



**SUBMISSION ON THE  
PROPOSED ELECTRICITY  
CONDUCT RULES FOR  
QUEENSLAND**

## 1.0 INTRODUCTION

We refer to the Consultation Paper *"Electricity Conduct Rules"* ("the Paper") issued by the Queensland Competition Authority ("QCA") for comment by 7 April 2000. We welcome the opportunity to comment and ask that you accept this as a submission on behalf of both Ergon Energy Corporation Limited ("EECL") and Ergon Energy Pty Ltd ("EEPL") (collectively referred to as "Ergon Energy") to this aspect of the consultation process.

In the submission, Ergon Energy has sought where possible to respond to the specific issues raised by the QCA as well as providing general comment on the suggested options for the introduction of Electricity Conduct Rules ("the Conduct Rules") in Queensland. Where relevant, we also rely on the comments that have been previously made to the QCA by EEPL on this issue under cover of letter to the Director dated 4 May 1999.

We have not commented on those sections with which we have no issue or specific comment to make at this point in time. Ergon Energy will, of course, give consideration to further comment as part of any subsequent consultation process.

## 2.0 GENERAL COMMENT

By way of preliminary comment, Ergon Energy is of the view that the introduction of prescriptive Conduct Rules would not result in an amelioration of QCA's concerns regarding competitive neutrality and consumer education. We believe that the optimal method for ensuring that the conduct of electricity entities accords with that desired by consumers, competitors and the QCA is to ensure that the Conduct Rules do not come to represent a "black-letter" pro-forma prescribing the behavior that is, and is not, acceptable.

Our reasons for encouraging a light-handed approach by the QCA to this issue are:

- Ergon Energy believes that a black-letter approach to the Conduct Rules may stifle the ability of concerned parties to reach an innovative and mutually satisfactory resolution of the issue of concern/complaint.
- A prescriptive approach is likely to result in increased costs for regulated entities and the relevant regulator.
- Further regulation of electricity entities would be contrary to the QCA's expressed preference for light-handed regulation as a means of fostering competition within the market.
- We are concerned that prescriptive regulation will merely encourage regulated entities to seek to circumvent the strictures imposed upon them by an artificial interpretation of the Conduct Rules rather than complying with their regulatory intent.

Essentially, Ergon Energy is of the firm belief that imposition of a prescriptive regime is not an effective means of promoting the responsibilities and functions of the QCA under section 120C of the Electricity Act 1994 ("the Act").

### **3.0 SECTION 2 - CURRENT REGULATORY AND LEGISLATIVE FRAMEWORK FOR THE ELECTRICITY MARKET**

Ergon Energy appreciates the recognition contained in the Paper of the considerable regulatory mechanisms that exist on a state and national level to control the conduct of electricity entities. We submit that a consideration of the need for Conduct Rules to govern conduct cannot occur in isolation from a consideration of these existing mechanisms and the combined effect of the regulatory controls. Consideration of the combined effect is essential in assessing both the benefits to be had from the suggested introduction of Conduct Rules and the appropriateness of their proposed content.

We largely agree with the QCA's assessment of the scope of the legislation listed under section 2 of the Paper. We do however wish to clarify that there are various other pieces of legislation such as the *Fair Trading Act (Qld) 1989* ("the FTA") and the *Freedom of Information Act (Qld) 1992* that may impact on the dealings of electricity entities, particularly in relation to consumers, and that also require consideration.

### **4.0 SECTION 4 - DOES THE EXISTING FRAMEWORK ADDRESS CONDUCT RULE ISSUES?**

Ergon Energy supports the QCA's statement that it is mindful of the costs associated with the introduction of Conduct Rules such as those proposed and that it wishes to avoid their introduction where conduct issues can be satisfactorily dealt with within the existing regulatory framework.

To this end, we believe that the summary of Conduct Rule issues within the existing framework that is provided in Attachment B to the Paper, fairly reflects the current regulatory position, with the following exceptions:

- The Act refers to the issue of "*curtailing interference with customers seeking to change retailers*" and the QCA has expressed concern that the provisions of the *Trade Practices Act 1974* ("the TPA") may not be specific enough to cover the circumstances of the retail electricity market.

Ergon Energy suggests that in combination, the provisions of the FTA, TPA and in particular Part IVA of the TPA (unconscionable conduct), create a broad safety net of consumer protection provisions that are directly applicable to the electricity industry. Recognition is also required of the fact that the TPA is not the only legislation or regulatory instrument relevant to this issue and consideration should also be given to the process for customer transfer governed from within the National Electricity Market ("the NEM"). The procedures underlying the existing Market Administration System and the Customer Administration and Transfer System proposed for the introduction of full retail competition influence the customer transfer process and the transfer obligations of electricity entities.

- As a general comment, there is a failure within the Paper to recognise the extent to which the NEM governs issues such as the facilitation of customer transfers and the manner in which settlements occur. In considering any Conduct Rule "gaps" that may exist, the QCA should assess the extent to which existing NEM arrangements govern the behavior of electricity entities.

