



## **Decision and Reasons for Decision**

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**Application Number:** 210501

**Applicant:** Mr R Buckley

**Respondent:** Ergon Energy Corporation Limited

**Decision Date:** 11 March 2009

**Catchwords:** **FREEDOM OF INFORMATION – section 11A – activities conducted on a commercial basis - jurisdiction**

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## REASONS FOR DECISION

### Summary

1. For the reasons set out below, I am satisfied that:
  - the matter in issue in this review consists of a report which was received or brought into existence by Ergon Energy Corporation Limited (**Ergon**) in carrying out its commercial activities
  - due to the combined effect of section 11A of the *Freedom of Information Act* 1992 (**FOI Act**) and section 256 of the *Electricity Act* 1994 (**EA**), the FOI Act does not apply to the matter in issue in this review.
2. Accordingly, this Office has no jurisdiction to review the internal review decision of Ms J Keen dated 22 April 2008.

### Background

3. By application dated 19 February 2008 (**FOI Application**), the applicant made a freedom of information application to Ergon for:

*Report on Kirwan Tenpin & Squash electrical incident prepared by Mr Chris Halliday of Electrical Consulting and Training. Report is approx. 50 pages, commissioned late April-May 2007.*
4. By letter dated 14 March 2008, Mr Alan Mitchell of Ergon advised the applicant that:
  - a document responsive to the applicant's FOI Application had been located
  - he had determined that access to the document was refused under section 43(1) of the FOI Act (**Original Decision**).
5. By letter dated 18 March 2008 (received 25 March 2008), the applicant sought internal review of the Original Decision (**Internal Review Application**).
6. By facsimile letter dated 22 April 2008, Ms Keen of Ergon notified the applicant that she had conducted an internal review and determined that the document was exempt from release under section 43(1) of the FOI Act (**Internal Review Decision**).
7. By application to the Office of the Information Commissioner (**Office**) dated 28 April 2008 (received 6 May 2008), the applicant sought external review of the Internal Review Decision (**External Review Application**). The External Review Application was accompanied by submissions:
  - setting out the background to the applicant's FOI Application
  - in support of the applicant's view that section 43(1) of the FOI Act did not apply to the matter in issue.

### Decision under review

8. The decision under review is the Internal Review Decision.

### Steps taken in the external review process

9. A copy of the document in issue was obtained from Ergon.
10. On 24 July 2008, a staff member of this Office notified the applicant by phone of the preliminary view that section 43(1) of the FOI Act did not apply to the matter in issue.
11. On 18 August 2008, a staff member of this Office notified the applicant by phone that the jurisdictional issues raised by section 11A of the FOI Act were also being considered in the context of this review.
12. On 19 August 2008, the applicant wrote to this Office regarding procedural matters in the review and submitted in relation to section 11A of the FOI Act that:

*I respectfully point out that all the evidence shows that this report was not commissioned for the commercial purposes necessary to fall within the provisions of this section of the Act, but to investigate the basis of our claim and other complaints relating to safety and legal breaches by Ergon Energy ...*
13. By letter dated 19 August 2008, this Office:
  - responded to the applicant's enquiries regarding procedure
  - confirmed that the jurisdictional issue raised by section 11A of the FOI Act was being considered in the context of this review.
14. On 25 August 2008, a staff member of this Office spoke with Ms Keen of Ergon to advise:
  - a preliminary view had initially been formed (and notified to the applicant) that section 43(1) of the FOI Act did not apply to the matter in issue
  - that this Office was considering the possible application of section 11A of the FOI Act to the matter in issue.
15. By letter dated 25 August 2008, this Office invited Ergon to provide submissions regarding the possible application of section 11A of the FOI Act to the matter in issue.
16. By facsimile received on 12 September 2008, Ergon provided this Office with its written submissions (**Ergon's Submissions**).
17. By letter dated 19 September 2008, a preliminary view was communicated to the applicant that due to the combined effect of section 11A of the FOI Act and section 256 of the EA, the FOI Act did not apply to the matter in issue. A copy of Ergon's Submissions was also provided to the applicant to enable the applicant to provide submissions in response.
18. On 15 October 2008, the applicant provided detailed written submissions to this Office in response to the preliminary view and Ergon's Submissions (**Applicant's Submissions**).
19. On 3 November 2008 and 11 November 2008, a staff member of this Office spoke with Ergon staff to obtain further information about the circumstances in which the matter in issue in this review was commissioned (in response to issues raised in the Applicant's Submissions).

