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8 December 2006

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Thank you for the opportunity to comment on the Retail Policy Working Group - National Framework for Distribution and Retail Regulation: Working Paper 1.

The Energy & Water Ombudsman NSW investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers.

EWON believes that the key consideration in national regulatory reform of the energy industry is to ensure the promotion and enhancement of the long-term interests of consumers. Consequently, we recommend that while consistency across jurisdictions is of significant importance, the most fundamental question to be addressed when developing a national framework is whether the outcome provides a best-practice framework of consumer protection.

For ease of reference we have adopted the same structure in our submission as the Working Paper. We have also included EWON's comments on the individual subject matter headings detailed in Attachments 1 and 2.

If you would like to discuss this matter further, please contact Brendan French, Deputy Ombudsman, on 02 8218 5251.

Yours sincerely

Clare Petre
Energy & Water Ombudsman NSW

Energy & Water
Ombudsman NSW

Response to

Retail Policy Working Group

National Framework for Distribution and Retail Regulation Working Paper 1

8 December 2006

Submitted by the

Energy & Water Ombudsman NSW

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Energy & Water Ombudsman NSW

Introduction

The Energy & Water Ombudsman NSW (EWON) is pleased to respond to the *Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 1.*

Established in 1998, EWON is the approved independent dispute resolution mechanism for customers of electricity and gas providers in NSW, and some water providers. Our aim is to provide fair, equitable and independent investigation and resolution of customer complaints. We work with all the key stakeholders – providers, community, government, and regulators – to improve the standard of service delivery for the benefit of NSW consumers.

For ease of reference, we have provided EWON's responses under the same headings as the Working Paper, concentrating on sections 2 to 5 and Attachments 1 and 2. We have also included comment of a more general nature immediately below.

Energy regulation

EWON sees as important an approach to the development of national energy market legislation and regulation that has at its centre the interests of consumers. It is from this perspective that we note the Working Paper's specific identification of the needs of consumers:

> *(b) the stated objectives for the NEL and NGL to promote efficient investment in and efficient operation and use of, energy services for the long term interests of consumers with respect to price, quality, safety, reliability and security of supply.*[1]

It is our experience as the approved industry dispute resolution body for NSW customers that strong, energy-specific consumer protection law is the most efficient, effective and reliable means of ensuring the stated objectives are met.

In putting forward this position we agree with the conclusions of the Utility Regulators' Forum.

> *Overall the review reached the following conclusions on the development of the competitive markets, which influenced URF in agreeing the framework at this point in time:*
> - *Energy is an essential service, for which there continues to be a demonstrated need at this time for energy-specific regulation to supplement general consumer law.*
> - *Small customer competition, while beneficial to the long-term interests of consumers, does not currently deliver effective*

[1] [Allens Arthur Robinson] *Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 1,* November 2006, p3 at 1.2(b).

customer protection in the absence of minimum regulatory requirements, particularly for disadvantaged and vulnerable customers.

- *Small customers, including some small business customers, are not sufficiently informed, experienced or motivated to ensure that their energy market contracts contain efficient, fair and reasonable terms without the support of basic customer protections.*[2]

Law, rules and other instruments

EWON endorses the general approach of the Working Paper in which high level policy and framework matters are intended to be encapsulated in statute while matters of implementation and administration are detailed in rules or other regulatory instruments. We agree with the Working Paper that this has the advantage of allowing for easier amendment of regulation as the market develops. It also has other advantages, such as that outlined in an earlier EWON submission:

> *Our experience in seeking advice about interpretation of a particular aspect of an obligation differs significantly depending on whether the obligation is legislative or administrative. It has proved difficult to obtain an interpretation of a legislative requirement. On the other hand seeking an interpretation of an administrative obligation has usually been a more straightforward process of writing to the regulator.*[3]

National Approach

Wherever possible EWON sees value in a nationally consistent approach to the regulation of gas and electricity. Consequently the regulatory experience of the present jurisdictional regulators will be of significant value in the development of a national regime. To this end, we recommend in particular three recent position papers circulated by the Utility Regulators' Forum: *Regulation of Retail Service Standards in the National market* [September 2006], *Regulation of Marketing Conduct in the National Market* [September 2006] and *Compliance Monitoring: Non-pricing energy retail regulation* [November 2006]. These three papers have drawn on real experience to identify key requirements for consumer protection within a national context and are a significant attempt to address and minimise the differences in each of the jurisdictions. EWON believes that this work provides an excellent basis for progress towards the objectives outlined by the Ministerial Council on Energy in the Working Paper.