- The QCA suggests that retailers may seek to recover costs associated with “franchise discounting” through the CSO payment. It is submitted that the recovery of costs through the CSO arrangement is adequately regulated by Queensland Treasury and is not an appropriate matter for further regulation through the QCA.

On this point, the Paper does not appear to recognise the implications of section 91 of the Act which provides that *“a retail entity **must** charge the price, or prices fixed under the methodology, notified under section 90”* [emphasis added]. This provision effectively requires a retailer to charge the price determined by the Minister, not more or less.

- The QCA has raised concerns that an electricity entity may suggest to a customer that switching from a retailer that has a close (ownership) connection with the distributor may have a detrimental effect on service or that common branding may effect the accuracy of information provided to a customer. Ergon Energy contends that representations such as this are adequately covered by the provisions of the TPA and in particular, sections 45 and 51AB.
- A further concern is expressed by the QCA that there may be an assignment of costs between contestable and regulated arms of a business. Ergon Energy suggests that this issue becomes one of considerably less concern as the market progresses towards full retail competition and that adequate protection on this issue already exists through the QCA’s consideration of the ring-fencing guidelines and Queensland Treasury’s examination of the costs prescribed as part of the CSO paid.

**The Authority invites comment on whether or not the current legislative and regulatory arrangements are sufficient to regulate the conduct of electricity entities, and:**

- **if sufficient, whether there is a need to consolidate and simplify the requirements of the current legislative and regulatory regime in a conduct related document; and**
- **if not sufficient, the areas in which additional conduct related regulation may be required.**

Ergon Energy submits that there are currently sufficient regulatory controls governing the behavior of electricity entities and that further prescription as to behavior by the QCA is not required.

We do not believe that a “consolidation and simplification” of the current legislative and regulatory regimes is possible or will assist either customers or industry participants. If the Paper is suggesting that the Conduct Rules essentially mirror existing regulatory requirements, Ergon Energy is of the view that any attempt to consolidate and simplify these controls will only heighten the risk of poorly or inadequately defining the parties’ obligations and thereby creating ambiguity/conflict for all parties. This level of conflict/ambiguity will do little to encourage appropriate behavior and would remove all prospect of clarity regarding rights and obligations.

If, on the other hand, the Paper were submitting that the Conduct Rules should supplant the existing regulatory requirements then Ergon Energy would view this suggestion as unachievable given that it would require numerous regulators to

“assign” their oversight role to the QCA. Obtaining such consent would be a difficult task for the QCA.

Ergon Energy does however believe that consideration should be given to the establishment of a dispute resolution scheme to allow the QCA to fulfil an oversight role for the behavior of electricity entities. This should only occur within the context of the QCA’s stated functions under the Act. Further discussion on this issue is contained under item 6 of this submission.

## 5.0 SECTION 5 – APPROACHES TO CONDUCT RULES

**The Authority invites comment on the appropriate form for preparation of conduct rules for electricity entities, should such conduct rules be deemed necessary.**

If it is determined that the formulation of Conduct Rules is required, we advise that of the “possible approaches” detailed for comment in the Paper, Ergon Energy supports the formulation of an “overarching framework” establishing a set of general principles to be complied with.

The use of an overarching framework would provide the electricity entity with the flexibility necessary to meet the requirements of current customers as well as assisting to ensure that the Conduct Rules are flexible enough to apply to market changes that would occur under full retail competition.

In relation to the “drawbacks” listed by the QCA, we comment as follows:

- The “reasonableness” of the queried behavior should always be considered in the context of the surrounding circumstances and under any approach, it would be impossible to avoid issues of interpretation. It is submitted that the benefits of light-handed regulation, flexibility and lower compliance costs should not be sacrificed in the interests of overly prescribing a party’s obligations. Issues of interpretation will be resolved over time as “precedents” regarding what is or is not acceptable behavior are established.
- As previously stated, Ergon Energy is concerned that adoption of prescriptive Conduct Rules will result in parties attempting to place an artificial interpretation on the Conduct Rules in an effort to “game” behavior and avoid the Conduct Rules’ intent. A black letter law approach will only encourage exploitation of perceived “loop-holes” and result in the need for the Conduct Rules to be continually refined to ensure that they are administratively efficient.
- It is suggested that the issue of consumers from non-English speaking backgrounds understanding the Conduct Rules is not resolved by the level of detail that the Conduct Rules may or may not contain but by ensuring that such consumers have access to appropriate interpreter services.

The overarching framework would minimize the cost of regulation (to which the other suggested options are likely to fall victim) while still promoting the intent of the Act and competition.

**The Authority invites comment on whether, if conduct rules are to be introduced, they should be in the form of voluntary industry codes or through formal regulatory requirements.**

Ergon Energy is of the view that the issue of voluntary versus compulsory should not be considered without an assessment of the impact of the options on participants governed by any proposed Conduct Rules.

