



Interim Consultation Notice

**Proposed amendments to the
Electricity Industry Code requiring
prior notice for price changes**

June 2009

Level 19, 12 Creek Street Brisbane Queensland 4000
GPO Box 2257 Brisbane Qld 4001
Telephone (07) 3222 0555
Facsimile (07) 3222 0599

general.enquiries@qca.org.au
www.qca.org.au

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SUBMISSIONS

Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (the Authority). The Authority is releasing this Interim Consultation Notice to provide an opportunity for interested parties to comment on the proposal to introduce a requirement for electricity retailers to give their small customers written notice of any price changes prior to enacting those changes. It is proposed that this requirement be added to the existing list of minimum terms and conditions of retail contracts, as contained in Chapter 4 of the Electricity Industry Code.

Written submissions should be sent to the address below. While the Authority does not necessarily require submissions in any particular format, it would prefer to receive an electronic version in Microsoft Word © format by e-mail. Submissions, comments or inquiries should be directed to:

Queensland Competition Authority
GPO Box 2257
Brisbane QLD 4001
Telephone: (07) 3222 0555
Fax: (07) 3222 0599
Email: electricity@qca.org.au

The **closing date** for submissions is **COB Friday 17 July 2009**.

Confidentiality and Public Access to Submissions

In the interests of transparency and to promote informed discussion, the Authority would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. Where it is unclear why a submission has been marked “confidential”, the status of the submission will be discussed with the person making the submission.

While the Authority will endeavour to identify and protect material claimed as confidential as well as exempt documents (within the meaning of the *Freedom of Information (FOI) Act 1989*), it cannot guarantee that submissions will not be made publicly available. As stated in section 187 of the *Queensland Competition Authority Act 1997*, the Authority must take all reasonable steps to ensure the information is not disclosed without the person’s consent, provided the Authority is satisfied that the person’s belief is justified and that the disclosure of the information would not be in the public interest. Notwithstanding this, there is a possibility that the Authority may be required to reveal confidential information as a result of an FOI request.

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office of the Authority, or on its website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact the office (07) 3222 0555.

Information about the role and current activities of the Authority, including copies of reports, papers and submissions can also be found on the Authority’s website.

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1. BACKGROUND

1.1 Minimum terms and conditions in retail contracts

Chapter 4 of the Queensland Electricity Industry Code (the Code) sets out the minimum terms and conditions for retail contracts entered into by retail entities and small customers in Queensland. Small customers are those that consume less than 100 MWh of electricity per year, according to section 300 of the *Electricity Regulation 2006* (the Electricity Regulation).

Broadly speaking, the minimum terms and conditions set out in Chapter 4 of the Code must be included in all retail contracts in Queensland. To the extent that any contract is inconsistent with these terms, it is unenforceable.

Customers who do not negotiate a contract with an electricity retailer (non-market customers) are on the standard retail contract set out in Annexure B to the Code. The terms of the standard retail contract are – and must remain – consistent with the terms of Chapter 4 of the Code.

For small customers who negotiate a contract with an electricity retailer (market customers), their contracts must also be consistent with the terms set out in Chapter 4 of the Code. However, there is a list of minimum terms and conditions in clause 4.2.3(d) of the Code that can be varied in negotiated retail contracts.

The Authority also has an absolute discretion to approve terms and conditions for any negotiated retail contract that do not conform with all or any of the provisions of Chapter 4 of the Code, if its discretion is exercised *before* the commencement of the contract (see clause 4.2.3(c) of the Code).

Currently, there is no requirement in the Code for electricity retailers to provide written notice to small customers prior to making changes to prices.

On 29 April 2009, the Associate Director-General of Mines and Energy, Department of Employment, Economic Development and Innovation wrote to the Authority requesting that the Authority commence a process to amend the Code to prevent retrospective price changes (**Attachment 1**). The request noted concerns about a recent incident in which Queensland Electricity Pty Ltd increased prices for its market customers significantly in mid January 2009 and applied the increase retrospectively, backdating the price rise to 1 January 2009.

While there is no evidence to suggest that Queensland Electricity acted other than in accordance with the terms and conditions in its market contracts, concern was expressed that individual customers may be denied an opportunity to choose alternative retailers if they are not informed of price changes in advance. The Authority shares these concerns.

1.2 Scope of Review

This review aims to assess the proposed change to the minimum terms and conditions contained in Chapter 4 of the Code, requiring retailers to provide written notice of price changes to small customers prior to the changes taking effect. The purpose of this Interim Consultation Notice is to assist interested parties in making submissions to the Authority in relation to this proposal.