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[2] Utility Regulators' Forum, *Regulation of Retail Service Standards in the National Market*, Utility Regulators' Forum Position Paper, September 2006, preface.

[3] Energy & Water Ombudsman NSW, Comment on *National Framework for Energy Distribution and Retail Regulation* *[Ministerial Council on Energy Standing Committee of Officials consultation paper, May 2005]*, January 2006, p10.

2 Retailer obligation to supply small customers

2.1 Current jurisdictional arrangements

Definition of small customers

The Working Paper outlines jurisdictional differences in the consumption thresholds at which a customer (in a contestable market) ceases to have a right to supply, though it should be noted that the NSW thresholds for electricity (160 MWh/yr) and gas (1 TJ/yr) are in both cases common to most other States. EWON considers that an obligation to supply small retail customers remains of pivotal importance for national regulation.

EWON's experience suggests that while energy consumption can be – and currently is – used as a means of establishing the protections to be made available to a consumer, the equation is not an exact one. While EWON receives few complaints from large retail customers, it is clear that some of those who contact EWON would not be considered large businesses under standard definitions[4] but are simply small enterprises with large energy demands (small food handling businesses that use freezers or small workshops with high energy use tools or equipment). Customers in these circumstances – who might otherwise be small owner-run businesses – are not infrequently in positions of significant disadvantage where their level of consumption has disallowed them access to the benefit of consumer protection regulation currently available to those whose consumption falls below the 160 MWh/yr threshold. For this reason EWON considers that consideration should be given to customers with particular vulnerabilities – such as the small businesses listed above or small business owners with language or other difficulties – particularly in terms of access to fundamental protections, notably external dispute resolution and payment/instalment plan options.

[4] There are several means to define a business as small or large, eg. through annual turnover (see s6D of the *Privacy Act 1988* [Cth]) or staff size (the Australian Bureau of Statistics recommends a small business to be one that employs fewer than 20 people: see Small Business in Australia, 2001). The latter appears to be the definition currently most favoured legislatively.

MARIA'S STORY

Maria runs a small wholesaling food business so, even though hers is a very small enterprise, it uses a lot of electricity because of industrial refrigerators and cooling rooms. Recently she received a letter from her retailer advising her that she was required to be supplied electricity under a market contract rather than a standing contract.

Maria asked the retailer why they had not automatically offered her this contract when she opened her account, but did not receive a response. Maria then received a letter advising that unless she signed a contract, she would be charged "mandated" rates, which were significantly higher than the rates she had been paying.

Because she had not yet received a response to her query, Maria did not sign a contract. In response, her retailer then issued her a bill on the "mandated rates". Maria contacted the retailer to dispute this invoice and was advised that because she had not paid the bill by the due date she would have to pay a $3000 security deposit in addition to the $2600 "mandated rates" invoice. She was told that if she did not pay these amounts within one week, her premises would be disconnected.

Maria was very upset at this request, as electricity supply was vital for powering her freezers. She managed to pay the amounts under protest, and contacted EWON about the retailer's actions. She felt that she should not have to pay the higher "mandated rates" which were not listed anywhere on the contracts she'd seen, and that she should not have to pay a security deposit in these circumstances.

Regulation of standing offer contracts

A further consideration in relation to obligation to supply is the regulation of standing offer contracts. The Working Paper indicates that New South Wales is unusual in not having all of the terms and conditions of such contracts regulated by authority or statute. (We understand that in New South Wales a very small number of terms must be present, as prescribed by regulation, but all other terms are at the discretion of the retailer.)

Although consumers are to some degree accustomed to the reality of contract terms when it comes to large purchases (cars, houses etc), they have not historically been required to think of utility accounts in the same way. EWON's experience is that although most energy customers in NSW are bound by standing contracts, only a tiny minority are aware of the fact, let alone aware of the terms under which they are supplied – until such time, for instance, as a compensation claim is denied 'on contract grounds'.