20. A staff member of this Office also spoke with Ergon on 27 February 2009 and 6 March 2009 to clarify matters relating to Ergon's role in the Queensland electricity industry.
21. In reaching a decision in this external review, I have taken the following into account:
- the FOI Application and Original Decision
  - the Internal Review Application and Internal Review Decision
  - the External Review Application
  - the Applicant's Submissions
  - Ergon's Submissions
  - file notes of telephone conversations with Ergon on 3 November 2008, 11 November 2008, 27 February 2009 and 6 March 2009
  - the matter in issue
  - relevant provisions of the FOI Act and other acts
  - relevant case law and previous decisions of this Office.

**Matter in issue**

22. The matter in issue comprises a document titled 'Power Quality Report for Ergon Energy, Kirwan Ten Pin Centre. Electrical Consulting and Training' (**Report**).

**Findings**

23. Section 21 of the FOI Act confers on persons a legally enforceable right to be given access under the FOI Act to documents of an agency and official documents of a Minister. This right of access is subject to other provisions of the FOI Act. In particular, the right of access is subject to Part 1 Division 4 of the FOI Act, which sets out provisions relating to the operation and application of the FOI Act.
24. The Report is a document of an agency which is a government owned corporation (**GOC**). Section 11A of the FOI Act provides that certain documents of particular GOCs are not subject to the operation of the FOI Act.

**Section 11A of the FOI Act**

25. Section 11A of the FOI Act provides as follows:

**11A Application of Act to GOCs**

*This Act does not apply to documents received, or brought into existence, in carrying out activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.*

26. Relevantly, Schedule 2 of the FOI Act provides:

**Schedule 2 Application of Act to GOCs**

<b>GOC</b>	<b>Application provision</b>
...	...
3 State electricity entity, within the meaning of the <i>Electricity Act 1994</i>	<i>Electricity Act 1994</i> , section 256
...	...

27. A 'State electricity entity' is defined in Schedule 5 of the EA to mean '*an electricity entity that is a GOC, a GOC subsidiary or a government company*'.
28. An 'electricity entity' is defined in section 22 of the EA which provides:

**22 Electricity Entities**

- (1) *An electricity entity is an entity that is a participant in the electricity industry.*
- (2) *The following entities are the participants in the electricity industry –*
- (a) *generation entities;*
  - (b) *transmission entities;*
  - (c) *distribution entities;*
  - (d) *retail entities.*

29. Section 256 of the EA provides as follows:

**256 Application of Freedom of Information Act and Judicial Review Act**

- (1) *In this section –*
- commercial activities** *means activities conducted on a commercial basis.*<sup>50</sup>
- community service obligations** *has the same meaning as in the GOC Act.*
- excluded activities** *means –*
- (a) *commercial activities; or*
  - (b) *community service obligations prescribed under the regulations.*
- (2) *A regulation may declare the activities of a State electricity entity that are taken to be, or are taken not to be, activities conducted on a commercial basis.*
- (3) *The Freedom of Information Act 1992 does not apply to a document received or brought into existence by a State electricity entity in carrying out its excluded activities.*
- (4) *The Judicial Review Act 1991 does not apply to a decision of a State electricity entity made in carrying out its excluded activities.*

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<sup>50</sup> Section 16 of the GOC Act (Meaning of corporatisation) defines corporatisation as a structural reform process for nominating government entities that, among other things, changes the conditions and (where required) the structure under which the entities operate so that they operate, as far as practicable, on a commercial basis and in a competitive environment (emphasis added).

30. Accordingly, the FOI Act will not apply to a document received or brought into existence by a State electricity entity in carrying out its excluded activities, being:

- community service obligations prescribed under the regulations
- commercial activities.

I will consider each category in turn.

