

Queensland Competition Authority Regulation 2018

Explanatory notes for SL 2018 No. 125

made under the

Queensland Competition Authority Act 1997

General Outline

Short title

Queensland Competition Authority Regulation 2018

Authorising law

Sections 20 and 245 of the *Queensland Competition Authority Act 1997* (the QCA Act).

Policy objectives and the reasons for them

The *Queensland Competition Authority Regulation 2007* is scheduled to expire on 31 August 2018 in accordance with Part 7 of the *Statutory Instruments Act 1992* and is required to be remade.

The objectives of the *Queensland Competition Authority Regulation 2018* (the QCA Regulation) are to:

- a) protect against unfair or inefficient pricing practices and service standards in the supply of water and wastewater services in Queensland; and
- b) ensure the Queensland Competition Authority (QCA) can continue to provide the services, and perform the functions, it is required to do in accordance with the QCA Act.

The QCA Act establishes the QCA as the State's independent economic regulator and sets out its functions. The QCA's key responsibilities include:

- under Part 3 of the QCA Act, it conducts recommendatory price investigations of declared 'monopoly business activities' at the direction of the Minister (the prices oversight regime);
- under Part 5 of the QCA Act, it administers the State's third party access regime, which requires it to perform a number of functions, such as deciding whether to approve a draft access undertaking and making access determinations in respect of declared services (the access regime); and

- under the *Electricity Act 1994*, it performs several functions in relation to electricity pricing at the direction of the Minister for that Act, including setting regulated retail electricity prices for regional Queensland.

Declaration of monopoly business activities under the prices oversight regime

Part 3 (Pricing practices relating to monopoly business activities) of the QCA Act includes a prices oversight regime which provides for the QCA to investigate and report on the pricing practices of monopoly or near monopoly businesses at the direction of the Minister. This is intended to ensure monopolies or near monopolies do not exploit their market power through unfair or inefficient pricing.

The QCA Regulation makes the business activities involving the supply of water and wastewater services by particular local governments across Queensland and the south-east Queensland distributor-retailer entities established under the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* subject to the prices oversight regime.

Given the nature of these businesses (i.e. suppliers of water and wastewater services), there is potential for unfair or inefficient pricing due to the lack of competition and high barriers to entry for potential competitors. This is particularly relevant to these businesses given the essential nature of the water and waste water services they provide.

Services and functions for which fees are payable

The QCA performs an important role in ensuring monopoly businesses operating in Queensland, particularly in the provision of key infrastructure and essential utilities, do not abuse their market power through unfair pricing or restrictive access arrangements.

In performing its role, the QCA carries out a range of services and functions as prescribed in the QCA Act. These services and functions are complex and involve consideration of many economic and legal considerations, often requiring the QCA to balance a range of competing factors and interests. The QCA has little to no discretion in whether to perform these services and functions.

It is important the QCA is adequately resourced to perform these services and functions effectively.

Achievement of policy objectives

The QCA Regulation will achieve its objectives by:

- a) enabling the Government to refer certain business activities to the State's independent regulator for an investigation under the prices oversight regime (Part 3 of the QCA Act) where appropriate; and
- b) enabling the QCA to recover costs for services it performs.

Declaration of monopoly business activities

The prices oversight regime provides for the QCA, at the direction of the Minister, to investigate and report on the pricing practices of a declared monopoly business activity. It is a recommendatory regime only, meaning the QCA's findings are not binding on the declared monopoly business.

The prices oversight regime involves two stages:

1. declaration of a monopoly business activity; and
2. Ministerial referral of a declared monopoly business activity for an investigation.

Section 20 of the QCA Act provides for a regulation to declare a government business activity to be a monopoly business activity. For local government entities, a government business activity must be a “significant business activity” as defined under the *Local Government Act 2009*.

