety accreditation. The standard provides information about occupational health and safety risks and external certification, allowing ENERGEX the discretion to develop its own policies, outcomes and systems within the framework provided. The standard does not apply to public safety and implementation of requirements of the standard does not ensure compliance.

The Authority noted submissions by ENERGEX that the requirements of SWP 39 in relation to scoping and safety requirements had not been set with the intent of securing a competitive advantage for ENERGEX, nor had ENERGEX sought to deliberately exploit the arrangements. The issue of intent is not a matter which the Authority is required to establish in investigating matters of competitive neutrality.

The Authority also noted that recent changes to Ministerial responsibilities resulted in the transfer of the Electrical Safety Office from the former Department of Mines and Energy to the Division of Workplace Health and Safety of the Department of Industrial Relations.

In the interests of completeness, the Authority also considered the complaint as if it had been made after the date of the change to the definition of competitive neutrality. This review came to the same conclusion - that the regulatory arrangements related to scoping and safety equipment and procedures under SWP 39 allowed ENERGEX to enjoy a competitive advantage over private service providers in the market because:

- while SWP 39 is ostensibly a requirement of ENERGEX, by virtue of its origins in the safety provisions of the *Electricity Act 1994*, it is a procedural or regulatory requirement of the State for the purposes of section 38(c) of the *QCA Act 1997*. While Hi-Load is subject to SWP 39, ENERGEX is not required by the *Electricity Act 1994* or the *Workplace Health and Safety Regulation 1997* to apply SWP 39 to itself.

Accordingly, ENERGEX is not subject to public and employee safety requirements of the State on conditions equivalent to those applying to its private sector competitors or potential competitors; and

- the competitive advantages that ENERGEX enjoys as a result of these legislative/procedural advantages are the same as those relating to the analysis under the previous legislation.

Prior to release, this report was provided as a draft to the parties to the complaint and relevant agencies for their consideration and comment. Comments were considered and, where appropriate, further changes were made to the report. The report was then further circulated, with the parties to the complaint endorsing the interpretation of legislative and regulatory arrangements presented in the report.

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1. EXECUTIVE SUMMARY

1.1 The Complaint

The Queensland Competition Authority (the Authority) decided on 22 May 2000 to investigate a complaint by Brisbane Hi-Load Escort Services Pty Ltd alleging a breach of the principle of competitive neutrality by ENERGEX.

Hi-Load alleged that ENERGEX was a competitor in the provision of electrical scoping and escort services to transporters of high loads (over 5 metres), and that it enjoyed competitive advantages over Hi-Load arising from government ownership or control of ENERGEX. The relevant unit of ENERGEX against which the complaint was directed was the Network Services Division (NSD).

In seeking to provide these services Hi-Load was subject to, among other requirements, ENERGEX's Standard Working Procedure (SWP) 39. ENERGEX is the entity responsible for establishing, interpreting, monitoring and enforcing compliance by NSD and other service providers with SWP 39. It was alleged that, when providing electrical scoping and escort services, NSD was not complying with certain requirements of SWP 39.

Specific allegations included that:

- NSD did not undertake scoping in accordance with the requirements of SWP 39;
- NSD did not comply with SWP 39 in relation to certain safety equipment and procedural requirements;
- NSD had won work by submitting unrealistically low quotes and subsequently invoicing the customer for a significantly greater amount than the original quote; and,
- scopes prepared by Hi-Load and provided to ENERGEX to satisfy the requirements of SWP 39 were available to NSD and allowed it to use that information to avoid the cost of conducting a scope itself.

1.2 Legislative Requirements

While the definition of competitive neutrality was changed following amendments to the *Queensland Competition Authority Act 1997 (QCA Act 1997)* which were effective from 26 May 2000, the Authority was required to investigate the complaint under the provisions of the *QCA Act* which applied at the time the Authority decided to investigate the complaint.

In this regard, prior to 26 May 2000, section 38 of the *QCA Act 1997* required that, for an agency carrying on a significant business activity to be in breach of the principle of competitive neutrality, it must enjoy a competitive advantage over competitors or potential competitors, in a particular market solely because of its government ownership or control.

1.3 Conclusions

Substantiation of Allegations

The Authority has investigated the complaint and concluded that the regulatory arrangements related to scoping and safety equipment and procedures under SWP 39, allowed ENERGEX to enjoy a competitive advantage over private service providers in the market solely because of the government ownership or control of ENERGEX. Accordingly, these arrangements breached the

principle of competitive neutrality. There were no reasons why the breach of competitive neutrality might have been warranted.

The complaint by Hi-Load, that NSD was a competitor in the provision of electrical scoping and escort services to transporters of high loads (over 5 metres) and enjoyed a competitive advantage over Hi-Load arising solely from government ownership or control of ENERGEX in respect of scoping and safety requirements under SWP 39, is substantiated.

The Authority has also determined that there are no reasons why the breach of competitive neutrality might have been warranted.

Reasons for the Decision

The Authority has concluded that there was a market within which Hi-Load and NSD competed to provide transporters of high loads with electrical escort services in the ENERGEX distribution area in South-East Queensland.

Scoping

The Authority has concluded that the regulatory arrangements, as they related to scoping for public and employee safety matters under SWP 39, allowed ENERGEX to enjoy a competitive advantage over private service providers in the market because:

- NSD itself was able to determine whether or not a scope should be undertaken, while Hi-Load was required to conduct a scope unless otherwise approved by ENERGEX. Such approval had never been given. There was no evidence that any systematic risk assessment was performed by ENERGEX to substantiate this differential treatment of NSD and Hi-Load. Whilst records were incomplete, there was evidence that NSD did not conduct scopes on all jobs it undertook and this provided NSD with a cost advantage as scoping was a significant part of the service;
- NSD was able to continue to operate despite known non-compliance with the requirements of SWP 39 as they related to record maintenance, while Hi-Load would be unable to proceed with a particular escort, and could potentially lose its permit to operate, if it was found to be in breach of this requirement; and
- these competitive advantages arose from the authority provided to ENERGEX to establish and interpret public and employee safety requirements for application to both itself and other competing service providers, and monitor and ensure compliance. It is considered that such authority was provided to ENERGEX solely because of its government ownership or control.

A private sector electricity distributor would not be permitted to establish, interpret, monitor or enforce compliance on other competing service providers, both on public policy grounds and because it would have an opportunity to gain an advantage over those competitors via differential application of the requirements to itself and its competitors. This conclusion is supported by consideration of institutional arrangements in New South Wales, where distributors are government owned, and Victoria, where distributors are privately owned.

Safety Equipment

The Authority has concluded that the regulatory arrangements, as they related to safety equipment and procedures (including the maintenance of current competencies by its personnel)

required by SWP 39 allowed ENERGEX to enjoy a competitive advantage over private sector providers in the market because:

- NSD was able to continue to operate despite some recorded incidents relating to safety equipment and procedural requirements of SWP 39. Hi-Load would be unable to proceed with a particular escort, and could potentially lose its permit to operate, if it was found to be in breach of these requirements. This also provided NSD with a cost advantage over Hi-Load ; and,
- these competitive advantages arose from the authority provided to ENERGEX to establish and interpret public and employee safety requirements for application to both itself and other competing service providers, and monitor and ensure compliance. It is considered that such authority was provided to ENERGEX solely because of its government ownership or control.

A private sector electricity distributor would not be permitted to establish, interpret, monitor or enforce compliance on other competing service providers, both on public policy grounds and because it would have an opportunity to gain an advantage over those competitors via differential application of the requirements to itself and its competitors. This conclusion is supported by consideration of institutional arrangements in New South Wales, where distributors are government owned, and Victoria, where distributors are privately owned.

The Authority noted submissions by ENERGEX that the requirements of SWP 39 in respect of scoping and safety requirements had not been set with the intent of securing a competitive advantage for ENERGEX, nor had ENERGEX sought to deliberately exploit the arrangements. The issue of intent is not a matter which the Authority is required to establish in investigating matters of competitive neutrality.

Matters Not Substantiated

The complaint that NSD has won work by submitting unrealistically low quotes was not substantiated as quoting practices are purely a matter of commercial negotiation between the parties and do not arise from government ownership or control.