## 1. Community service obligations

31. Section 222 of the *Electricity Regulation 2006* (ER) provides:

### **222 Commercial and excluded activities for Act, s256**

- (1) *For section 256(1), definition excluded activities, of the Act, a community service obligation for the charging of customers by a State electricity entity in accordance with price equalisation, or at a price fixed by the Minister, is a prescribed community service obligation.*
- (2) *For section 256(2) of the Act, negotiations between the Ministers and a State electricity entity about costs and charges for providing electricity as a community service obligation are declared to be commercial activities of the State electricity entity.*
- (3) *For section 256(2) of the Act, the activities of the System Operator for Queensland are declared to be commercial activities.*
- (4) *In this section –*

***Ministers** means the Minister who administers the Act and the Minister who administers the Government Owned Corporations Act 1993.*

***price equalisation** means a system for charging customers the same price for the supply of electricity, whether or not the cost of the supply is the same.*

[my emphasis]

32. Accordingly, on account of the definition of 'excluded activities' in section 256 of the EA, a community service obligation<sup>1</sup> (CSO) is only excluded from the operation of the FOI Act if it is prescribed under the regulations in one of two ways:

- under subsection 256(1) of the EA, excluded activities include those community service obligations which are prescribed under the regulations
- under subsection 256(2) of the EA, a regulation may declare the activities of a State electricity entity that are taken to be, or are taken not to be, activities conducted on a commercial basis.

33. Section 222(1) of the ER provides that a CSO for the charging of customers by a State electricity entity in accordance with price equalisation, or at a price fixed by the Minister, is a prescribed CSO.

34. As there is no evidence before me that the Report is a document received or brought into existence by a State electricity entity in carrying out a CSO, including that prescribed in section 222(1) of the ER, it is necessary to consider whether the Report was received or brought into existence in the course of Ergon carrying out its commercial activities.

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<sup>1</sup> In section 256 of the *Electricity Act 1994*, *community service obligations* has the same meaning as in the *Government Owned Corporations Act 1993* (see section 121 of that Act). Broadly speaking, 'to qualify as a community service obligation an activity must involve: the provision of a non-commercial product or service; such services being purchased by the Government on behalf of the community in line with Government priorities; and such services being purchased from a commercial business entity' (*Community Service Obligations: A Policy Framework. Queensland Treasury March 1999*, page 4)

## 2. Commercial Activities

35. As set out above, subsection:
- 256(2) of the EA provides that a regulation *may* declare the activities of a State electricity entity that are taken to be, or are taken not to be, activities conducted on a commercial basis
  - 222(2) of the ER provides that negotiations between the Ministers and a State electricity entity about costs and charges for providing electricity as a community service obligation are declared to be commercial activities of the State electricity entity.
36. There is no evidence before me that the relevant activity relates to the declared commercial activity in section 222(2) of the ER. Given that the commercial activities to which section 256 of the EA apply are not limited to those prescribed in the regulation, it is necessary to consider:
- which of Ergon's activities are activities conducted on a commercial basis; and
  - whether the Report was received, or brought into existence, in carrying out those commercial activities.
37. Subsection 256(1) of the EA provides that commercial activities '*means activities conducted on a commercial basis*'.
38. The EA does not contain a definition of 'commercial basis', nor is 'commercial' defined in the *Acts Interpretation Act 1954*.
39. The Macquarie Dictionary offers several definitions of the word 'commercial' including: '*of, or of the nature of, commerce*', '*engaged in commerce*', '*capable of returning a profit*', '*preoccupied with profits or immediate gains*'. The corresponding meaning of the word 'commerce' is given as '*interchange of goods or commodities ...; trade; business*'.

### ***Ergon's submissions***

40. In support of its view that the Report was received or brought into existence by Ergon in carrying out its commercial activities, Ergon submits that:

*The Report relates to Ergon Energy's core business of electricity distribution and the Report was brought into existence in carrying out the commercial activities of Ergon Energy, that being for the purpose of conducting a review of those commercial activities. In particular, the most likely cause behind the failure of the main neutral connection on the transformer that supplies electricity to the Kirwan Ten Pin Centre, the surrounding electricity network and any improvements that may be required to Ergon Energy's response to the matter.*

*The Report considered external commercial relationships and dealings with an external party. The Report also discloses details of Ergon Energy's inspections and maintenance over its power line assets over recent years and makes recommendations as to how Ergon Energy could improve its services affecting external commercial relations and performance.*

*Ergon Energy's management of the manner in which it undertakes its commercial activities and in particular the seeking of material upon which to obtain the most likely*

*cause behind the failure of its assets is an intrinsic part of the undertaking of those commercial activities by Ergon Energy.*

*The Report was commissioned by Ergon Energy exclusively for Ergon Energy in order to allow Ergon Energy to consider its position and its potential legal rights and liabilities in relation to its commercial activities. In commissioning the Report Ergon Energy was pursuing a commercial course of action with a view to ensuring that its commercial interaction with customers was effective and appropriate and ensuring that Ergon Energy was meeting appropriate standards, and thus avoiding possible exposure to further commercial liability which would have a negative affect on its commercial reputation and performance.*