The monopoly business activities declared by the QCA Regulation are the water and sewerage supply services of particular local governments across Queensland and the south-east Queensland distributor-retailer entities established under the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*. Each of these business activities are significant business activities in accordance with the *Local Government Act 2009* (i.e. there is potential for competition from the private sector and they have annual expenditure of at least \$13.96 million).

The QCA Regulation maintains existing regulatory arrangements (i.e. each of the business activities were declared as monopoly business activities by the *Queensland Competition Authority Regulation 2007*).

Declaration as a monopoly business activity does not automatically result in QCA oversight. A QCA investigation can only occur if the Minister refers the monopoly business activity for an investigation. The “threat” of regulatory oversight that declaration provides can have a positive influence on the behaviour and pricing practices of the relevant business. That is, the entity carrying on the business may be deterred from taking advantage of its market power to avoid being referred for a QCA investigation.

Declaration under the prices oversight regime is a “light-handed” approach for protecting consumers from monopolistic behaviour. It seeks to deter adverse outcomes at minimal cost and interference from Government. However, it provides for greater Government intervention if it is warranted.

Services and functions for which fees are payable

Section 245(2) of the QCA Act enables a regulation to be made for or about fees or charges for services provided, or functions performed, by the QCA. The QCA Regulation provides for the QCA to charge fees for the majority of services and functions it performs under the QCA Act and other Acts. This is consistent with the existing arrangements applying under the *Queensland Competition Authority Regulation 2007*.

Typically, the QCA’s fees are passed through to customers of the regulated entities on the basis that the beneficiaries of economic regulation should contribute to its cost.

Consistent with section 30A of the *Statutory Instruments Act 1992*, section 3 of the QCA Regulation provides that fees payable to the QCA must be reasonable.

Consistency with policy objectives of authorising law

The QCA Regulation is consistent with the objective of the QCA Act which is to establish the Queensland Competition Authority (QCA), an independent statutory body, to perform certain regulatory functions aimed at promoting efficient resource allocation.

Inconsistency with policy objectives of other legislation

The QCA Regulation is consistent with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

Declaration of monopoly business activities

a) Maintain the existing declarations under the prices oversight regime

As noted above, declaration under the prices oversight regime is a “light-handed” approach for protecting consumers from monopolistic behaviour. It seeks to deter adverse outcomes at minimal cost and interference from Government. However, it provides for timely Government intervention if greater regulation is deemed necessary. There are no compliance costs associated with maintaining the existing declarations.

b) Cease to declare the relevant business activities for prices oversight

Ceasing to declare the relevant business activities would be a change from existing arrangements and would limit the potential for regulatory oversight by the QCA.

This would reduce the “threat” of regulation and associated benefits that declaration provides in terms of moderating firm behaviour. This option will not deliver savings as declaration itself does not impose compliance costs.

c) Impose more prescriptive regulation on the relevant business activities

Intrusive and “heavy-handed” regulation (for example, deterministic price setting by an independent regulator) is not considered appropriate due to the significant administrative and compliance costs associated with it. As there is currently no evidence that the relevant businesses are abusing their market power, a more prescriptive approach is unlikely to deliver overall net benefits to customers and the community more broadly at this time.

Services and functions for which fees are payable

a) Maintain the QCA’s fee charging powers

The majority of the QCA’s operations are funded by fees. This fee-based revenue is supplemented by an annual grant from Government (\$4 million in 2016-17 and 2017-18). The QCA’s fees vary annually depending on the services and functions it has been required to perform. The QCA’s regulatory fees were approximately \$13.8 million in 2015-16 and \$10.8 million in 2016-17 (QCA Annual Report 2016-17).

Fee setting arrangements operate on a cost recovery basis to the extent such costs are reasonable. As part of its regulatory decisions the QCA also sets arrangements for QCA fees to be passed through to consumers. This reflects the principle that the beneficiaries of economic regulation should contribute to its costs.