The complaint that scopes prepared by Hi-Load were used by NSD to avoid the cost of conducting a scope itself was not substantiated as no evidence was found of the systematic use by NSD of scoping information lodged by Hi-Load.

1.4 Recommendations

To remedy the breach, the Authority recommends that:

- ENERGEX put in place effective, publicly transparent and competitively neutral risk assessment procedures to determine whether an electrical escort service provider, being either a private sector entity or NSD, needs to undertake scopes before the transport of a high load; and
- public and employee safety standards for high load transport, and sanctions and remedies for non-compliance with those standards, be set and enforced by an agency which is independent of ENERGEX.

ENERGEX has advised that it has recognised a number of the issues raised in relation to SWP 39 and has recently:

- undertaken to clarify scoping requirements for all service providers so that NSD does not enjoy any additional discretion or authority compared with a private service provider; and
- implemented an internal risk assessment procedure to provide for the proper assessment of the level of scoping required for high-load transport escort (although the Authority notes that this only applies to NSD and not private service providers).

It was noted that ENERGEX has received certification by the National Association of Testing Authorities of its safety systems to Australian Standard AS4801-2000 “Occupational health and safety management systems – Specification with guidance for use” safety accreditation. The standard provides information about occupational health and safety risks and external certification, allowing ENERGEX the discretion to develop its own policies, outcomes and systems within the framework provided. The standard does not apply to public safety and implementation of requirements of the standard does not assure compliance.

The Authority also noted that recent changes to Ministerial responsibilities resulted in the transfer of the Electrical Safety Office from the former Department of Mines and Energy to the Division of Workplace Health and Safety of the Department of Industrial Relations.

1.5 Amended *QCA Act 1997*

Following amendments to the *QCA Act* which were effective from 26 May 2000, an agency can only be found to be in breach of the principle of competitive neutrality if the agency enjoys a competitive advantage over competitors or potential competitors because the agency’s activities are not subject to: (a) full tax equivalent systems; (b) offsetting debt guarantee fees; or (c) government procedural or regulatory requirements on conditions equivalent to the conditions to which a competitor may be subject.

In the interests of completeness, the Authority decided to consider the complaint as if it had also been made after the date of the change to the definition of competitive neutrality. This review came to the same conclusion - that the regulatory arrangements related to scoping and safety equipment and procedures under SWP 39, allowed ENERGEX to enjoy a competitive advantage over private service providers in the market solely because:

- while SWP 39 is ostensibly a requirement of ENERGEX, by virtue of its origins in the safety provisions of the *Electricity Act 1994*, it is a procedural or regulatory requirement of the State for the purposes of section 38(c) of the *QCA Act 1997*. While Hi-Load is subject to SWP 39, ENERGEX is not required by the *Electricity Act 1994* or the *Workplace Health and Safety Regulation 1997* to apply SWP 39 to itself.

Accordingly, ENERGEX is not subject to public and employee safety requirements of the State on conditions equivalent to those applying to its private sector competitors or potential competitors; and

- the competitive advantages that ENERGEX enjoys as a result of these legislative/procedural advantages are the same as those outlined in Section 1.3.

The Authority also determined that there were no reasons why the breach of competitive neutrality would have been warranted.

In respect of the complaints relating to ENERGEX’s quoting practices and access to information, there are no procedural or regulatory requirements of the Commonwealth, State or a local government governing quoting practices or the internal management of commercially sensitive information and, therefore, these matters would not have fallen within the Authority’s jurisdiction under the amended *QCA Act 1997*.

2. THE COMPLAINT

The complainant in this matter is Brisbane Hi-Load Escort Services Pty Ltd (Hi-Load). Hi-Load was established in 1997 to provide electrical scoping and escort services to transporters of high loads.

Brisbane Hi-Load's resources include qualified personnel, two modified scoping and escort vehicles (approved by Queensland Transport), specialist tools, equipment and radios.

Hi-Load's main area of operation is South-East Queensland. However, it has also provided services to transporters in other areas of Queensland and in New South Wales.

2.1 The Agency

The complaint was directed against ENERGEX Limited, a successor agency to the SEQEC. The relevant unit of ENERGEX is the Network Services Division (NSD).

NSD provides, among other services, electrical escort services for the transport of high loads by private companies.

2.2 The Complaint

Hi-Load alleged that ENERGEX did not comply with certain procedural requirements set out in Standard Working Procedure (SWP) 39 relating to safety and quality assurance in the provision of escort services for the road transport of over dimensional loads, with which private sector competitors such as Hi-Load were required to comply. Hi-Load noted that the standard was formulated by ENERGEX under a requirement of the Department of Mines and Energy (DME).

In particular, the alleged procedural advantage related to what Hi-Load considered the most significant and expensive part of the service, the surveying of routes and planning works (scoping). It was alleged that this non-compliance enabled ENERGEX to quote prices that did not reflect the full cost of providing these services. Details of this and other alleged advantages are outlined below.

In addition, it was alleged that ENERGEX had access to information upon which it was able to rely to lower its costs of service provision, as a result of its regulatory responsibilities.

2.3 Alleged Advantages

Scoping

The major procedural advantage allegedly enjoyed by ENERGEX related to scoping. Scoping involves surveying the proposed route and planning the electrical works required to accommodate a high-load transport.

Hi-Load conducts a detailed scope for each job in accordance with the requirements of SWP 39. Scoping is estimated by Hi-Load to represent about 30 per cent of the cost of the total service.

Hi-Load alleged that NSD did not undertake scoping in accordance with SWP 39, and relied on other means to approximate the scoping task (eg. in-house knowledge), or simply did not conduct a scope. Hi-Load believed that non-compliance by Hi-Load with these requirements would prevent Hi-Load from performing an escort service, while non-compliance by NSD did not prevent it from operating and provided it with a cost advantage over Hi-Load.

Safety Equipment

Another alleged procedural advantage related to instances of non-compliance by NSD with SWP 39 in relation to certain safety equipment and procedural requirements, including the fitting of height sticks to vehicles (used to gauge the proximity of a load to overhead wires), fitting skid rails to loads to ensure wires pass over loads without snagging and the use of personal safety equipment, such as gloves. Hi-Load believed that non-compliance by Hi-Load with these requirements would prevent Hi-Load from performing an escort service, while non-compliance by NSD did not prevent it from operating and provided it with a cost advantage over Hi-Load.

Quoting Practices

Hi-Load claimed that NSD won work by submitting an unrealistically low quote, and subsequently invoiced the customer for a significantly greater amount than the original quote. It was suggested that this may be the result of cost over-runs due to failure by NSD to perform detailed scopes, or a failure by NSD to properly prepare quotes. Hi-Load indicated that it did not have the ability that NSD had to vary prices to reflect costs after the event.

Scoping Information

The alleged information advantage enjoyed by NSD allegedly arose from the possible availability of scopes prepared by Hi-Load and provided to ENERGEX to satisfy administrative requirements. The availability of such information within ENERGEX may have allowed NSD to access and use that information to avoid the cost of conducting a scope itself. This practice would confer an advantage on NSD by lowering its costs and allowing it to offer a lower quote for the service.

3. THE DECISION TO INVESTIGATE

3.1 Requirement to Investigate

Under the provisions of the *QCA Act 1997*, the Authority is required to investigate a complaint about an alleged breach of the principle of competitive neutrality if:

- the activity which is the subject of the complaint has been declared to be a significant business activity by the Ministers (the Premier and Treasurer);
- the complainant is, or seeks to be, in competition with the significant business activity in the relevant market;
- the complainant is, or may be, adversely affected by the competitive advantage enjoyed by the significant business activity;
- the complainant has made a genuine attempt to resolve the matter of its complaint with the government agency;
- the complainant and the affected agency satisfy certain procedural requirements outlined in the *QCA Act 1997*.