*The engagement of Electrical Consulting and Training to produce the Report was in itself a commercial activity. The commissioning of an independent report to obtain advice in connection with the undertaking of its commercial activities within its core business is also an activity which a prudent commercial enterprise would undertake in the course of its commercial activities.*

### **Applicant's submissions**

41. In support of his case, the applicant submits that:

*With respect, we do not accept the provisional view that Section 11A applies to the Report because we do not accept that Ergon was pursuing a commercial activity when commissioning the Report. The reasons for this include:*

- 1. We submit that the nature of the activity undertaken by Ergon at the time the Report was commissioned was to ascertain any liability under Section 97 of the Electricity Act 1994 and so was a matter of statutory compliance, not a commercial activity.*
- 2. We submit that in commissioning the Report Ergon was complying with its regulatory obligations relating to its mandatory maintenance obligations. Compliance with statutory and regulatory obligations is not commercial activity and that negligence and breach of duty are not commercial activities.*
- 3. We submit that Section 11A does not apply to commercial activities that are not conducted in a competitive environment. Any commercial components that may be included in this report are secondary to Ergon's regulatory compliance and are not conducted in a competitive environment.*
- 4. With regard to the circumstances under which the Report came into being, Ergon struck a formal agreement with Kirwan Tenpin regarding the commissioning of the Report which waived any rights under Section 11A in the event that any aspects of Section 11A would have ordinarily applied. That waiver still stands.*
- 5. Clause 9.4 of Ergon's Standard Connection Contract obligates Ergon to provide consumer's written information relating to failure of supply or breaches of electricity regulation. This is contractual confirmation that Ergon acknowledges its regulatory and statutory obligation to provide information that falls within the normal provisions of the FOI Act and is not encompassed by the provisions of Section 11A.*

42. In summary, the applicant's submits that the relevant activity was not a commercial activity. Rather, it was conducted to assess Ergon's relevant liability and compliance with statutory and regulatory obligations, neither of which was conducted in a competitive environment. The applicant also alleges that Ergon waived relevant rights under an agreement and that Ergon has certain relevant obligations arising out of the Standard Connection Contract.



43. To assist characterisation of the relevant activity, the parties' more specific submissions<sup>2</sup> are set out below.

(i) *In what circumstances was the Report received or brought into existence?*

44. The applicant submits that:

- the Report was commissioned pursuant to an agreement between Ergon and Kirwan Tenpin (which provided for a copy of the Report to be provided to Kirwan Tenpin)
- an email from an Ergon staff member confirms this agreement<sup>3</sup>
- the purpose of commissioning the Report did not relate to Ergon's commercial dealings, only to its regulatory obligations
- any ancillary benefits Ergon obtained from commissioning the Report were incidental and not of concern to Kirwan Tenpin.

45. Ergon submits that the Report was commissioned exclusively by Ergon, for Ergon.

(ii) *Is the distribution of electricity a commercial activity?*

46. The applicant submits that:

- Ergon's core commercial activity is the retail sale of electricity, and the maintenance functions fall within the distribution activity
- Ergon acknowledges it has both commercial objectives alongside statutory and regulatory non-commercial obligations by splitting its operations into two parts: retail (commercial) and connection (maintenance) and requires its customers to enter into separate contracts for each
- by Ergon's own contractual definitions, selling electricity is a commercial activity, but the mandatory testing, inspecting and maintenance of that network to a specific standard is not
- the matter investigated arose not from the discharge of Ergon's normal commercial activity but from the failure of its maintenance arm to properly discharge its duties.

47. Ergon submits that the Report was brought into existence in carrying out a review of Ergon's core business of electricity distribution, including a review of the most likely cause behind the failure of the main neutral connection on the transformer that supplies electricity to Kirwan Tenpin Centre and the surrounding network.

(iii) *Was the activity conducted in a commercial environment?*

48. The applicant submits that:

- section 11A of the FOI Act does not apply to commercial activities that are not conducted in a competitive environment

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<sup>2</sup> And other information where relevant.

<sup>3</sup> I note that the relevant email (dated 30 April 2007) confirms that:

- an external investigator had been commissioned to look at the circumstances surrounding the claim and matters raised in an earlier meeting
- Ergon could provide weekly updates as the matter progressed
- an outcome was anticipated within 3 weeks.