Chapter 2 of this Notice outlines the proposal in further detail and discusses the relevant terms and conditions set out in the Code. It also contains an analysis of the approach taken in other jurisdictions.

An indicative timetable to finalise the matters raised in this Discussion Paper is provided below:

Action	Date
Release of Interim Consultation Notice	19 June 2009
Submissions close	17 July 2009
Release Draft Decision and Final Notice	21 August 2009
Receive Submissions on Draft Decision	18 September 2009
Release Final Decision	23 October 2009

Under the Act, the Authority must seek Ministerial approval of any proposed Code amendments and, if granted, publish the amendments in the Queensland Government Gazette.

2. PROPOSAL TO AMEND MINIMUM TERMS AND CONDITIONS

2.1 Objective of the Code

When considering making amendments to the Code, the Authority must consider the Code objective.

The objective of the Code is to promote efficient investment in, and efficient use of, electricity services for the long-term interests of Queensland customers, about:

- (a) the price, quality, reliability and security of supply of electricity; and
- (b) the reliability, safety and security of the Queensland electricity system.

2.2 Existing requirements regarding price changes

Chapter 4 of the Code sets out the minimum terms and conditions to be included in retail contracts with small customers in Queensland. These minimum terms and conditions do not currently include any requirement for electricity retailers to provide notice to small customers prior to changing their prices.

Part 4.12 of the Code contains the most relevant minimum requirements for retailers with respect to price changes.¹

Clause 4.12.1 of the Code provides that, if a small customer changes from one type of tariff to another, the retailer must obtain a meter read and calculate the small customer's bill on a pro rata basis. This requirement to obtain a meter read appears to prevent a price change applying retrospectively in circumstances where a customer changes from one tariff type to another.

However, where the tariff (price) is changing but not the tariff type, clause 4.12.2 requires that:

Where during a billing cycle the tariff rate or charge applying to a small customer changes, the retail entity must calculate the bill on a pro rata basis using:

- (a) the old tariff rate or charge up to but not including the date of change; and*
- (b) the new tariff rate or charge from and including the date of the change to the end of the billing cycle.*

In these circumstances, no meter read or other action is required prior to the price change coming into effect. There is merely a requirement for bills to be calculated on a pro-rata basis using the old tariff up to the "date of change", whenever that is determined to be.

In the case of the retrospective price changes introduced by Queensland Electricity, the terms of the negotiated retail contract entered into by those customers expressly allowed the retailer to amend the price so long as notice was provided. However, the notice did not need to be provided before the date of the price change. The contracts only required that notice be given as soon as practicable and, in any event, no later than the next bill.

Each retailer will have its own terms and conditions regarding the application of price changes to existing customers. However, there is nothing in the Code to prevent retrospective price changes being implemented in the manner adopted by Queensland Electricity or any other retailer in respect of small customers on market contracts.

¹ Part 4.11 of the Code, relating to undercharging and overcharging in bills, applies when there has been some mistake or miscalculation of the amount that a small customer is charged in a bill.

Under the standard retail contract contained in Schedule B of the Code, which provides the terms and conditions applying to all non-market customers (those on notified prices), a retailer is obliged to charge small customers the notified (regulated) tariff applying at any point in time.

While notified tariffs can, and do, change, this is not at the discretion of any particular retailer and the date of effect for notified prices is fixed at the time any changes are notified. The standard retail contract simply provides at clause 8.3 that, when notified prices change, the details of the change will be included in the first bill issued after that change occurs and prices will change from the date of effect of the change in the notified prices.

2.3 Existing limits on retrospective price changes

The Authority is of the view that retailers may effectively be restricted in their capacity to backdate price changes by more than the duration of one billing cycle (usually three months). Clause 4.9.1 of the Code requires retailers to use their best endeavours to issue bills to small customers at least quarterly. This is a minimum term that can be varied in a negotiated retail contract, so a billing period will not always be exactly three months.

However, clause 4.9.6 of the Code requires retailers to include certain particulars on each bill, including *the relevant fees, charges and tariffs applicable to the small customer*. A retailer attempting to backdate a price increase for a small customer beyond the most recent bill would potentially be in contravention of the Code as it would mean that bills it had previously issued to customers would not have contained the correct fees, charges or tariffs as required. Given that most (if not all) contracts with small customers in Queensland currently require quarterly billing, this appears to provide a de facto limit of three months on the period that most retailers could currently backdate any price changes.

2.4 Other jurisdictions

A brief summary of the arrangements applying in New South Wales, Victoria and South Australia is provided below.