3.2 Rationale for the Decision to Investigate

The Authority decided to investigate the complaint as it considered the necessary legislative requirements were satisfied, in particular that:

- ENERGEX is a successor to the South East Queensland Electricity Corporation (SEQEC). All of the business activities of SEQEC were declared on 1 July 1997;
- an examination of the market indicated that Hi-Load was in competition with ENERGEX;
- Hi-Load could be affected by non-compliance by ENERGEX with the principle of competitive neutrality;
- Hi-Load had attempted to resolve the complaint with ENERGEX;
- the complaint was not frivolous or vexatious, nor had the complainant failed to provide any required information, nor was there any other matter that could preclude investigation of this complaint.

3.3 Basis for the Investigation

While the definition of competitive neutrality was changed following amendments to the *Queensland Competition Authority Act 1997 (QCA Act 1997)* which were effective from 26 May 2000, the Authority was required to investigate the complaint under the provisions of the *QCA Act 1997* which applied at the time the Authority decided to investigate the complaint.

4. THE MARKET

The market for a product or service is an area of close competition between substitute goods and services and can be defined or distinguished by the nature of the service being provided, a geographic dimension, the market focus of participants, and the timing of their provision.

4.1 The Service

Hi-Load provides services to transporters of loads over 5.0 metres in height. Hi-Load offers a bundle of services that are jointly supplied, including surveying and planning the transport route (“scoping”), obtaining permits, providing a physical escort and managing associated works. These various services were provided to satisfy mandatory and practical requirements for the total transport task.

Some of these services related directly to electrical (safety and asset protection) requirements, while others related to the requirements of Queensland Transport, the Queensland Police Service, relevant local government authorities and any other parties affected by a high load transport.

During the investigation, ENERGEX expressed the view that some of the services provided by Hi-Load were separable and noted that it would be acceptable to have different service providers responsible for different tasks required under SWP 39, indicating that “route preparation (planning, scoping and obtaining permits) and escorting (including lifting and/or relocation of mains)” as examples. This possibility has also been noted in the Electrical Safety Office draft document *Safety Code for Transport of High Loads* (2000).

The complainant noted, however, that scoping required the ability to recognise by visual inspection the type of electrical services that would be approached by the high-load and an appreciation of all aspects of a high-load transport, including truck and trailer operating characteristics. As the success of the electrical escort relies on the scope, the complainant submitted that any move to separate scoping and escort services should recognise the interdependence of these activities and specify appropriate competencies. While noting the complainants’ concerns in respect to separation, the separation of certain services as suggested by ENERGEX is considered possible, and such a possibility may enhance rather than detract from competition between Hi-Load and ENERGEX in relation to meeting the electrical requirements of the transporter of the high load.

ENERGEX noted that high load transport escort services represent a minor activity for NSD compared with its core activities of design, construction and maintenance services for the distribution network.

Essentially, however, electrical escort services were provided by both Hi-Load and NSD and both were directed to assisting transporters of loads over 5.0 metres.

4.2 The Geographic Dimension

The geographic dimension of a market defines the physical boundaries within which the market existed. Hi-Load indicated that it faced competition or potential competition from NSD throughout ENERGEX’s distribution area.

ENERGEX submitted that it did not agree that the geographic bounds of the market should correspond with the ENERGEX distribution area and noted that high load escort services may be required anywhere in Australia where a high load transport route passed under electrical wires. Accordingly, ENERGEX did not consider itself to be a competitor with Hi-Load in the

market as “despite its capability, NSD does not offer a high load escort service in any area outside South East Queensland”.

The Authority accepted that NSD had the capability to offer high load escort services in another distribution area, and noted that Hi-Load did occasionally provide its services outside of ENERGEX’s distribution area.

However, the matters raised by ENERGEX did not alter the fact that competition occurred between ENERGEX and Hi-Load within the ENERGEX distribution area.

4.3 The Market Focus

The market focus of customers and competitors in the provision of a good or service identifies whether they consider themselves to be, and therefore act as, competitors in a particular market. Electrical escort service providers are engaged by the transporter of a high load. Hi-Load identified NSD as its only competitor and noted that each had, from time to time, provided quotes in competition for the same job. Transporters selecting an escort service provider had the option to choose to contact Hi-Load or NSD, or both, for an estimate to provide the service.

ENERGEX submitted that the service was provided in South East Queensland only as a result of the practical operation of the *Electricity Act 1994* and ENERGEX’s obligations pursuant to its role as the holder of a ‘distribution authority’, the distributor’s licence to operate issued by the Department of Mines and Energy. Nevertheless, ENERGEX recognised that “[Hi-Load] is a competitor to ENERGEX in this work” in correspondence to Hi-Load dated 16 September 1999, and had submitted quotes in competition with Hi-Load for the same transport jobs.

4.4 Timing of the Provision of Services

The provision of services at different times also indicates whether competition in a market existed. ENERGEX submitted that, when it performed high load escorts, it provided the service for customers as a ‘contractor of last resort’. That is, ENERGEX claimed that the only time NSD provided the service was on occasions when no other service provider was available to the transporter and that NSD was compelled to provide the service in order to protect ENERGEX assets.

Hi-Load disputed that the ‘provider of last resort’ scenario suggested by ENERGEX applied to all escort work by NSD, citing examples of transport jobs for which both Hi-Load and NSD had provided quotes. In some of these instances, Hi-Load had undertaken substantial preparatory work for a job that was subsequently performed by NSD. Hi-Load provided details of jobs performed by NSD on 13 December 1998 (Murarrie to Lytton) and 9 April 1999 (Beaudesert to Jimboomba) as specific jobs for which Hi-Load was initially engaged and prepared scopes, but for which electrical escorts were subsequently performed by NSD.

4.5 Other Matters

The Authority noted submissions by ENERGEX that, in addition to these characteristics, a number of other factors should be considered to establish the existence of a market. For example, ENERGEX cited the lack of references to relevant case history and a lack of econometric testing as representing deficiencies in the market definition adopted by the report.

In respect to the need for references to legal case history, section 173(1) of the *Queensland Competition Authority Act 1997* states:

“In an investigation, the authority – (a) must act with a little formality as possible; and (b) is not bound by technicalities, legal forms or rules of evidence; and (c) may inform

itself of any matter relevant to the investigation in any way it considers appropriate; and (d) must comply with natural justice.”

Econometric testing in relation to electrical escort service provision would require a database that, according to an independent audit of records, would not have been available from the parties to the complaint or from another source.

ENERGEX also considers that the market is broader than ENERGEX’s distribution area. Even if a broader market did exist, this would not alter the fact that ENERGEX and Hi-Load competed in ENERGEX’s distribution area.

4.6 Conclusion

The Authority has concluded that Hi-Load and NSD competed to provide transporters of high loads with electrical escort services in the ENERGEX distribution area in South East Queensland. Both service providers and purchasers of those services have recognised that the services are substitutes and that they are provided on a competitive basis. This demonstrates that a particular market exists for the purposes of the requirements of the *QCA Act 1997*.

5. REGULATORY ENVIRONMENT

5.1 Transport Legislation and Regulation

The *Transport Operations (Road Use Management) Regulation 1995* stipulates certain mandatory requirements for high load transport movements, including permits and authorities to be obtained, notifications to be made, equipment and vehicle specifications, operating instructions, use of communication devices, use of warning devices and use of pilots and escorts. The regulation also requires approvals to be obtained from relevant authorities where the dimensions of the load are likely to interfere with overhead wires.

General escort requirements for a road transport movement are determined according to the load category. These categories and requirements are set out in Queensland Transport documents *Performance Guidelines for Excess Dimension Vehicles Carrying Indivisible Articles*; *Performance Guidelines for Excess Dimension Special Purpose Vehicles and Vehicles Carrying Indivisible Articles Requiring Pilot and Escorts*; and, *Performance Guidelines for Pilot and Escort Vehicles and Drivers*. These requirements apply to the road transporter.

5.2 Electricity Legislation and Regulation

Requirements for electrical works are broadly set out in the *Electricity Act 1994* and the *Electricity Regulation 1994*. The stated purpose of the *Electricity Act 1994* is to regulate the industry and to promote electricity safety.