- Ergon is in a position of a monopoly and any commercial activity in connection with the maintenance of its network has no bearing on any competitive outcomes
- *Walsh* can be distinguished as it involved the potential disclosure of commercially sensitive internal tendering documents in respect of Ergon's dealings in the marketplace with external service providers and suppliers
- although the arrangements between Ergon and its customers are clearly a commercial activity, there is nothing commercially sensitive about these arrangements and the FOI Act is not intended to be excluded
- the commercial sensitivity does not apply to the distribution entity because the commercial activities it engages in do not relate to and are specifically excluded from the commercial retailing of electricity.

49. Ergon submits that the Report was brought into existence in carrying out:

- a review of Ergon's core business of electricity distribution
- the commercial activities of Ergon.

(iv) *Was the activity an assessment of potential liability?*

50. The applicant submits that:

- the nature of the activity undertaken by Ergon at the time the Report was commissioned was to ascertain any liability under statute<sup>4</sup> and any investigation into liability is an activity of statutory compliance, not a commercial activity
- Ergon has no liability apart from statute and accordingly, any investigation into liability is an activity of statutory compliance, not a commercial activity
- in commissioning the Report, Ergon was complying with its regulatory obligations relating to its mandatory maintenance obligations.

51. Ergon submits that the Report was commissioned in order to allow Ergon to consider its position and its potential legal rights and liabilities in relation to its commercial activities.

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<sup>4</sup>More specifically, the applicant refers to section 97 of the EA. Section 97(1) of the EA provides:

**97 Limitation of liability of electricity entities and special approval holders that are not Registered participants**

- (1) *An electricity entity or special approval holder that is not a Registered participant is not liable for damages to a person for a partial or total failure to supply or sell electricity or perform an obligation under a contract in relation to the supply or sale of electricity, unless the failure is due to –*
- (a) *anything done or omitted to be done by the electricity entity or special approval holder in bad faith; or*
  - (b) *the negligence of the electricity entity or special approval holder.*

...

I note that section 97 applies to an electricity entity or special approval holder that is not a Registered participant (as that term is defined in the *Electricity – National Scheme (Queensland) Act 1997*). As Ergon is a Registered participant, I consider that section 97 of the EA is not a relevant consideration. However, I note that similar provisions are contained in the *National Electricity Law* (as that term is used in the *Electricity – National Scheme (Queensland) Act 1997 (Qld)*), which apply to Registered participants. Accordingly, I have interpreted the applicant's submissions as referring to Ergon's liability under statute generally.

(v) *Report also makes recommendations re improving operational performance*

52. Ergon submits that:

*The Report also discloses details of Ergon Energy's inspections and maintenance over its power line assets over recent years and makes recommendations as to how Ergon Energy could improve its services affecting external commercial relations and performance.*

53. The applicant submits that:

- the purpose of commissioning the Report did not relate to Ergon's commercial dealings, only to its regulatory obligations
- any ancillary benefits Ergon obtained from commissioning the Report were incidental.

(vi) *Was there a contractual obligation to provide Report?*

54. The applicant submits that:

- Ergon's 'agreement' to provide Kirwan Tenpin with a copy of the Report waives any rights under section 11A of the FOI Act, which may ordinarily have applied
- Ergon has obligations under clause 9.4 of Ergon's Standard Connection Contract to provide consumers with written information relating to a failure of supply or breaches of electricity regulation. Ergon therefore acknowledges that such information falls within the normal provisions of the FOI Act, such that section 11A does not apply
- *We contend that the commissioning of the Report was in part a response by Ergon to its responsibilities under Clause 9.4 and that the commissioning of the Report was not a commercial activity but a continuation of Ergon discharging its regulatory and contractual obligations to provide a written explanation of its failure to supply...The information contained in the email from Kylie Dunell regarding the timetable for providing a response was in accordance with the requirements of Clause 9.4.*

55. In respect of this point, I note that clause 9.4 of the Standard Connection Contract<sup>5</sup> provides:

**9.4 Your right to information**

- (a) *At your request, we must use our best endeavours to provide an explanation for any:*
- (i) *interruption to the supply of electricity to the premises; or*
  - (ii) *supply of electricity to the premises of a quality in breach of any relevant standards under electricity legislation.*
- (b) *If you request that the explanation be in writing, we must, within 10 business days of receiving the request, give you either:*
- (i) *the written explanation; or*
  - (ii) *an estimate of the time it will take to provide a more detailed explanation where a longer period is reasonably required in the circumstances.*

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<sup>5</sup> Annexure A to the Electricity Industry Code.