Standing contracts are written by the retailers themselves, and often contain waivers of liability for all manner of events. While it is clear that a number of network events (particularly those relating to extreme weather conditions, or other "acts of God"), for instance, are beyond the control of the network company, a number of the waivers contain elements that are somewhat surprising and that potentially blur the relationship between retailer and network provider. The following extract is an example of some of the restrictions included in NSW connection contracts (emphasis added):

Retailer B Standard Form Customer Connection Contract (Feb 05)

16.3 Exclusion of liability for supply interruptions, distortions or fluctuations
Subject to the above, and as far as the law permits ***[Retailer B] is not liable for any loss the customer may suffer (including, without limitation, where caused by any negligent or wilful act or omission by [Retailer B]****) arising from:*

a) *any fluctuation or distortion (in voltage magnitude, voltage waveform or frequency) or interruption to the supply (by the customer's retail supplier) of electricity to the customer's premises or from any such supply not being or remaining continuous;*
b) *the customer's retail supplier discontinuing supply of electricity to the customer; or*
c) *[Retailer B] interrupting the supply of electricity by the customer's retail supplier to the customer's premises.*

16.4 To the extent that [Retailer B] has any liability to the customer despite the effect of paragraph 16.3, [Retailer B]'s liability (under contract, tort or any other basis), is limited, as far as the law permits, as follows:

a) *[Retailer B] is not liable for any indirect, economic, special or consequential losses of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind), and*
b) ***[Retailer B]'s liability for all other losses suffered by the customer is limited to the lesser of:***
   i. ***The total amount billed to the customer's retail supplier*** *(or to the customer under clause 7.4)* ***for network charges*** *relating to the use of [Retailer B]'s distribution system for*

the supply of electricity by the customer's retail supplier to the customer's premises) ***during the year that [Retailer B]'s breach, act or omission (which gives rise to the claim) occurred,*** *or*

ii. $5,000 (GST inclusive, if any),

for all claims the customer makes in any one calendar year.

Such exclusion clauses are frequently relied on by suppliers to deny claims submitted by customers for compensation for damaged appliances. The denial of the claim can have a significant effect on customers, and the operation of the exclusion clause certainly attempts to limit "the consumer's right to sue the supplier".[5]

In our experience there appears to be no consistency in the terms of the various supply (and connection) contracts applying across New South Wales. In the absence of specific regulation, it is often the case that consumers are reliant on the good will of the supplier in paying compensation for damaged goods, for instance.

Given that there is no regulation of the terms of these standing offer contracts, EWON has elsewhere supported the introduction of unfair contract terms legislation to improve the protection afforded to consumers in NSW.[6]

2.2 Work to date on national framework

Designating local retailers and supply areas

EWON agrees with the Working Paper's assessment that the designation of local retailers and supply areas by ministerial order within particular jurisdictions should be maintained. The current approach of designating local retailers on whom this obligation rests remains the most practical. However, as the market develops nationally, and industry restructure occurs, consideration will need to be given to applying the obligation to all retailers based on site ownership rather than designated local suppliers. As noted in the Working Paper, though, the business systems and energy trading capacity to satisfy such obligations may not presently be sufficient for all retailers operating in the market; in fact they may place unnecessary barriers for new market entrants.

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[5] Under section 32X(k) of the *Fair Trading Act 1999 (Vic)*, this consideration is a factor to be considered in assessing whether a particular term is unfair.

[6] Energy & Water Ombudsman NSW, *Submission to the Inquiry into Unfair Terms in Consumer Contracts* [New South Wales Legislative Council Standing Committee on Law and Justice, October 2006], October 2006.

National framework for standard offer terms / consumer protections

The Working Paper notes that the decision to maintain an obligation to supply will remain with the jurisdictions but that where such an obligation exists it should be subject to regulation within a national framework. EWON endorses this approach as the means to ensure equity and parity for consumers across jurisdictions. To this end, we support the recommendation that the Australian Energy Market Commission should regulate such terms. We note that there are significant differences between jurisdictions in relation to the regulation of various assistance measures offered to customers (eg hardship programs, payment options available, instalment plans) so we are pleased to note the Working Paper's recommendation that the AEMC should make a rule to cover 'payment methods and dealing with payment difficulties'[7] – though we would anticipate that such measures would be available to customers on market as well as standing contracts.