Chapter 2 Part 5 of the *Electricity Act 1994* sets out the requirements for distribution entities. Section 42(b) states that the entity must operate, maintain and protect its supply network to ensure the adequate, economic, reliable and safe connection and supply of electricity to its customers. The distribution entity must further comply with any conditions imposed under the *Regulations* or stated in the 'distribution authority', the distributor's licence to operate issued by the DME.

Section 99 of the *Electricity Act 1994* requires a person to give notice of any work affecting an electricity entity's works, and to take measures required by that entity to protect or reinstate those works.

Section 252(1) notes that additional conditions imposed under the *Act* may require compliance with a protocol, standard, code, inter-governmental agreement or another agreement stated in the condition. Section 263 authorises the Governor in Council to make regulations under the *Act*, and Schedule 2 sets out various matters which may be the subject of regulation, including technical, operational and safety requirements for standards about work practices and procedures, and safety in relation to electricity and its use including safety of private plant.

Under sections 62 of the *Electricity Act 1994*, the Chief Executive of DME is nominated as the *Regulator*. Section 63 sets out the functions of the Regulator, including to review and make recommendations about standards and practices under the *Act*. The *Regulator* has issued the *Electrical Industry Safety Code 1998* (the Safety Code), which sets out minimum electrical safety standards for the industry, including the requirements to:

- plan work in advance to avoid hazardous situations;
- assess the risk of contact with energised parts (a competent assistant may be required);
- use work procedures which will prevent inadvertent contact with energised parts;

- ensure work procedures are adequate to prevent other workers and members of the public being exposed to possible electric shock or other personal injury; and
- when working on roadways, all work is to be undertaken in compliance with the requirements of the Department of Transport, the Police Department and the Electricity Supply Industry.

Previous versions of the Safety Code have been in general circulation for over 30 years and the Safety Code is recognised by all industry workers in Queensland. However, there does not appear to be any legislative basis for the issue of the Safety Code. While the Regulator's functions include reviewing and making recommendations about standards and practices under the *Electricity Act*, there is no express power to issue codes regulating to safety.

There is a power in the *Workplace Health & Safety Act 1995* which could be used to authorise the issue of the Safety Code. Section 41 of the *Workplace Health and Safety Act 1995* gives the Minister power to make advisory standards and industry codes of practice.

Advice from the Division of Workplace Health and Safety, with reference to the *Workplace Health and Safety (Advisory Standards) Notice 1998*, indicates that the Safety Code is not an industry code of practice which has been formally notified by then Minister for Employment, Training and Industrial Relations, as the Minister responsible for the *Workplace Health and Safety Act*.

The *Electricity Regulation 1994* includes among its purposes the electrical safety of electrical workers, other workers, customers and the general public. Section 4 states that the purposes of the *Electricity Regulation 1994* may be achieved in various ways, including by prescribing standards and procedures for the design, building and maintenance of electric lines and works, the performance of electrical work and the performance of work on customers' electrical installations. Section 142 sets out the functions of the Electricity Health and Safety Council as a body that is to make recommendations to the Regulator.

The Electrical Safety Office (ESO) of the DME is responsible for ensuring compliance by electricity entities and electrical contractors, workers, manufacturers and suppliers with the electrical safety and licensing provisions of the *Electricity Act 1994*, the *Electricity Regulation 1994* and the Safety Code. However, significant powers are still delegated to the distributors. Sections 170 and 171 of the *Electricity Act 1994* set out the requirements for an electricity entity to report and investigate accidents. In addition, Section 149 of the *Workplace Health and Safety Regulation 1997* requires persons performing work likely to come within 2 metres of an overhead electric line to consult with the relevant distributor and ensure compliance with the safety precautions required by the distributor. These provisions provide ENERGEX with an authority to monitor and enforce compliance by competitors with ENERGEX requirements.

At the time of the complaint, participants in the industry were also required to observe the *Safety Code for Transport of High Loads 1986* developed by the former *Queensland Electricity Commission* (QEC). Both the Safety Code and the *Safety Code for Transport of High Loads 1986* require distributors to have a documented work procedure in place.

The ESO recently reviewed the existing (QEC) code and produced two draft documents for industry comment: a revised *Safety Code for Transport of High Loads*, and *Guidelines for Road Transport Operators for Movement of High Loads (2000)*. These documents outline requirements for transporters of over dimension (high) loads regarding the electricity network, and refer to Queensland Transport requirements, QEC Guidelines for Escorting High Loads (1986), *Workplace Health and Safety Act 1995* and the Safety Code.

5.3 SWP 39

In order to ensure compliance with the requirements of the *Electricity Act 1994*, *Electricity Regulation 1994* and codes, ENERGEX developed a series of Standard Work Procedures (SWPs) that set out the procedures performing various categories of electrical work. SWPs contain the detailed procedures to be followed by persons carrying out relevant electrical work.

ENERGEX developed Standard Work Procedure *Provision of High Load Escorts* (SWP 39) as the relevant procedure for the provision of high load escorts. SWP 39 is intended to operationalise the electrical requirements for the transport of high loads and comprises procedures for providing electrical escort services to transporters of high loads and establishes the competencies required of supervising officers. ENERGEX has chosen to apply SWP 39 to itself and other service providers as the relevant SWP for electrical scoping and escort services.

The stated aims and objectives of SWP 39 are to minimise risks to personnel, the public and damage to the infrastructure of ENERGEX and other utilities.

Key features of SWP include:

- competencies, training and qualifications necessary to conduct a scope of the proposed route and to provide the electrical escort;
- specifications for warning devices (for example, flashing lights) for accompanying vehicles and plant;
- details of specialist tools and equipment necessary for electrical works;
- requirements to comply with general workplace health and safety legislation, guidelines for traffic control and accident prevention;
- procedural requirements related to route preparation, planning or conduct works; and
- record keeping requirements (including work verification records) as well as a requirement to retain records for a period of 12 months.

ENERGEX submitted that SWP 39 “is not a law and is only used as a guideline by agreement between parties because it is convenient for those parties and it reduces their liability.” However, according to the terms of SWP 39, it is evident that ENERGEX intends SWP 39 to be mandatory. This is evidenced by use of words such as “mandatory”, “shall”, “requirements”, “acceptable” and “non-conformance” throughout the document. Furthermore, ENERGEX conducted itself on the basis that SWP 39 is mandatory, including writing to the private service provider indicating that all loads are required to be transported in accordance with SWP 39.

Indeed, the Authority noted advice that SWP 39 appears to be the only basis for the regulation of high load electrical escort work.

As noted above, the ESO would be advised of significant incidents involving accidental death or injury to persons engaging in SWP 39 related work, as required by the *Electricity Act 1994* and *Electricity Regulation 1994*. Investigations would be conducted in the first instance by ENERGEX officers authorised by the *Regulator*.

5.4 Conclusions

On the basis of the above, the Authority has concluded that:

- ENERGEX is required to operate, maintain and protect its supply network to ensure the adequate, economic, reliable and safe connection and supply of electricity to its customers (Section 42 (b) of the *Electricity Act 1994*);
- ENERGEX chooses to attain the above objectives by, inter alia, requiring compliance with SWP 39;
- private service providers are liable to comply with ENERGEX's public and employee safety requirements as a result of Section 149(3) of the Workplace Health and Safety Regulation 1997.

Furthermore, the Safety Code which has been in general circulation for over 30 years and is recognised by all industry workers, specifically requires ENERGEX to establish work procedures to prevent other workers and members of the public being exposed to possible shock or other personal injury. However, it is not evident that there exists a legislative basis for this Code.

6. GOVERNMENT OWNERSHIP

6.1 The Principle of Competitive Neutrality

The Authority's decision to investigate was made under the provisions of the *QCA Act 1997* in force on 22 May 2000. The principle of competitive neutrality for the purposes of the investigation is, therefore, 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 of the government ownership or control of the agency.

A central feature of the complaint is that ENERGEX was not complying with certain procedural requirements set out in Standard Working Practice (SWP) 39 relating to safety and quality assurance in the provision of escort services for the road transport of over dimension loads, with which private sector competitors such as Hi-Load were required to comply.

To determine whether any such advantages could arise solely as a result of government ownership or control of the agency, the Authority considered the underlying rationale for the current regulatory and institutional arrangements in Victoria where distributors are privately owned, and those in New South Wales (NSW) where distributors are owned by the NSW Government.