New South Wales

Retailers in New South Wales are expressly prohibited from making retrospective changes to the prices they charge small market customers.

The relevant legal provisions are located in clauses 22 and 23 of the *Electricity Supply (General) Regulation 2001* (NSW), as set out below:

22 - Variation of charges under a negotiated customer contract

(1) *A variation in the rates of charges for connection services provided or electricity supplied by a licence holder under a negotiated customer contract with a small retail customer has no effect, and may not be imposed, unless a written notice setting out particulars of the variation is served on the customer.*

(2) *The particulars to be set out in such a notice must:*

(a) *specify the date on or after which the variation is to take effect being a date that is later than the date the notice is served, and*

(b) *include a statement of the new rates or the amount of the variation.*

23 - Variation may not operate retrospectively

A variation in the rates of charges for connection services provided or electricity supplied under a customer contract for which notice is required to be given under this Division operates from the date specified in the relevant notice of the variation and does not operate retrospectively.

The clear intent of these provisions is to prevent retailers from retrospectively changing the prices they charge their small customers. Note that section 22(2)(a) above specifically states that the date on which the variation is to take place must be later than the date the customer is notified of the price change. Section 23 further states that variations in the rates and charges retailers apply to their customers cannot change retrospectively.

Victoria

Currently, retailers in Victoria are able to change their prices retrospectively if they do so in accordance with an express term or condition in the contract and they obtained *explicit informed consent* from the customer in relation to that term or condition.

The Victorian Energy Retail Code (Version 5 – January 2009) sets out the minimum terms and conditions required in retail contracts in Victoria. Part 6 of that Code relates to Market Contracts and variations to these market contracts. Specifically, clause 20 states that:

20. Variations Require Customer's Agreement

- (a) The tariff and any terms and conditions of an energy contract between a customer and a retailer may only be varied by agreement in writing between the customer and the retailer.*
- (b) If the amount of the tariff changes in accordance with a term or condition of an energy contract previously agreed between the customer and the retailer, no further agreement is required between the retailer and the customer to effect such tariff change, provided that, where the contract is a market contract, the customer had given its explicit informed consent to the inclusion of the relevant term or condition in the energy contract.*
- (c) Also for the avoidance of doubt, if the tariff and terms and conditions of a dual fuel contract vary on disconnection by a retailer of a domestic customer's gas in accordance with and as contemplated by a disconnection warning, no further agreement is required.*

Note that section 20(b) effectively allows a retailer to change the price only in accordance with a formula or on a basis that was already explained to, and agreed to by, the customer. Any other type of price change requires a new, written agreement between the customer and the retailer, according to section 20(a) and, therefore, cannot be retrospective.

South Australia

Similar to Victoria, retailers in South Australia are currently allowed to retrospectively change prices so long as the change is made in accordance with a written disclosure statement outlining the manner in which the price change will occur and agreed to by the customer at the time the contract was entered into.

The South Australian Energy Retail Code (March 2004) sets out the obligations that retailers must comply with in dealing with small customers. Clause 6.7.2 of that Code states:

6.7.2. Change of tariff within a billing cycle

Where during a billing cycle the tariff rate or charge applying to a small customer changes, the retailer must calculate the bill on a pro rata basis using:

- (a) the old tariff rate or charge up to and including the date of change; and*

(b) the new tariff rate or charge from the date of the change to the end of the billing cycle.

Clause 9.3 of that Code also contains the following condition included in the standard offer contract used in South Australia:

9.3. Variations to the customer's tariffs and charges

We may only vary our tariffs and charges in accordance with the requirements of the Electricity Act or other applicable regulatory instruments and any variation will be published on our website and in the South Australian Government Gazette.

If the conditions applying to our tariffs and charges change so that your previous tariff and charges no longer apply to you at your supply address, we can decide which tariffs and charges will apply.

Clause 14.1(e) of the Energy Marketing Code (March 2004) states that:

14. WRITTEN DISCLOSURE STATEMENT

14.1 When a marketing contact results, or is intended to result, in a small customer entering into a customer sale contract, or when a small customer contacts a marketer for the purposes of entering into a customer sale contract, the following information must be provided in writing to the small customer by the marketer in a written disclosure statement at the time the customer sale contract is entered into:

(e) if the prices, charges, tariffs or service levels are able to be changed by the retailer under the customer sale contract, the manner in which any such change may be effected;

As such, in South Australia, electricity retailers are able to change prices retrospectively so long as the retailer includes a clause outlining the manner in which any such price change may be effected as part of the written disclosure statement it provides to the customer.