SCOTT'S STORY

Judy called EWON on behalf of her cousin Scott who had been living without hot water since his gas was disconnected

permanently in a wheelchair. He wasn't comfortable talking on the phone so she was calling for him. She said he couldn't go on without hot water – he had been using cold water but winter was approaching. Scott had made part payments towards his bill and only had $20 arrears outstanding. His bills were usually less than $100 but having been disconnected 4 times in the past 2 years his debt was mostly made up of reconnection fees. The disconnections happened when he was in and out of hospital and couldn't get to pay his bills.

EWON contacted the company who said they would reconnect and waive the fee if Scott set-up a Centrepay arrangement. We explained to Judy that Centrepay meant there were regular payments going towards his bills. Scott agreed and Judy helped him set up Centrepay to cover future accounts and avoid disconnection.

Removal of price controls

The Working Paper refers to the Australian Energy Market Agreement that commits jurisdictions to the removal of price regulation once it can be demonstrated that the market is operating effectively. Clearly, such assessment of the relative effectiveness of the contestable market will need to be predicated on a close examination of how different consumer segments are being served under

[7] *Working Paper 1*, p10.

market contracts, particularly those in circumstances that might be considered vulnerable (eg those on low, fixed incomes; culturally and linguistically diverse communities; tenants; frail aged). EWON has recently experienced a significant rise in the number of complaints by those who are vulnerable to coercive or misleading marketing.[8] It is clear that a number of these customers are in circumstances that at present would suggest a standing contract would be of greater benefit than a market contract (eg they are not penalised if they don't elect to pay via direct debit; they can pay at a post office; they are on limited duration tenancies; they will have access to a 1st tier retailer's hardship program).

2.4 Content of regulation – options and recommendations

Application procedures, connection services and exemptions to the obligation

During 2005 EWON participated in a working group established by the Independent Pricing and Regulatory Tribunal to look into specific challenges facing NSW customers upon moving into, or out of, a premise. The working group comprised government, retailer and community representation. In its final report the group considered that the following principles should be applied to application and connection procedures.

> *The process by which customers arrange supply under standard form contracts should:*
> - *facilitate entry into standard supply contracts as a result of a request from a customer, without requiring customers to sign and return forms to suppliers;*
> - *result in suppliers having sufficient information to identify the customer and the premises at which supply is being arranged;*
> - *result in customers having sufficient information about the essential terms and protections of the standard form supply contract;*
> - *not impose unnecessary costs on suppliers."*[9]

EWON would, in this context, question whether a requirement for the provision of a property owner or agent's details (as suggested in the Working Paper) could in fact act as an impediment to connection and raise privacy concerns for customers, particularly those in private rentals. We recognise that in some instances, retailers may require information that assists them in identifying a customer in addition to the standard information of the customer's name, address and date of birth.

[8] The number of marketing complaints to EWON rose 254% in 2005/06 from 2004/05. For detail, see EWON's 2005/06 Annual Report and fact sheets for seniors at http://www.ewon.com.au/.
[9] Independent Pricing and Regulatory Tribunal, *Move In / Move Out Working Group: Recommendations for amendments to electricity and gas licence and authorisation obligations*, December 2005, p4.

However, we do not consider that any regulation should specify or prescribe the forms of identification and other contact details that should be provided by a customer, as this may lead to unreasonable barriers to customers wishing to enter into a standing contract. EWON suggests that the wording of the amended regulation should enable retailers to require information from a customer that is sufficient to establish an account but not so prescriptive as to deny this option to those without specified forms of identification or who may wish not to provide details of their property owner or agent.

