



12 December 2006

Manager, MCE Secretariat
Department of Industry Tourism and Resources
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Dear Sir /Madam

RE: National Framework for Distribution and Retail Regulation' – Working Paper 1

The Energy Retailers Association of Australia (ERAA) welcomes the opportunity to comment on the Retail Policy Working Group's, 'National Framework for Distribution and Retail Regulation' – Working Paper 1.

The Energy Retailers Association of Australia (ERAA) supports the development of a streamlined, efficient and low cost regulatory framework for electricity and gas distribution and retailing at the national level. The current complexity of consumer protection arrangements and differences in regulatory requirements across jurisdictions imposes significant compliance costs upon retailers, which in turn diminishes the benefits that would otherwise flow from energy market reforms.

We believe that the outcomes of this Working Paper have a unique opportunity with which to deliver further efficiencies to the retail energy market. It is our view that a national regime for licensing and consumer protection is preferable to the continuation of the current jurisdictional approach that has been unable to achieve the delivery of nationally consistent outcomes, this despite obligations to do so in enabling legislation in each jurisdiction.

The ERAA has significant concerns with the prominence given to the work of the Utility Regulators' Forum (URF) in developing a single set of contractual terms and conditions.

We note that the URF Position Paper has not been publicly released, and therefore has not been subject to review by industry.

The ERAA is concerned the URF may have produced an amalgamation of existing regulations, with the 'highest obligation' regulation being accepted as 'best practice'. The ERAA does not believe that such an approach takes into account the fundamental objectives of the review, and would only serve to entrench much of the current cost and complexity associated with retail regulation.

While the URF may be attempting to achieve regulatory consistency, we note that in practice a number of jurisdictional regulators have continued to amend, modify or make new regulation, leading up to national regulation framework, which is not in keeping with these principle of consistency or efficiency principles.

A recent example is the Essential Services Commission Victoria (ESCV), which has recently released a paper in which it is contemplated that market contract exit fees be regulated. This occurs in no other jurisdiction. This proposal does not appear to be designed at reducing regulatory overlap, or improve the efficiency and burden of regulation.

The Victorian and New South Wales regulatory frameworks were largely developed in 2001, prior to the commencement of full retail contestability. Whilst some recent amendments have been made in Victoria, these almost exclusively have been to increase the regulatory burden, this despite Victoria being one of the most competitive retail energy markets in the world.

In South Australia, ESCOSA developed its framework in 2002 with the benefit of the experiences gained from contestability in other markets (i.e. NSW and Victoria), including information from stakeholders regarding the costs of specific regulatory controls.

More recently the Queensland industry codes have been developed through extensive consultation during 2006. There has been input from community, retail, and government representatives co-coordinated by independent consultants. This diverse group of participants had a considerable understanding and experience with competition in the south-eastern markets.

Although the ERAA believes that the Queensland Code may contain elements that are unnecessary, it is however the most current evaluation of the appropriate balance between consumer protection and minimising the regulatory burden.

To the extent that any exiting jurisdictional arrangements are used as a benchmark for the national framework, it is Queensland which should be first considered.

The ERAA is therefore concerned to ensure that undue weight is not placed on the URF's recommendations. The ERAA has developed a model National Consumer Protection Code, which, similar to the URF Policy Paper, promotes a consistent approach. However the ERAA paper goes further to also take into account the "reducing the regulatory overlap" and "minimizing the burden and cost of regulation"

objectives. Whilst it contains fewer obligations than the Queensland codes, it must be recognised that Queensland is yet to commence FRC, and that a number of requirements in the Queensland codes reflect the initial tendency of a government towards greater regulation in the early stages of the competitive market. It is our view, however that in a more mature market, including all south-eastern jurisdictions (and Queensland once the national transition occurs), that the ERAA code would facilitate an appropriate balance in achieving the national reform objectives.

Please find below our specific comments.

Should you require any further information in relation to this matter please feel free to give me a call on (02) 9369 3263.

Yours sincerely,

[\[Transmitted electronically\]](#)

Cameron O'Reilly
Executive Director
Energy Retailers Association of Australia

Retail Obligation to supply small customers

We note that Allens Arthur Robinson observed that the concept of 'local retailer' is becoming less relevant over time, and we argue further that this process has been accelerated by the high rate of customer transfers, particularly in Victoria and South Australia.

However the issue of who should have the burden for the obligation to supply is difficult for our members to resolve.

It is the majority view of the ERAA members that it is no longer appropriate for the former franchise retailers to alone burden the responsibility of the obligation to supply.¹

The Queensland electricity market is currently establishing arrangements whereby the obligation to offer will rest with the financially responsible market participant, and not the area retailer. The ERAA supports this approach as it ensures that the obligation does not operate as a barrier to entry for new retailers (as the burden of the obligation only grows in direct proportion to the size of the retailer's customer base) whilst spreading the burden beyond the local retailers.²

If the concept of local retailer based on former franchise retailers is to be maintained, the arrangements must be sufficiently broad to allow the local retailer to be designated on a basis other than geography.

Deemed Supply arrangements

The ERAA does not support the proposal for a deemed second-tier customer to be covered by the tariffs and terms and conditions that applied to the previous occupant. It is likely that particular benefits or surcharges applied to the previous contractual relationship, which are either unreasonable for the retailer to provide to new occupant (in the case of a benefit) or for the new occupant to pay (in the case of a surcharge). Examples include an additional discount on the basis of the previous occupant's loyalty, or conversely the payment by the customer of an additional green energy premium. Other difficulties include that the tariff may be been 'sunsetting' and unavailable to new customers, that the site has been vacant for some time and the specifics of the previous contractual relationship are not readily attainable, that the contract contained payment obligations (for example direct debit or bill smoothing) which are not appropriate for the new customer, or that the characteristics of the site (i.e. residential/commercial/industrial) have changed.