The Authority then investigated the specific allegations to ascertain whether any advantages did exist and whether these were derived solely from government ownership or control of ENERGEX.

6.2 Interstate Institutional Arrangements

Victoria

In Victoria, the disaggregation of the electricity sector commenced in the early 1990s and resulted in the establishment of 5 generators, 1 transmitter and 5 distributors. These are private entities. Industry changes in Victoria were formalised in the *Electricity Safety Act 1998 (Vic)* and various regulations.

In Victoria, regulatory responsibilities have been conferred upon the Office of the Regulator General and the Office of the Chief Electrical Inspector (OCEI). This process:

- was supported by private distributors as regulatory functions were not part of their core business;
- reflected concerns that it was not appropriate for private businesses to be vested with market regulation powers due to issues of conflict;
- included excising regulatory, inspection and audit functions previously performed by employees of distribution entities;
- requires the OCEI to oversee compliance with network safety matters identified under the *Electricity Safety (Network Assets) Regulations 1999 (Vic)*; and,
- requires the OCEI to license private inspectors and inspection companies in relation to private installation work.

There is also an option for distributors to submit safety management schemes to the OCEI. These must be independently validated by an auditor and, after consideration by the OCEI, may be referred to the Governor in Council for declaration under an Order in Council. An ongoing

compliance program is developed by OCEI, including auditing and performance requirements. These arrangements complement, but do not replace, audit and enforcement functions of the OCEI in relation to the Victorian *Act* and *Regulations*.

New South Wales

In New South Wales, the electricity industry has also experienced substantial change in recent years. Distribution is undertaken by 6 government owned, corporatised distributors, each divided into a retail and distribution business.

Distributors (and retailers) are required to hold a licence and compliance with conditions is audited every year against requirements of the *Electricity Supply Act 1995 (NSW)* and the *Electricity Supply (Safety Plans) Regulation 1997 (NSW)*. Further, some codes developed by the Electricity Association of NSW (eg. distribution risk management code) may be recognised by the Ministry of Energy and Utilities (MEU) and adopted as industry standards, which then become a licence requirement.

The *Act* requires independent audits of compliance to be conducted and that self-compliance be assessed and reported in an annual report to the MEU. The system is similar to that of annual financial reporting. The *Electricity Supply (Safety Plans) Regulation 1997 (NSW)* requires distributors to submit a safety and operating plan to the MEU, including details of the measures they will take in order to comply with the regulations. Audited annual statements of compliance with the plan are to be submitted to the MEU.

Like distributors in NSW, ENERGEX is also largely self-regulating, and performs some regulatory functions on behalf of the Government. These have been delegated to ENERGEX and other distributors by the *Regulator* and, historically, the distributor has been in the best position to perform these functions. The competitive neutrality and conflict issues associated with regulating and competing in the same market did not exist at the time these arrangements were instituted.

The ESO advised the Authority that many of the current arrangements regarding the development and administration of safety are a continuation of arrangements with predecessor electricity boards. These arrangements have not been substantively reviewed since the boards were corporatised. The ESO also indicated that, on the hypothetical scenario that Queensland distributors were privatised, regulatory arrangements would not need to be revised in the light of the change in ownership.

Implications for Queensland

The regulatory arrangements in New South Wales more closely reflect arrangements in Queensland. In both cases, compliance is largely self-regulated and regulations are imposed on private sector service providers by the government owned distributors under their procedures. For example, when Hi-Load operates in the area of the NSW distributor NORTHPOWER, it is subject to the NORTHPOWER procedure 'Escorting High Loads on Public Roads' SWP 02 030.

This situation is quite different in Victoria where the regulatory responsibilities are separated from the (privately owned) distributors.

6.3 Rationale for Prevailing Regulatory Arrangements

SWP 39 states that its objectives are the maintenance of the safety of personnel and the public, and the protection of ENERGEX's assets.

Public Safety

Governments are traditionally responsible for matters of public safety. Electricity is an area of inherently high risk to public safety.

The *Electricity Act 1994*, *Electricity Regulation 1994* and the relevant Codes (identified in 5.2 above) define broad public safety objectives. For example, the Safety Code requires that work procedures are adequate to prevent “members of the public from being exposed to possible electric shock” but does not provide detailed guidance on how this should be achieved.

The prevailing regulatory arrangements provided substantial discretion and authority to ENERGEX to establish public safety requirements, and to interpret, monitor and ensure compliance by its own activities and those of other competing service providers operating in ENERGEX’s distribution area.

The extent of the discretion and authority provided is even more evident if the apparent lack of a legislative basis of the Safety Code is taken into account.

A private entity may be permitted to establish working procedures consistent with detailed public safety regulations. However, the Authority considers that it would not have been granted the discretion to establish, interpret, monitor and enforce compliance on other competing service providers, both on public policy grounds and because it would have an opportunity to gain an advantage over those competitors via differential application of the requirements to itself and its competitors.

Furthermore, the Authority is of the view that, because of the importance of public safety, the public safety regulator responsible for investigating incidents would not accept the assessment of a private entity’s officers as the basis for determining whether to investigate an incident further or rely on the internal investigation to remedy the cause of the incident. In this regard, it is noted that in Victoria, where distributors are privately owned, independent private investigators are employed for this purpose, while an independent regulator establishes the appropriate standards.

Accordingly, it is considered that the discretion to establish public safety requirements for other service providers, and to interpret, monitor enforce, and investigate, compliance by other competing service providers are vested with ENERGEX solely because of its government ownership or control.

The Authority noted comments by the ESO that a number of special approvals have been issued by DME to small, private network operators (such as in Weipa). DME confirmed that special approvals have been issued, however, these generally pre-date the restructuring and establishment of competition in the electricity industry. Furthermore, DME advised that, under current legislation and codes, it would not be possible to grant approval for a single entity to undertake generation, distribution and retail activities.

Employee Safety

Electricity is an area of inherently high risk to employees in the industry.

The *Workplace Health and Safety Act 1995* requires service providers to comply with a distributors employee safety requirements.

The current regulatory arrangements provide substantial discretion and authority to ENERGEX to establish appropriate employee safety requirements, and to interpret, monitor and ensure

compliance by its own activities and those of other service providers operating in ENERGEX's distribution area.

The extent of the discretion and authority provided is even more evident if the apparent lack of legislative basis for the Safety Code is taken into account.

A private entity may be permitted to establish working procedures consistent with detailed employee safety regulations. However, the Authority considers that it would not have the discretion to establish, interpret, monitor and enforce compliance on other competing service providers, both on public policy grounds and because it would have an opportunity to gain an advantage over those competitors via differential application of the requirements to itself and its competitors.

Furthermore, the Authority is of the view that, because of the importance of employee safety, the regulator of employee safety responsible for investigating incidents would not accept the assessment of a private entity's officers as the basis for determining whether to investigate an incident further or rely on the internal investigation to remedy the cause of the incident. In this regard, it is noted that, in Victoria, where distributors are privately owned, independent private investigators are employed for this purpose, while an independent regulator establishes the appropriate standards.

Accordingly, it is considered that the discretion to establish employee safety requirements for other service providers, and to interpret, monitor, enforce, and investigate, compliance by other competing service providers are vested with ENERGEX solely because of its government ownership or control.

Protection of Assets

Requirements relevant to the protection of an entity's assets are generally imposed to ensure that the quality of such assets is maintained.

It is considered that both private and government owned agencies would be allowed to impose requirements on third party operators wishing to conduct works which may affect their assets, even to the point where such requirements may be different for the owner-entity compared with the third party, according to the owner-entity's assessment of the risks associated with service provision by each party.

Accordingly, it is considered that issues involving asset protection did not arise solely as a result of the government ownership or control of ENERGEX.

6.4 General Conclusions

ENERGEX was required to ensure the protection of its employees, assets and electricity safety. ENERGEX developed SWP 39 in relation to high-load escorts to achieve these objectives. The *Workplace Health and Safety Regulation 1997* requires private service providers to comply with ENERGEX's public and employee safety requirements. ENERGEX has chosen to apply SWP 39 to itself.