Fee setting can help deter regulatory gaming and promote effective regulator engagement if costs are borne by the participants to the regulatory process, rather than the community more broadly.

b) Remove the ability for the QCA to charge fees for services its performs.

Removing the ability for the QCA to charge fees for its services would leave the QCA significantly under-resourced and hinder its ability to effectively perform its role without additional Government funding.

If the QCA was fully funded by Government, the major beneficiaries of the QCA's regulation (particularly the mining industry) would benefit without directly contributing to its costs.

Benefits and costs of implementation

The benefits of implementing the QCA Regulation include:

- constraining the potential abuse of market power by monopoly (or near monopoly) businesses. This delivers benefits to consumers of the relevant services (e.g. through lower prices and improved services) as well broader economic benefits resulting from more efficient resource allocation;
- Government savings resulting from the QCA's recovery of costs through fees (QCA fees were approximately \$13 million in 2015-16 and \$10 million in 2016-17. These costs would likely need to be funded by Government if the QCA is unable to charge fees for its services);
- economic benefits arising from the QCA being adequately resourced to effectively perform its functions (e.g. effective access regulation promotes the efficient use of, and investment in, significant infrastructure, with the effect of promoting competition in dependent markets).

Implementation of the QCA Regulation will not impose significant compliance costs on Government or the QCA. The QCA incurs some administrative costs associated with implementing a fee framework, however these are not significant compared to the value of fees recovered.

The QCA Regulation will continue to impose direct costs (i.e. fees) on regulated entities (and their customers). However, these fees reflect the QCA's reasonable costs and in the absence of fee-charging arrangements, these costs would likely be funded by Government.

Overall, the benefits of the QCA Regulation outweigh the costs.

Consistency with fundamental legislative principles

The QCA Regulation has regard to fundamental legislative principles.

Consultation

The QCA was consulted about, and supports, the making of the QCA Regulation. Consultation with the QCA occurred throughout the regulatory development process.

The Office of Best Practice Regulation (OBPR) was consulted regarding the QCA Regulation and determined that a Regulatory Impact Statement was not required. A 'sunset review' of the expiring regulation was undertaken in 2017 and approved by the OBPR as satisfactorily meeting the objectives for sunset reviews under the Queensland Government Guide to Better Regulation.

Declaration of monopoly business activities

The key stakeholders are the Government entities carrying on the declared monopoly business activities. These are the south-east Queensland distributor-retailer entities (Queensland Urban Utilities and Unitywater) and nine local governments across Queensland.

No consultation was undertaken with these stakeholders on the basis that the QCA Regulation is consistent with existing arrangements. Further, declaration does not impose any actual costs on the monopoly business activities until the Minister refers the monopoly business activity to the QCA for an investigation. At that point, the Minister must consult with the relevant entity prior to the referral being made in accordance with section 23 of the QCA Act.

Fee-related provisions

The services for which fees are payable under the QCA Regulation reflect existing arrangements (noting that minor amendments have been made to remove obsolete functions and address drafting issues).

During consultation, the QCA proposed that Government consider broadening the list of services for which fees are payable under the QCA Regulation. The Government considered the QCA's proposal as well as its capacity to perform its functions under existing funding arrangements and decided not to expand the list of services for which fees are payable at this time.

Other stakeholders were not specifically consulted on the QCA Regulation. However, some stakeholders have previously commented on the QCA's fee arrangements in other consultation processes. In this regard, stakeholders have commented on issues such as the transparency of fees.

As the fee-related provisions of the QCA Regulation are consistent with the standard legislative approach (section 30A of the *Statutory Instruments Act 1992*), and that the QCA Regulation ensures fees are only charged for specifically defined activities and must not exceed the QCA's reasonable costs, further amendments to address specific stakeholder concerns about fee arrangements are not proposed. Non-legislative measures may address these issues. For example, it is noted that the QCA has a fee framework which was reviewed in consultation with stakeholders and has implemented practices aimed at improving stakeholder engagement and the transparency of fees.