¹ This position on the obligation to supply transferring from the franchise retailer is not supported by Powerdirect Australia

² This position on the obligation to supply obligation resting with the financially responsible market participant is not supported by Powerdirect Australia

The proposal by the RPWG is cumbersome and operationally difficult to administer and prevents retailers transitioning customers off already obsolete tariffs.

We support the Queensland gas market approach (and similar to South Australia) whereby retailers publish their tariffs and terms and conditions for deemed customers. Such an approach protects consumers through a transparent process which can be monitored by the regulator, whilst allowing the retailers the ability to cover their reasonable costs of supplying deemed customers. These arrangements also support a non-price regulated environment.

Terms & conditions

The ERAA agrees that the preferred approach is for retailers to have discretion as to whether to adopt the standing offer terms and conditions or to provide alternative terms & conditions that are not inconsistent with those terms.

This allows the retailer flexibility in deciding what its product offering should be.

Our experience is that the benefits of developing alternative terms and conditions are dependent upon the approach adopted by the jurisdictional regulators, and that there is potential for the costs of negotiating with the regulator to outweigh those benefits. The advantage of the recommendation is that it provides an opportunity for retailers to explore the potential for alternative terms, whilst allowing the fall-back option of the standard terms.

The ERAA generally supports the subject matter headings proposed in the Consultation Paper (i.e. the NERA Paper) as the basis for the standing offer terms and conditions. The terms should be limited to those aspects of energy retailing that are not covered by general consumer protection law. To the extent that other obligations are raised as possible inclusions, there first must be a demonstrated case that the customer benefits will outweigh the compliance and administrative costs of doing so, consistent with the market objective and regulatory best practice.

With regard to the bill smoothing heading, an important distinction must be made between an obligation to provide customers in financial difficulty with access to alternative payment arrangements (i.e. payment assistance), and negotiated agreements as a valued-added service designed to meet consumer preferences (i.e. traditional bill smoothing). Whilst it is appropriate for the former to be included in mandated standing offer terms, as a consumer protection mechanism, the latter arrangement is appropriately a matter of negotiation between the retailer and the customer as part of a market contract.

Small customer market contracts

Section 3.4 of the Working Paper discusses three broad options relating to market contracts. Our comments against each option are;

Option1. The ERAA recognises the need for regulation which effectively protects consumers and we believe that relying on existing consumer protection laws to the fullest extent, is the preferred approach for developing the minimum terms and conditions for market contracts. In particular, such an approach avoids the regulatory costs imposed by regulators re-interpreting, and inevitably extending the coverage of existing laws. To the extent that additional obligations are included, they should be energy specific and ensure that the benefits to consumers exceed the costs of regulation, consistent with regulatory best practice.

Option 2 applies energy-specific regulation where general consumer protection laws are inconsistent, with cooling-off periods provided as such an example. We recognise the potential benefit of including cooling-off periods in the minimum terms, given the inconsistency in the various jurisdiction laws. Operationally, it would be difficult for a retailer to apply anything other than a consistent time frame across customer contracts. However, we are not aware of other relevant examples of general consumer protection inconsistencies that would impose such costs to justify adopting Option 2.

Option 3, developing energy specific regulation, is contrary to the simplicity and efficiency objectives, and is the least preferred option. As stated previously, there have been instances where regulators do not merely restate existing obligations, but inevitably re-interpret and extend them. In addition, retailers are still required to obey the relevant general consumer laws, whereby the only option for consistency will be to adopt the most onerous arrangements, contrary to the efficiency objective. All jurisdictions provide an adequate consumer protection framework, whereby adopting the least onerous provisions should be seen as providing for regulatory efficiency, and not a diminution of consumer rights.

In order to encourage a competitive retail market, it is critical that the regulatory framework provides greater flexibility in market contract arrangements to encourage innovation and product differentiation. This is in preference to standard offer contracts. The minimum terms for market contracts, should therefore be a sub-set of the standard offer terms.

Small customer marketing

There is nothing inherent in the marketing of retail energy that warrants the application of energy-specific regulation. Marketing activities are appropriately governed by various Fair Trading Acts and other instruments at the Commonwealth and jurisdictional level. The rationale for adopting option 1 is, if anything, stronger for marketing than for determining the minimum terms and conditions, as unlike the

physical nature of the supply, the sales process is no different than that for any other good or service.

With respect to the objective of minimizing regulatory duplication with existing general consumer protection law, the ERAA is concerned that the Working Paper understates the significance of this problem and the costs that it imposes. In a number of instances regulators have re-interpreted and extended the general consumer protection obligations. An example is the ESCV's *Guideline 10 – Confidentiality and Explicit Informed Consent*, which reinterprets and extends the Commonwealth Privacy Act. Similarly clauses of the various jurisdictional market codes are covered by the general laws covering misleading and deceptive conduct.

It is the ERAA's view that no specific energy marketing codes are warranted.

Attachment 1 Part B – Possible Additional Terms and Requirements

We note also that the paper includes a list of possible additional terms that may be included in the national framework.

The ERAA does not believe that these terms and requirements are necessary.

It is important that the process of transitioning to a national framework does not get complicated by the need to adopt every regulatory clause that is found in the jurisdictions, Similarly that features of current retailer offering do not need to be spelt out in unnecessary regulation.