The prevailing regulatory arrangements provided substantial discretion and authority to ENERGEX to establish public and employee safety requirements, and to interpret, monitor and ensure, and investigate, compliance by its own activities and those of other service providers operating in ENERGEX's distribution area.

A private entity would not have the discretion and authority to establish standards for its competing service providers as it would have the incentive to establish differential standards between itself and competitors. Accordingly, it is considered that such responsibilities to establish and administer public and employee safety requirements are vested with ENERGEX solely because of its government ownership or control.

7. ALLEGED COMPETITIVE ADVANTAGES

As noted in the preceding section, the Authority concluded that the regulatory arrangements which permitted ENERGEX to establish and interpret standard working procedures related to public and employee safety for application to other competing service providers, and to monitor and ensure compliance of those service providers, arose solely because of its government ownership or control.

The Authority proceeded to consider whether ENERGEX enjoyed the alleged competitive advantages, and whether the competitive advantages arose solely as a result of its government ownership.

To assist in this regard, the Authority commissioned a review by Quality Assurance Services (QAS). QAS is a subsidiary of Standards Australia International, and provides independent certification and assessment services across a range of industry sectors.

7.1 Scoping

Assessment

The major procedural advantage allegedly enjoyed by NSD related to scoping. Scoping involves surveying the proposed route and planning works to accommodate a high-load transport movement. It is relevant to ensuring that public and employee safety is maintained and to protect the infrastructure assets of ENERGEX.

Hi-Load alleged that NSD did not undertake scoping in accordance with SWP 39, and relied on other means to approximate the scoping task (for example, in-house knowledge) or simply did not conduct a scope.

Hi-Load conducted a detailed scope for each job in accordance with the requirements of SWP 39.

SWP 39 stated that, for categories 3 and 4 loads (over 5.0m and 5.5m height), the “route shall be scoped by a Service Provider authorised to operate under this SWP unless otherwise advised by ENERGEX”. Hi-Load has never been so advised by ENERGEX.

ENERGEX contended that, according to its interpretation of SWP 39, it was permissible for NSD to conduct a detailed scope “where necessary”, and that any instance where detailed scoping was not performed did not represent non-compliance with SWP 39. SWP 39 provided ENERGEX with certain discretionary powers that were not available to a private provider.

It is evident that, to discharge its public and employee safety responsibilities, ENERGEX was able to determine the scoping requirements of it and other service providers. Presumably, this determination would require an assessment of the public safety issues relevant to a particular escort service task and the capacity of NSD and the other service provider to meet the necessary standards.

For a competitive advantage to arise from scoping which is relevant to the principle of competitive neutrality (that is, one which results from its government ownership or control), it would be necessary to substantiate that ENERGEX had the ability to take advantage of its responsibilities in a manner which did not reflect the relative risks of the service providers for a particular task.

On the basis of the Authority’s assessments and those of QAS, it was noted that:

- Hi-Load was always required to scope its jobs with a view to identifying potential risk and putting in place the necessary work program to ensure such risks were adequately addressed. This was despite an incident free record in relation to the escorts conducted by Hi-Load since it commenced operations in 1997;
 - NSD was not subject to the same requirements despite evidence of some breaches of the requirements of SWP 39. NSD appeared to scope routes on an irregular basis and was allowed to rely on its in-house knowledge. While NSD may possess such in-house knowledge, there was no evidence that the risk assessments necessary to determine whether a scope should be required for a particular job were being conducted;
 - while scopes and risk assessment are sometimes referred to by the parties in a manner that might suggest these are separate issues, QAS noted that conducting a detailed scope was itself the most appropriate risk assessment to follow prior to conducting an electrical escort for a high load transport;
- under SWP 39, it is a requirement to keep records of scopes for a period of 12 months. QAS found that Hi-Load maintained records of all scopes prepared since it commenced operations in 1997. QAS also found that:
 - records in ENERGEX depots were generally difficult to locate, with discrepancies between SWP 39 requirements, and existing records maintenance practices. It was observed that, where conducted, scoping records were not always maintained;
- Hi-Load may be audited at any time, including record and field audits.
 - there would appear to be little or no auditing of NSD scopes;
- In the event that Hi-Load was found to fail in its compliance, it could face a number of penalties, including having a job halted.
 - the electrical escort provided by NSD on 9 April 1999, for which a significant incident advice was prepared, proceeded after contact with the live service. On that occasion, the sanction applied to NSD involved staff refresher or further training.
- Audits of Hi-Load would be undertaken by an ENERGEX employee, independent of Hi-Load.
 - the investigation of NSD incidents, including the 9 April 1999 incident, were undertaken by an authorised ENERGEX employee and reported to the ESO in the first instance.

The Authority notes that there were many requirements of SWP 39 that could be considered to be relevant to the objectives of both public and employee safety and the protection of infrastructure assets. Where particular requirements of SWP 39 met all of these objectives, it was not possible to conclude that they arose solely as a result of government ownership or control. However, there are requirements which are considered to apply only to public safety or the protection of employees, and which are not related to the protection of infrastructure assets.

These include requirements of SWP 39 relating to:

- competencies required for scoping which relate to construction site access, placement of road signs and traffic controls (section 4.1 of SWP 39);

- vehicle equipment requirements (section 5.1); and
- use of height measuring sticks (section 6.1).

Some instances of failures by ENERGEX to comply with general safety requirements have been outlined in overall system audit reports prepared by the ESO. While not specifically identified as SWP 39 breaches, they were relevant to safety aspects of SWP 39.

Conclusions

The Authority concluded that regulatory arrangements, as they relate to scoping under SWP 39, allowed ENERGEX to enjoy a competitive advantage over private service providers in the market because:

- NSD itself was able to determine whether or not a scope should be undertaken, while Hi-Load was required to conduct a scope unless otherwise approved by ENERGEX. Such approval had never been given. There was no evidence that any systematic risk assessment was performed by ENERGEX to substantiate this differential treatment of NSD and Hi-Load. Whilst records were incomplete, there was evidence that NSD did not conduct scopes on all jobs it undertook and this provided NSD with a cost advantage as scoping is a significant cost in providing the service.
- NSD was able to continue to operate despite known non-compliance with the requirements of SWP 39 as they relate to record maintenance, while Hi-Load would be unable to proceed with a particular escort, and could potentially lose its permit to operate, if it was found to be in breach of this requirement; and
- these competitive advantages arose from the authority provided to ENERGEX to establish and interpret public and employee safety requirements for application to both itself and other competing service providers, and monitor and ensure compliance. It is considered that such authority was provided to ENERGEX solely because of its government ownership and control.

A private sector electricity distributor would not be permitted to establish, interpret, monitor or enforce compliance on other competing service providers, both on public policy grounds and because it would have an opportunity to gain an advantage over those competitors via differential application of the requirements to itself and its competitors. This conclusion is supported by consideration of institutional arrangements in New South Wales, where distributors are government owned, and Victoria, where distributors are privately owned.

7.2 Safety Equipment

Assessment

ENERGEX was claimed to have a procedural advantage relating to non-compliance with SWP 39 in relation to a range of requirements related to the use of safety equipment. Some of these matters included ENERGEX's 'safety non-negotiables' and some instances of non-compliance were separately referred by Hi-Load to ENERGEX and the Electrical Safety Office for investigation.

The Authority did not consider it necessary to conduct a comprehensive audit of ENERGEX's activities, as it was apparent from a review of significant incident advices, which were lodged with the ESO and Electricity Supply Association of Australia (ESAA), and ESO reports that ENERGEX faced continuing issues associated with non-compliance with safety requirements.

Investigations by the QAS of those instances reported to ENERGEX and ESO have found that:

- the lack of independent, authorised observers during escort resulted in inconclusive findings on a number of matters, including the wearing of gloves, method for clearing services, measurement of high voltage procedure, presence of observers when lifting, and appropriateness of response time to repair a damaged service; and,
- a review of ENERGEX personnel training records indicated that the competencies listed for SWP 39 were not recorded and/or current. The Authority notes that ENERGEX is further investigating this matter.