### **Relevant decisions of this Office**

56. Relevantly, I note that section 11A of the FOI Act is not intended to confer complete exclusion of documents produced in the course of Ergon's activities from the operation of the FOI Act.<sup>6</sup>
57. I also note that it is possible for a document containing information about an agency's commercial activities to have been brought into existence in carrying out an activity that was not conducted on a commercial basis. For example, in *Readymix Holdings Pty Ltd and Port of Brisbane Corporation; Brisbane Mini Mix Pty Ltd (Third Party)*<sup>7</sup> (**Readymix**), the Information Commissioner determined that documents relating to the assessment and approval of a development application lodged by a third party in respect of land vested in the Port of Brisbane Corporation were not excluded from the operation of the FOI Act by section 11A of the FOI Act on the basis that in receiving, assessing and approving a third party's development application, the Port of Brisbane Corporation was carrying out a public regulatory activity, rather than an activity conducted on a commercial basis.
58. Similarly in *Hansen and Queensland Industry Development Corporation*,<sup>8</sup> documents relating to a decision by the Queensland Industry Development Corporation to terminate a person's employment were not excluded from the operation of the FOI Act by section 11A of the FOI Act on the basis that that activity was not conducted on a commercial basis.
59. In *Walsh and Ergon Energy Corporation Limited*<sup>9</sup> (**Walsh**), the Information Commissioner stated:

*In determining whether the [report] was received or brought into existence in carrying out the commercial activities of Ergon, the contents of the report itself are relevant, but only to the extent that they assist the task of properly characterising the nature of the activity. It is possible for a document containing information about Ergon's commercial activities to have been brought into existence in carrying out an activity that was not conducted on a commercial basis, eg. accounting to the shareholding Minister for the performance of Ergon's statutory functions.*

60. Also in *Walsh*, the Information Commissioner:
- considered whether a report commissioned by Ergon and prepared by Deloitte Touche Tohmatsu (**Deloitte**) which reported on allegations of improper conduct on the part of Ergon officers in relation to dealings with external contractors, suppliers and service providers, was received or brought into existence by Ergon in carrying out commercial activities
  - found the nature of the relevant activity related to the broader business objective of ensuring satisfactory commercial performance, and that was an inherently commercial activity.<sup>10</sup>

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<sup>6</sup> As discussed by the Information Commissioner in paragraph 19 of *Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265 (in the context of a discussion about the Queensland Industry Development Corporation) this could have been achieved in unequivocal terms by reference to the entity in section 11(1) of the FOI Act.

<sup>7</sup> (2003) 6 QAR 294.

<sup>8</sup> (1996) 3 QAR 265.

<sup>9</sup> (2004) 6 QAR 419, at paragraph 23.

<sup>10</sup> See *Walsh*, paragraph 46.

61. I note also the Information Commissioner's decision in *Burtenshaw and Department of Natural Resources, Mines and Water; Mr Dunn (Third Party)(Burtenshaw)*,<sup>11</sup> where it was found that documents comprising correspondence received, or created, by Ergon (between Ergon and the Department of Natural Resources, Mines and Water) relating to the electrical infrastructure of Ergon, which provides the basis for providing services to its customers, and thus its commercial activities, were documents brought into existence, or received, by Ergon in carrying out its commercial activities.
62. Further, I note the decision of *Qantas Airways Limited and Cairns Port Authority*<sup>12</sup> (*Qantas*), in which the Information Commissioner considered whether documents received or bought into existence in carrying out the development and implementation of the Authority's bird and wildlife risk management program were documents brought into existence in the carrying out of an activity which was conducted on a commercial basis.
63. Relevantly, in *Qantas*:
- the Authority was required to comply with an aerodrome licence which stated that the authority's operation and use of the Airport was subject to the relevant acts, regulations and conditions
  - the applicant argued that activities mandated by statutory and regulatory instruments in the interests of safety should not be characterised as commercial activities.
64. In the circumstances, the Information Commissioner found that while the authority was required to meet the requirements of the aerodrome licence, in doing so, the authority was not itself carrying out a public regulatory function (as was the case in *Readymix*), but rather, was taking action as a licensee, to comply with conditions of a licence issued by the regulator.
65. The Information Commissioner also considered whether the bird and wildlife risk management program was an activity conducted on a commercial basis, and noted:
- While the Authority is required to comply with minimum regulatory requirements, the Authority does have discretion as to the strategies employed in conducting the bird and wildlife risk management programme and the extent of their investment made in managing the risk of bird strike for purposes, other than regulatory requirements, that are commercial considerations.*<sup>13</sup>
- ...
- While the bird and wildlife risk management programme may also serve to meet the minimum regulatory requirements for an aerodrome licence, the documents in issue clearly demonstrate that the bird and wildlife risk management programme is a comprehensive activity carried out on a commercial basis involving a substantial investment by the Authority to manage the significant risks to the Authority's profit margins posed by bird strikes.*<sup>14</sup>
66. Previous decisions of this Office have also found that activities relating to investigations into performance, and to risk assessment and management, can be activities conducted on a commercial basis.