The working group also identified the following matters which retailers should be required to provide to new customers:

- *information about the relevant guaranteed customer service standards and that those standards form part of the relevant customer contract*
- *a statement of the customer's rights in relation to disputes and resolution of disputes with the licence holder, including particulars of the ombudsman scheme and the procedures for referring complaints and disputes to the ombudsman*
- *particulars of any rebate or relief available under any Government funded rebate or relief scheme under which a customer may obtain a rebate or relief from charges*
- *information about how copies of the licence holder's customer contracts may be obtained, and*
- *information in community languages about the availability of interpreter services for the languages concerned and telephone numbers for the services.*[10]

Such an approach removes the necessity to provide a full standing offer contract by abstracting the key consumer provisions into a simpler document more easily understood by a consumer – yet also providing for access to the full contract for those interested. EWON considers it is important for customers in a new site to be provided with information concerning the assistance measures as offered by the relevant retailer as well as details of both internal and external dispute resolution available. We also believe that it is important that a retailer be required to offer a customer the opportunity to pay a security deposit or connection charges in instalments rather than to have the failure to pay provide grounds for a retailer to refuse supply.[11]

[10] Ibid.

[11] Working Paper 1, at page 27, suggests that '*failure to provide any security the retailer is entitled to require under the standing offer terms*' and '*failure to pay an amount due to the retailer in respect of the new supply (such as connection or charges)*' would exempt the retailer from the obligation to supply.

Deemed supply arrangements and Move-in customers

EWON agrees with the position taken in the Working Paper that national legislation needs to establish the existence of a deemed contract and that the circumstances and details of that contract are best dealt with by regulation, as is currently the case in New South Wales.

While we recognise that the Working Paper does not seek to outline in comprehensive detail all circumstances in which a deemed contract may exist and how it will operate (noting that this will be a matter for regulation rather than legislation), we would recommend that considerable consultation should occur on this matter prior to the development of the regulation. EWON has received a considerable number and range of complaints regarding deemed contracts ('New Occupant Supply Arrangements'). For this reason we were pleased to participate in the IPART-facilitated 'Move-in / Move-out' working group as noted above, and would recommend the observations and conclusions of the working group for consideration of those who will draft the national regulation. Of the issues outlined in the Working Paper (at Attachment 3), we note:

- The Working Paper suggests a deemed contract should remain in place for 3 months only. The regulatory standard in Victoria is 180 days for electricity and 120 days for gas. The recommendation of the New South Wales 'Move-in / Move-out' working group is for a deemed supply arrangements to remain in place for 180 days. We can see circumstances in which the shorter period could adversely affect customers.

- EWON has concerns with the proposal to have (for non-standard retailers) deemed contract conditions based on the previous contract for a particular site. In New South Wales at present, the retailer who owns the site is required to bill those supplied under this kind of arrangement the lesser of the (previous) contract rate and the standard retailer's franchise rate. Some retailers have informed EWON that this has disadvantaged them in those circumstances in which a contract had been offered and accepted by the previous occupant based on particular consumption patterns that no longer exist. We understand that this is an area in which some retailers have reported non-compliance. We suggest that there is value in ensuring that deemed contracts would offer tariffs, terms and conditions that are based on the local standing offer tariffs, terms and conditions.

- The Working Paper requests comment on how – or should – deemed contracts apply when a customer changes regulatory status (ie moves from small to large retail, or vice versa). EWON has elsewhere commented on some of the ambiguities that currently exist in NSW in relation to whether large retail customers of electricity can be charged under a 'New Occupant

Supply Arrangement'.[12] If such provisions are restricted to those deemed to be small retail customers, there is some confusion as to the basis upon which retailers will be able to recover charges from a large retail "new occupant" who is not a signatory to a valid negotiated contract.[13]

- The Working Paper infers that a retailer may vary the tariffs, terms and conditions of supply at the end of the maximum duration of the deemed supply arrangement. While the intent is clearly to encourage occupants to enter into a contract – standing or market – EWON suggests that allowing the tariff to be set entirely on discretionary grounds (if this is intended) may cause confusion and, in certain circumstances, significant hardship.[14] There may well also be questions as to the consistency of application across retailers and even within the same franchise area at different times. Allowing retailers to set unpublished and/or unregulated tariffs in this way separates this group of customers from all others, small or large. If a change of tariff, terms or conditions is to occur after a stipulated period (whether 3 or 6 months), EWON suggests that the following would be appropriate measures to protect new occupants:

    - There are significant assurances in place that the occupant is aware that they are being supplied under a New Occupant arrangement and that the tariff will change by a set amount at a certain date.[15] This information could be provided to customers via a requirement for retailers to issue a notice (including information in community languages) to the supply address within 30 days of the retailer becoming aware that consumption is occurring in the absence of a standing or market contract. EWON also suggests a requirement for reminder notices to be sent at regular intervals.[16] Clearly, such notices would also inform customers of the need to secure a regulated or negotiated contract and of all the rights and obligations that would apply to a contract-holder.