The Authority seeks the views of interested parties on the following issues:

- **Should a requirement be introduced into the Electricity Industry Code for electricity retailers in Queensland to give small customers written notice of any price changes prior to those price changes coming into effect?**
- **If such a requirement should be introduced, what changes should be made to the Electricity Industry Code (for example, should this requirement be added to the list of minimum terms and conditions for retail contracts in Chapter 4 of the Code or would alternate approaches be preferable)?**

3. REFERENCES

Department of Mines and Energy: Queensland Government (2008), *Electricity Industry Code*.

Electricity Supply Act 1995 (NSW).

Electricity Supply (General) Regulation 2001 (NSW).

Essential Services Commission of South Australia (2004), *Energy Marketing Code, EMC/01*.

Essential Services Commission of South Australia (2004), *Energy Retail Code, ERC/01*.

Essential Services Commission of Victoria (2009), *Energy Retail Code, Version 5*.

Independent Pricing and Regulatory Tribunal of New South Wales, *Electricity Retail Suppliers Licence Conditions Reference Document, Version 3*.

Independent Pricing and Regulatory Tribunal of New South Wales, *Electricity Standard Retail Suppliers and Retailers of Last Resort Licence and Endorsement Conditions Reference Document, Version 3*.

4. ATTACHMENT 1

QLD COMPETITION AUTHORITY

- 5 MAY 2009

DATE RECEIVED



Your Ref:
Our Ref: ADG12

29 APR 2009

Mr John Hall
Chief Executive
Queensland Competition Authority
GPO Box 2257
BRISBANE QLD 4001

Dear Mr Hall

I am writing to you requesting that the Queensland Competition Authority (QCA) commence a process, under Division 5 Part 1A of Chapter 5 of the *Electricity Act 1994*, to amend the Electricity Industry Code (the Code).

The proposed amendment is to Chapter 4 of the Code (Customer Retail Services), to include in the minimum terms and conditions of a negotiated retail contract with a small customer a requirement that a retail entity must give the customer prior written notice of any price increase.

The proposed amendment is in response to concerns arising from recent action by Queensland Electricity Pty Ltd (QE) to increase its prices for customers on market contracts retrospectively. Specifically, on 13 January 2009, QE advised the former Department of Mines and Energy of its decision to increase prices to all its market contract customers by 13.63 percent, effective from 1 January 2009. QE wrote to all its affected customers in mid-January 2009, informing them of the price increase. These price increases were applied to QE's market customers and backdated to 1 January 2009.

At the request of the former Minister for Mines and Energy, the Energy Ombudsman Queensland has investigated whether the retrospective price increase was allowable under the market contracts. The Department has been provided with a copy of EOQ's report, which concluded that QE's retrospective price rise was in accordance with the terms of its market contracts with customers.

Associate Director-General
Mines and Energy
Department of Employment, Economic
Development and Innovation
PO Box 15216
City East
Queensland 4002 Australia
Telephone +61 7 3898 0375
Facsimile +61 7 3238 3088
Website www.dme.qld.gov.au
ABN 98 628 485 885

Specifically, clause 3.6 of the QE Negotiated Contract Terms and Conditions states that QE "may amend your energy charges but will provide you with notice of any change. The notice will be given to you as soon as practicable, and in any event no later than your next bill."

The EOQ report advises that Clause 3.6 would seem unambiguous in giving QE the right to vary its charges to the customer. By providing customers with a letter advising them of the price increase, QE appears to have met its obligation under that clause. EOQ has not found any evidence of misleading conduct by QE in terms of customers being incorrectly advised that prices would not change during the term of the contract. Further, EOQ does not consider that QE's response and explanation regarding the increase in network costs over time to be unreasonable or misleading.

I am concerned that whilst QE appears to have met its obligations under its contracts and the Code, the application of retrospective price increases does not align with the intent of the Code, particularly in relation to providing adequate consumer protection for small customers in a competitive retail market.

I am particularly concerned that, while in this case QE's retrospective application was for two or three weeks before notice was given to customers, there appears to be nothing to prevent market contracts which allow retrospective price increases to be applied for a much longer period.

Further, by ensuring customers are informed in advance of any price increases, customers have an opportunity to exercise their rights to look for an alternative contract with another retailer, if they so choose.

I would appreciate QCA progressing its consideration of the proposed amendment to the Code as a matter of high priority.

Should you have any further enquiries, please contact Mr Darren Schneider, Director, Industry and Client Services of Mines and Energy on telephone 3237 1131.

Yours sincerely



DAN HUNT
Associate Director-General