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<sup>11</sup> (Unreported, 12 May 2006)

<sup>12</sup> (Unreported, 15 November 2005).

<sup>13</sup> At paragraph 4.26.

<sup>14</sup> At paragraph 4.30.

67. For example, in *Walsh*, the Information Commissioner found (at paragraph 44) that in relation to the report commissioned by Ergon which was prepared by Deloitte, in appointing Deloitte:

*... Ergon was pursuing a commercial course of action with a view to ensuring that its commercial interaction with external suppliers and service providers was effective and appropriate. Ergon was seeking to ensure that it was meeting appropriate standards of corporate governance, and thus avoiding irregularities, inefficiencies and possible exposure to further adverse publicity and/or commercial liability, both of which would negatively affect its commercial reputation and performance.*

and further, at paragraph 45,

*... it is significant that Deloitte not only investigated and reported upon the veracity or otherwise of the ... allegations, but provided recommendations as to how Ergon could improve its internal management of staff operations affecting external commercial relations. Deloitte made various recommendations for improvement ... Ergon was engaging external management consultants to provide it with a business service, designed not only to ensure the integrity and viability of various of Ergon's commercial relationships and activities, but to obtain advice and recommendations as to how those activities might be enhanced.*

68. In summary, the Information Commissioner considered the nature of the activity in *Walsh* related to the broader business objective of ensuring satisfactory commercial performance which was an inherently commercial activity.<sup>15</sup>

69. Further, in *Tooker and Central Queensland Ports Authority*,<sup>16</sup> the Information Commissioner concluded that:

- documents received or brought into existence for the purpose of documenting the authority's risk assessment issues relating to coal handling services and their appropriate commercial management, was a key income earning activity of the authority and a strategic investment to ensure profitability
- documenting the authority's consideration of risk assessment issues and the appropriate commercial management of such issues was an activity conducted on a commercial basis.

### **Findings of fact and conclusions re section 11A of the FOI Act**

70. Having regard to the issues set out in paragraph 36 of this decision and to the matter in issue, relevant law, previous decision of this Office and all of the submissions made by the parties, I am satisfied that:

- Section 11A of the FOI Act applies to a State electricity entity within the meaning of the EA
- State electricity entity within the meaning of the EA, means '*an electricity entity that is a GOC, a GOC subsidiary or a government company*'
- Ergon is a State electricity entity within the meaning of the EA, being an electricity entity (distribution entity<sup>17</sup>) which is a government owned corporation

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<sup>15</sup> See *Walsh*, paragraph 46.

<sup>16</sup> (Unreported, 23 October 2007).

- Section 11A and Schedule 2 of the FOI Act applies to Ergon's activities, to the extent provided by section 256 of the EA
  - the FOI Act confers on persons a legally enforceable right under the FOI Act to access documents of an agency and official documents of a Minister, subject to other provisions of the FOI Act including section 11A of the FOI Act
  - section 11A of the FOI Act is a provision which addresses jurisdictional matters, that is, whether:
    - the FOI Act applies to a given document; and
    - this Office has jurisdiction to review a decision about access to a document to which section 11A of the FOI Act applies
  - section 11A of the FOI Act does not confer any rights *per se* and a party to a review is unable to waive the application of this section to documents in issue in a review
  - I am unable to conclude that there has been a waiver of 'rights' by agreement in section 11A of the FOI Act as alleged by the applicant
  - clause 9.4 of the Standard Connection Contract confers on a customer a right to request information under a contract in certain circumstances
  - clause 9.4 of the Standard Connection Contract does not equate to a right to access information under the FOI Act as submitted by the applicant
  - having regard to the content of the Report, I am satisfied that the Report is not a document received or brought into existence by a State electricity entity in carrying out a CSO, including that prescribed in section 222(1) of the ER.
71. With respect to which of Ergon's activities are conducted on a commercial basis, I am satisfied that:
- as an electricity entity, Ergon must comply with statutory obligations and industry codes, standards and rules in the performance of its activities<sup>17</sup>
  - as a company GOC, Ergon also has statutory duties and obligations<sup>19</sup>
  - as a participant in the electricity industry, Ergon's commercial activities relate primarily to the distribution of electricity – essentially, the connection and supply of electricity to customers' premises.
72. Having regard to the content of the Report to the extent that that information assists the task of properly characterising the nature of the activity undertaken in receiving or bringing the Report in existence, I am satisfied that:

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<sup>17</sup> Under section 37 of the EA, a distribution entity is a person who holds a distribution authority, and under section 38 of the EA, a distribution authority authorises its holder to supply electricity using a supply network within its distribution area.

<sup>18</sup> Such as obligations under its distribution authority (See Chapter 2, Part 5, Division 5 of the EA), the *Electrical Safety Act 2002*, the Electricity Industry Code and the National Electricity Rules.

<sup>19</sup> See the *Government Owned Corporations Act 1993*.

- the Report relates directly to Ergon's electrical infrastructure which provides the basis for providing services to its customers and thus its commercial activities<sup>20</sup>
- by commissioning the Report, Ergon was pursuing an activity with a commercial basis, which, broadly stated, was intended to:
  - enable Ergon to understand what caused an incident which occurred in the course of its core commercial activity, being the distribution of electricity
  - enable Ergon to consider its position in relation to potential liabilities
  - assist Ergon to improve its operational performance (for instance, to assess Ergon's response to the incident, to identify compliance issues, and to improve Ergon's future service provision<sup>21</sup>)
- the nature of the relevant activity conducted related to the broader business objective of ensuring satisfactory commercial performance in a number of areas which are inherently commercial activities<sup>22</sup>
- while I acknowledge that Ergon has obligations and liabilities arising under statute, an activity which is conducted to investigate, and/or ensure compliance with those obligations may also be commercial in character<sup>23</sup>, particularly when the results of an investigation may have financial implications
- applying the matters set out above with respect to the nature of the activity undertaken in bringing the Report into existence, I consider that:
  - the activity of compliance with statutory and regulatory requirements or obligations is different in character from the performance of a public regulatory function<sup>24</sup>
  - the strategies employed by Ergon, and the investment made by Ergon in meeting its statutory and regulatory requirements or functions is, in the circumstances, properly characterised as a commercial activity
  - the nature of that activity included an investigation of potential liabilities arising out of Ergon's core commercial activity, which could have a commercial impact upon Ergon (both in a financial sense and in relation to its reputation).

73. In summary, I am satisfied that the Report was received or brought into existence by Ergon in the course of it:

- pursuing a commercial course of action with a view to ensuring that its commercial interaction with customers was effective and appropriate
- seeking to understand the cause of the incident
- considering its position with respect to potential liabilities in relation to the incident (which had potential financial implications)
- attempting to ensure that it met appropriate standards of service provision, thus avoiding possible exposure to adverse publicity and/or commercial liability, both of which would negatively affect its commercial reputation and performance. In this respect, I also note

<sup>20</sup> In accordance with *Burtenshaw*

<sup>21</sup> Which are activities which it seems a prudent commercial enterprise would undertake

<sup>22</sup> In accordance with *Walsh*

<sup>23</sup> In accordance with *Qantas*

<sup>24</sup> In accordance with *Qantas*



that the Report makes general recommendations in respect of Ergon's operational performance related to the broader objective of ensuring its satisfactory commercial performance.

## **DECISION**

74. On the basis of the matters set out above, I find that:

- the matter in issue in this review consists of a document which was received or brought into existence by Ergon Energy Corporation Limited in carrying out its commercial activities
- due to the combined effect of section 11A of the *Freedom of Information Act* 1992 and section 256 of the *Electricity Act* 1994, the *Freedom of Information Act* 1992 does not apply to the matter in issue in this review.

75. Accordingly, I do not have jurisdiction to review the internal review decision of Ms Keen dated 22 April 2008.

76. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act* 1992 (Qld).

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**F Henry**  
**Assistant Commissioner**  
**Date: 11 March 2009**