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[12] See Energy & Water Ombudsman NSW, submission to '*Move in – Move out Licence obligations Issues Paper*' (September 2005), p7.
[13] The Working Paper, at page 20, states that 'The same threshold should apply in relation to the deemed supply arrangements regime'.
[14] EWON's experience is that customers from culturally and linguistically diverse communities tend to be more represented among those supplied via the NSW New Occupant Supply Arrangement than others.
[15] We note that a number of NSW retailers only issue a 'Dear Occupant' letter once consumption has reached a threshold level. In a number of complaints made to EWON by customers this has led to circumstances in which occupants of a premise have been supplied under a New Occupant Supply Arrangement for many months or years.
[16] In a number of complaints investigated by EWON a retailer has sent one 'Dear Occupant' letter (often discarded by a tenant who feels that it is intended for the landlord and/or is advertising material) and made no follow up for a period of months or years.

- A regulated number of attempts at contact to be made to inform the occupant of the impending change in tariff, including personal contact (telephone and/or visit) in/outside working hours. To this end, the requirements could match those currently in place for retailers to observe before requesting disconnection of a site.

Terms and conditions

The Working Paper lists five options that may be considered to cover the spectrum from light- to heavy-handed prescription of the terms and conditions that should apply to standing contracts. There is a suggestion that a middle-ground would be preferable; ie, one in which minimum requirements for standing contracts are outlined by the regulator but retailers are free to vary the terms (but should remain consistent with the intent).

It has been EWON's experience that differences between retailers' standing contracts can add complexity and confusion unnecessarily. Further, as noted above, some NSW suppliers have added elements to the contracts (such as liability waivers) that are unregulated. It is difficult to see any competitive or other advantage in there not being a single, standing contract regardless of geography or jurisdiction. This model would remove one layer of complexity for customers and, it can only be presumed, would ultimately reduce rather than increase regulatory burdens on the retailers. To this end, EWON favours option 5 which recommends the use of a model contract, as currently operates in South Australia.

We note that the Working Paper suggests a lists of subject areas appropriate for regulation in a standing contract but notes that 'payment difficulties and bill smoothing' should be possible exemptions from this list. It is notable that both payment difficulties and bill smoothing are significant areas of complaint to EWON, particularly from customers facing financial disadvantage or difficulty. For this reason, and given that the jurisdictions are increasingly focussing on regulation of assistance measures and programs, we consider this an important area for regulatory oversight. We also note the comment by the Utility Regulators' Forum in relation to the importance of ensuring independent dispute resolution is supported by legislation or licence:

> *The framework provides for information to customers to ensure that they are aware of their key rights, entitlements and obligations, and a complaints handling process which provides for escalation through the business to an independent Ombudsman as a last resort. These obligations may be better placed in a legislative or licence provision.*[17]

[17] Utility Regulators' Forum, *Regulation of Retail Service Standards in the National Market*, Utility Regulators' Forum Position Paper, September 2006, p13.

Tariffs

EWON would agree that standing offer retail tariffs are, at this point of market development, appropriately regulated at a jurisdictional level.

Enforcement mechanisms

EWON noted in our submission to the "*Consultation Paper National Framework for Energy Distribution and Retail Regulation May 2005*" that

> *One of the aspects of a licensing regime is that new entries are required to undertake an assessment process to ensure that necessary systems are in place so that compliance with licence conditions is possible. The concept of compliance monitoring does not appear in the consultation paper.*[18]

The focus of the Working Paper appears to be on civil action by the Australian Energy Regulator to enforce compliance. Clearly such faculties are required by the AER and, for electricity, are supported by current legislation. EWON recommends for consideration the compliance monitoring program outlined in the Utility Regulators' Forum, *Compliance Monitoring: Non-pricing energy retail regulation* [November 2006], particularly in relation to the early assessment and auditing of new market entrants to ensure the development of a compliance culture.