For example, under section 3.7.1(d) of the conditions attached to licences held by retailers in New South Wales, a retailer would be required to prepare and submit plans to the responsible Minister in relation to the Conduct Rules. The regulatory requirement for retailers in New South Wales to adopt and implement strategies relating to “Industry Standards, Guidelines and Codes” would, in effect, remove any suggested voluntary element of the Conduct Rules for any retailer operating or holding a licence in New South Wales.

There may therefore be an unintended effect upon other regulatory requirements, particularly for retailers.

In view of this and the potential for inequity between electricity entities, it is suggested that the Conduct Rules (if any) should apply to all entities operating in the market, at all levels.

## **6.0 SECTION 6 – COMPLIANCE ISSUES**

We note the comments by the QCA contained in the Paper that a compliance program will normally require a monitoring program and reporting system to verify compliance and that this might go so far as to include an option for auditing. Ergon Energy expresses its concern regarding the substantial cost implications, for both regulated entities and the regulator, of implementing a detailed compliance program and participating in audits.

It is Ergon Energy’s belief that, should the QCA ultimately determine that the formulation of Conduct Rules is required, the issue of compliance with those Conduct Rules is an internal management issue for the individual electricity entity.

**The Authority invites comment on the most appropriate form for a compliance system, including the establishment of a complaints resolution process.**

Following from our views expressed above, Ergon Energy believes that the most effective means for ensuring compliance with the Conduct Rules would be for the introduction of a structured complaint resolution system instead of the introduction of behavioral restrictions. The QCA could assume the role of system oversight and intervene where necessary to facilitate the parties reaching an appropriate resolution.

While we note the courses of action open to the QCA under sections 120T and 120V of the Act, referral of an alleged breach of the Conduct Rules to the Supreme Court

does little to encourage resolution of the dispute at an early stage and the expense of an application to the Supreme Court (particularly for consumers) will usually be difficult to justify. Accordingly, such an application should only be made by the QCA after all other avenues are exhausted or if there is a genuine need for a mandatory or prohibitory injunction.

Adoption of a dispute resolution process would provide a means of ensuring compliance (through the QCA's oversight role in the process) as well as establishing a dispute resolution procedure that is both flexible and cost effective for all parties involved, including the QCA as regulator.

As stated in EEPL's letter of 4 May 1999 to the QCA:

*"The methodology we propose is, very broadly, that whenever a retailer (or an aggrieved consumer) ["Affected Party"] has issue with the conduct of another retailer ("the Offending Party") a notice be issued under the Conduct Rules to the Offending Party. Under the auspices of the Queensland Competition Authority ("QCA") the Offending and Affected Parties should be required to conduct an informal discussion on the issue and reach agreement that is then submitted to the QCA for endorsement. Assuming endorsement is provided the QCA then monitors the agreement for compliance by all parties. If endorsement is not provided by the QCA then a process for the QCA issuing a determination and reasons is required.*

*If the Offending and Affected Parties are unable to resolve the matter amicably then either party may issue a notice under the Conduct Rules to the other (and the QCA). The QCA then intervenes and mediates the dispute. Should the Parties be unable to reach settlement within a defined time period (under the Conduct Rules), the Rules could provide for the QCA to call for submissions from all Parties (again within a specified time period) and allow oral argument to occur (without legal representation). Following this the QCA could issue a draft ruling (within a specified time period), allowing the Parties to then respond to the draft ruling. The QCA would then issue a final ruling that binds the Parties and rules on the behavior.*

*The Conduct Rules should incorporate penalties (administered by the QCA) for the failure of a Party to comply with either a ruling or agreement made under the Conduct Rules. Further they should also allow for the QCA's determination to be appealed to a Tribunal."*

Ergon Energy supports the suggestion contained in the Paper that a complaints mechanism may be used as an alternative to formal compliance reporting, with the QCA investigating whether the Conduct Rules have been breached only where a complaint arises. Further consideration could be given to the appropriate means for the QCA and the individual electricity entities to promote the existence of the dispute resolution scheme to consumers.

## **7.0 CONCLUSION**

Using the stated “objectives” of the Paper as a basis, Ergon Energy can summarise its position on the introduction of Conduct Rules as follows:

### **The need for specific conduct rules**

There is a range of regulatory regimes that control the conduct of electricity entities. The Conduct Rules should therefore only go so far as to address any “gaps” that may exist between the QCA’s responsibilities and functions under the Act and existing regulation.

### **The form of the Conduct Rules (if any)**

Ergon Energy submits that there are currently sufficient regulatory controls governing the behavior of electricity entities and that further prescription as to behavior by the QCA is not required. Ergon Energy does however believe that consideration should be given to the establishment of a dispute resolution scheme to allow the QCA to fulfil an oversight role regarding the behavior of electricity entities but only within the context of its functions under the Act.

### **The most appropriate means of ensuring compliance**

Ergon Energy submits that an appropriate level of compliance monitoring and complaint handling would be achieved through the introduction of a dispute resolution system promoted by the QCA and electricity entities to consumers and within the industry.

We thank the QCA for the opportunity to submit on the Paper and would welcome the opportunity to discuss our submission should clarification be required and to participate in any further consultation process on this issue.