The Authority also noted that Government concern over electrical accidents in the industry has led to the establishment of a Joint Ministerial Taskforce to investigate and make recommendations on improving the manner in which electrical incidents can be prevented, or investigated and dealt with.

The Authority notes that there were many requirements of SWP 39 that could be considered to be relevant to the objectives of both public and employee safety and the protection of infrastructure assets. Where particular requirements of SWP 39 met all of these objectives, it was not possible to conclude that they arise solely as a result of government ownership or control. However, there are requirements which are considered to apply only to public safety or the protection of employees, and which are not related to the protection of infrastructure assets. These include requirements of the SWP 39 relating to:

- traffic control measures (section 7.2 of SWP 39);
- measuring conductor heights (section 8.1);
- testing of measuring equipment and use of personal protective equipment (section 8.5.1);
- current competencies relating to public and employee safety (Appendix 2); and,
- control measures to avoid personal injury (Appendix 5).

Some instances of failures by ENERGEX to comply with general safety requirements have been outlined in overall system audit reports prepared by the ESO. While not specifically identified as SWP 39 breaches, they were relevant to safety aspects of SWP 39.

Conclusions

The Authority has concluded that the regulatory arrangements, as they relate to scoping for public and employee safety matters under SWP 39, allowed ENERGEX to enjoy a competitive advantage over private service providers in the market because:

- NSD was able to continue to operate despite some recorded incidents relating to safety equipment and procedural requirements of SWP 39. Hi-Load would be unable to proceed with a particular escort, and could potentially lose its permit to operate, if it was found to be in breach of these requirements. This also provided NSD with a cost advantage over Hi-Load; and,
- these competitive advantages arose from the authority provided to ENERGEX to establish and interpret public and employee safety requirements for application to both itself and other competing service providers, and to monitor and ensure compliance. It is considered that such authority was provided to ENERGEX solely because of its government ownership or control.

A private sector electricity distributor would not be permitted to establish, interpret, monitor or enforce compliance on other competing service providers, both on public policy grounds and because it would have an opportunity to gain an advantage over those competitors via differential application of the requirements to itself and its competitors. This conclusion is supported by consideration of institutional arrangements in New South Wales, where distributors are government owned, and Victoria, where distributors are privately owned.

7.3 Quoting Practices

ENERGEX was alleged to enjoy an advantage from an alleged practice of submitting unrealistically low quotes to win jobs, and subsequently invoicing the customer for a significantly greater amount than the original quote based on a proper costing of the job.

It is considered that quoting practices are purely a commercial matter between the parties. Users of services provided by ENERGEX should understand the basis on which ENERGEX quotations are provided. It is open to Hi-Load to provide quotes on conditions that it negotiates with customers. It is also noted that there was no suggestion in the complaint that ENERGEX is subsidising or cross-subsidising its high load escort activities. Indeed, QAS found that, since the establishment of standard rates (August 1999), ENERGEX has a costing structure that is geared towards a margin that returns a profit.

The complainant submitted that during the period prior to the adoption by ENERGEX of a standard rate costing structure there was scope for ENERGEX to cost and quote to provide its service on an incomplete and non-commercial basis. While this may have been possible, the Authority considered that, whether an entity undertakes a scope and incorporates the cost into a fixed price contract, or does not undertake a scope and subsequent remedial works force it to revise its costs and pass these on to clients (if clients are willing to accept them), each represents a legitimate practice.

It is not considered therefore that ENERGEX had any advantage in respect of its quoting practices that arose solely from its government ownership or control.

7.4 Scoping Information

Assessment

The information advantage allegedly enjoyed by NSD arose from the possible availability of scopes prepared by Hi-Load and provided to ENERGEX for purposes related to a high load transport.

The availability of this information within ENERGEX may have allowed NSD to access and adopt the information submitted by Hi-Load and thereby avoid the cost of conducting a scope itself. This practice would confer an advantage on NSD by lowering its costs and allowing it to offer a competing quote to provide the service.

ENERGEX stated that there is no basis to this allegation as there is no requirement for scopes to be lodged when a permit is issued. Hi-Load submitted that it still held concerns regarding the commercially sensitive nature of information his business provided to ENERGEX and advised that there were two common exceptions to ENERGEX's advice:

- scopes were required to be submitted to ENERGEX whenever it was necessary for an escort provider to notify ENERGEX of the need for switching (disconnection/reconnection) associated with a transport;

- scopes were required to be provided to ENERGEX where application was made for a period permit. A period permit is a permit issued to allow a number of identical items to be transported on the same route within a period of time.

QAS reviewed current practices and found that:

- permit applications were required to be forwarded directly to a central fax at Network Services Division rather than to another part of ENERGEX as might be expected if the relative risks and capabilities of each service provider were being assessed by ENERGEX. On this basis, it is not evident that there are appropriate administrative arrangements to ensure that NSD was not privy to a competitor's scopes;
- the authority to approve applications was not documented or clearly delegated;
- where an application was received without a completed scoping section, NSD was in the exclusive position of being able to contact the applicant and offer to provide the scoping service. No list of alternative service providers was issued to applicants.

At the same time, QAS noted that, despite these inappropriate arrangements, there was no conclusive evidence of any systematic use by NSD of scoping information held by ENERGEX.

Conclusions

In the absence of appropriate evidence, the Authority has concluded that a breach of competitive neutrality could not be sustained. At the same time, it would seem appropriate that ENERGEX alter the way in which scoping information is handled to ensure that there can be no suggestion of inappropriate use of commercially sensitive documents within ENERGEX.

7.5 Recommendations

To remedy the breach, the Authority recommends that:

- ENERGEX put in place effective, publicly transparent and competitively neutral risk assessment procedures to determine whether an electrical escort service provider, being either a private sector entity or NSD, needs to undertake scopes before the transport of a high load; and
- public and employee safety standards for high load transport, and sanctions and remedies for non-compliance with those standards, be set and enforced by an agency which is independent of ENERGEX.

ENERGEX has advised that it has recognised a number of the issues raised in relation to SWP 39 and has recently:

- undertaken to clarify scoping requirements for all service providers so that NSD does not enjoy any additional discretion or authority compared with a private service provider; and
- implemented an internal risk assessment procedure to provide for the proper assessment of the level of scoping required for high load transport escort (although the Authority notes that this only applies to NSD and not private service providers).

It is also noted that ENERGEX has received certification by the National Association of Testing Authorities of its safety systems to Australian Standard AS4801-2000 "Occupational health and safety management systems – Specification with guidance for use" safety accreditation. The standard provides information about occupational health and safety risks and external

certification, allowing ENERGEX the discretion to develop its own policies, outcomes and systems within the framework provided. The standard does not apply to public safety and implementation of requirements of the standard does not assure compliance.

The Authority noted submissions by ENERGEX that the requirements of SWP 39 in respect of scoping and safety requirements had not been set with the intent of securing a competitive advantage for ENERGEX, nor had ENERGEX sought to deliberately exploit the arrangements. The issue of intent is not a matter which the Authority is required to establish in investigating matters of competitive neutrality.

The Authority also noted that recent changes to Ministerial responsibilities resulted in the transfer of the Electrical Safety Office from the former Department of Mines and Energy to the Division of Workplace Health and Safety of the Department of Industrial Relations.

8. SECTION 49 ISSUES

Section 49 of the *QCA Act 1997* requires the Authority to have regard to a range of matters in relation to the investigation of a complaint.

The following section considers s49 matters for those elements of the complaint that the Authority considers represent breaches of the principle of competitive neutrality, that is, the scoping and safety equipment and procedural requirements of SWP 39.

The need to ensure compliance with the principle of competitive neutrality

ENERGEX is the successor to the SEQEC, which was declared for the purposes of the *QCA Act 1997*. As a result, the Government has indicated that it intends that ENERGEX be subject to the principle of competitive neutrality. The Authority's recommendations are designed to promote compliance by ENERGEX with the principle of competitive neutrality.

The need of efficient resource allocation

Resources will be most effectively allocated when those best able to manage the risks associated with a particular task are provided with an appropriate opportunity to do so. The competitive advantages identified in respect to scoping indicate that there is no evidence of a systematic risk assessment undertaken by ENERGEX.

As a result, it is considered that the practices relating to scoping and safety equipment and procedures were not consistent with efficient resource allocation. The Authority's recommendations for the adoption of effective, publicly transparent and competitively neutral risk assessment procedures will, if accepted, promote efficient resource allocation.

The need to promote competition

The Authority considered that the presence of a private service provider in the same market as ENERGEX promotes competition. The Authority's recommendations for the adoption of effective, publicly transparent and competitively neutral risk assessment procedures are essential to maintaining and promoting competition in the market.

Any government policies or guidelines about the application of the principle of competitive neutrality

The then Minister of Mines and Energy, the Department of Mines and Energy, and ENERGEX were consulted on this matter. The board and management of ENERGEX are responsible for complying with the principle of competitive neutrality under the *QCA Act 1997*. There are no other policies or guidelines about the application of the principle of competitive neutrality that are relevant to the Authority's conclusions and recommendations.

Any directions about the application of the principle of competitive neutrality given to the government agency by the government

The then Minister of Mines and Energy, the Department of Mines and Energy, and ENERGEX were consulted on this matter. There are no directions about the application of the principle of competitive neutrality that are relevant to the Authority's conclusions and recommendations.

Any arrangements between the government and the government agency about a competitive disadvantage suffered by the agency because of the government ownership or control of the agency.

There are no arrangements between the government and the government agency about the application of the principle of competitive neutrality that are relevant to the Authority's conclusions and recommendations. Furthermore, at no stage has ENERGEX claimed that it suffers a competitive disadvantage because of its government ownership or control.

Any laws about the application of the principle of competitive neutrality

ENERGEX is subject to the *Government Owned Corporations Act 1993*. This Act contains a requirement that government owned corporations (GOCs) adhere to the principle of competitive neutrality.

Any legislation or government policies relating to ecologically sustainable development

There are no laws or government policies relating to ecologically sustainable development that are relevant to the Authority's conclusions and recommendations.

Social welfare and equity considerations including community service obligations and the availability of goods and services to consumers

Consumers of electrical scoping and escort services would benefit from the adoption of the recommendations and the promotion of a competitive market which provides customers, particularly those in the electricity general, mining and manufacturing industries, with a choice of service provider. ENERGEX does not receive any CSO payments in relation to escort services for the transport of high loads.

Any legislation or government policies relating to occupational health and safety or industrial relations

The Authority considers that the recommendations of the Authority will promote occupational health and safety, and public safety.

ENERGEX is obligated to comply with the electrical safety requirements of *the Electricity Act 1994*, the *Electricity Regulation 1994* and codes authorised by the Department of Mines and Energy, with the exception of section 99 of the *Electricity Act 1994* (relevant SWP 39).

ENERGEX is also subject to requirements of the *Workplace Health and Safety Act 1995* and *Regulations*, with the exception of section 149 of the *Workplace Health and Safety Regulations 1997* (relevant to SWP 39).

However, there are no provisions within this legislation that would justify a breach of the principle of competitive neutrality.

Economic and regional development issues, including employment and investment growth

The Authority considers that there are no significant economic and regional development issues related to the provision of electrical escort services to transporters of high loads. As high load transport escort services are not a major business of ENERGEX, either in terms of employment or investment, this activity is unlikely to have a significant impact on employment or investment growth.

The interests of consumers or any class of consumers

The Authority considers that the interests of consumers will be served by promoting competition and ensuring that regulatory arrangements are competitively neutral. The competency and efficiency demonstrated by the private provider should promote improvements in service quality for all customers in the market.

9. AMENDED QCA ACT 1997

9.1 Requirements of the amended QCA Act 1997

Following amendments to the QCA Act which were effective from 26 May 2000, an agency can only be found to be in breach of the principle of competitive neutrality if the agency enjoys a competitive advantage over competitors or potential competitors because the agency's activities are not subject to: (a) full tax equivalent systems; (b) offsetting debt guarantee fees; or (c) government procedural or regulatory requirements on conditions equivalent to the conditions to which a competitor may be subject.

In the interests of completeness, the Authority decided to consider the complaint as if it had also been made after the date of the change to the definition of competitive neutrality.

While SWP 39 is ostensibly a requirement of ENERGEX, by virtue of its origins in the safety provisions of the *Electricity Act 1994* and the *Workplace Health and Safety Regulation 1997*, it is a procedural or regulatory requirement of the State for the purposes of section 38(c) of the *QCA Act 1997*. While Hi-Load is subject to SWP 39, ENERGEX is not required by the *Electricity Act 1994* or the *Workplace Health & Safety Regulation 1997* to apply it to itself.

Accordingly, ENERGEX is not subject to public and employee safety requirements of the State on conditions equivalent to those applying to its private sector competitors or potential competitors.

The Authority proceeded to consider the issue of whether this provides ENERGEX with a competitive advantage.

Scoping

As indicated above, ENERGEX is not subject to the public and employee safety requirements of the State on conditions equivalent to those applying to its private sector competitors or potential competitors. The same competitive advantages as were identified under the preceding provisions of the *QCA Act 1997* also apply in this instance.

Accordingly, it is considered that the regulatory arrangements in relation to the scoping requirements of SWP 39 provided ENERGEX with a competitive advantage that represented a breach of the principle of competitive in accordance with the provisions of the amended legislation.

Safety Equipment

As indicated above, ENERGEX is not subject to the public and employee safety requirements of the State on conditions equivalent to those applying to its private sector competitors or potential competitors. The same competitive advantages as were identified under the preceding provisions of the *QCA Act 1997* also apply in this instance.

Accordingly, it is considered that the regulatory arrangements in relation to the safety equipment and procedural requirements of SWP 39 provided ENERGEX with a competitive advantage that represented a breach of the principle of competitive neutrality in accordance with the provisions of the amended legislation.

Quoting Practices

ENERGEX was claimed to have enjoyed an advantage from an alleged practice of submitting unrealistically low quotes to win jobs, and subsequently invoicing the customer for a significantly greater amount than the original quote, based on proper costing of the job.

There was no suggestion in the complaint that quoting and pricing practices may be attributable to the agency's activities not being subject to requirements to include full tax equivalents or off-setting debt guarantee fees (under s38 (a) and (b)).

Further, there is no procedural or regulatory requirement of the Commonwealth, the State or a local government for the private sector to submit tenders that reflect commercial pricing practices. As such, whether or not NSD is required to reflect commercial pricing practices in its tenders is irrelevant for the purposes of the principle of competitive neutrality under the amended provisions of the *QCA Act 1997*.

Therefore, the matter of quoting practices would not have fallen within the Authority's jurisdiction had a complaint been made in accordance with the provisions of the amended legislation.

Scoping Information

The information advantage allegedly enjoyed by ENERGEX arose from the possible availability of scopes prepared by Hi-Load and provided to ENERGEX for purposes related to a high load transport.

The availability of this information within ENERGEX may allow the competing ENERGEX service provider unit to access and adopt the information submitted by Hi-Load and thereby avoid the cost of conducting a scope itself. This practice would confer an advantage on the ENERGEX service provider unit by lowering its costs and allowing it to offer a competing quote to provide the service.

However, any such advantage does not arise from a procedural or regulatory requirement of the Commonwealth, the State or a local government that applies to a private sector competitor on terms and conditions that are different from those applying to the agency.

Accordingly, the matter of the competitive advantage alleged to derive from the availability of commercially advantageous information within ENERGEX would not have fallen within the Authority's jurisdiction had a complaint been made in accordance with the provisions of the amended legislation.

9.2 Conclusions

The Authority is of the view that, under the amended provisions of the *QCA Act 1997*, the regulatory arrangements prevailing at the time of the decision to investigate, provided ENERGEX with a competitive advantage that represented a breach of the principle of competitive neutrality in respect of the scoping and safety equipment and procedural requirements of SWP 39.

Similarly, as the amendments to the *QCA Act 1997* did not affect s49 of the *Act*, the Authority is of the view that there are no reasons why a breach of the principle of competitive neutrality would have been warranted.