[18]Energy & Water Ombudsman NSW, Comment on *National Framework for Energy Distribution and Retail Regulation* *[Ministerial Council on Energy Standing Committee of Officials consultation paper, May 2005],* January 2006, p10.

3 Retailer – small customer market contracts

As the Utility Regulators' Forum has identified, the current market context is such that energy-specific regulation is required, notably because

- energy is an essential service, with immediate and often detrimental affects from loss of supply
- small customer competition has not yet delivered effective consumer protection across all customer segments, particularly for those in vulnerable circumstances
- some small retail customers – including businesses – have not shown themselves to be fully capable of negotiating fair and reasonable terms.

We have outlined in greater detail in Attachment 1 our observations regarding minimum contract terms.

3.4 Content of regulation – options and recommendations

The Working Paper outlines three alternative approaches to the subject of energy-specific regulation for market contracts, ranging from exception regulation (where specific treatment is reserved for those matters not otherwise captured by national and jurisdictional consumer protection laws) to a 'comprehensive energy specific consumer protection regime'. We recommend the third alternative – that in which a comprehensive regime is developed – as the preferred option in that it creates a comprehensive document that will reduce customer (and retailer) confusion, particularly where there exist myriad jurisdictional differences in generic consumer protection legislation. Importantly, the Working Paper concludes that although a comprehensive regime has the potential to duplicate elements from other consumer protection instruments, this should not lead to an increase in the regulatory burden 'unless it creates separate and inconsistent compliance obligations'. EWON's experience suggests that many retailers would welcome a single, comprehensive, energy-specific regulation as a number have faced significant challenges in dealing with jurisdictional differences in this area – often leading to customer (and regulator) dissatisfaction and complaint. For this reason EWON supports Option 3.

Small customers who have the benefit of market contract regulation

The Working Paper recommends that the benefit of market contract regulation (of terms, etc) be applied to the same class of customer who otherwise would have a right of supply from the local retailer (ie a small retail customer). There is caveat included which suggests that certain other limitations could be applied – for instance, to remove businesses whose consumption is nevertheless lower than the

(large retail) threshold and those domestic (and other?) customers who have multiple supply points. EWON is firmly of the view that there should be no differentiation between business and domestic small retail customers. It is arguable that to do so would have a perverse outcome in encouraging business customers to remain on standing contracts rather than to lose protections by taking up a market contract. More important, perhaps, is the fact that certain small businesses would be very exposed by the loss of particular consumer protections, notably those involving undercharging, meter reading, disconnection and external dispute resolution.[19] In EWON's experience, electricity and/or gas supply is a crucial commodity for small business and the loss of certain minimum guarantees – otherwise available to those on standing contracts – could have very serious consequences in a number of contexts.

[19] We note that increasing numbers of small businesses are operated from residential premises.

4 Retailer – small customer marketing

In the year 2005-06 retail competition complaints represented 20% of all issues raised with EWON, a substantial increase from 8% in 2004/2005. Marketing complaints represented 43% of retail competition issues raised by customers. Compared with the previous year, this represents a 254% increase in marketing complaints.

- 677 customers said they had been misled by marketers
- 442 customers said they had not agreed to a contract
- 155 customers said they were pressured or coerced into signing a contract

Of particular concern were complaints related to energy marketing to elderly and vulnerable customers. Complaints received over the past 18 months included the following examples of many similar complaints:

- 91 year old, sight and hearing impaired
- 89, 82 year old blind/visually impaired
- 90,88, 87, 80 year olds with poor hearing
- 85 year old, cannot read or write
- 90 year old widow
- 94, 92, 91, 88, 86, 85, 84, 79, 76 year old pensioners
- Customers with dementia/Alzheimer's disease

EWON has needed to investigate complaints about marketing to people:

- with literacy problems
- of non English speaking background
- with an intellectual disability
- with acquired brain injury
- recovering from surgery/hospitalisation

In our submission to the "*Consultation Paper National Framework for Energy Distribution and Retail Regulation May 2005*" we argued that the essential nature of energy and the absence of nationally consistent fair trading laws necessitated national rules to govern the marketing of energy contracts. Our casework experience in the year since has only strengthened this view. We also note that this is the clear opinion of the Utility Regulators' Forum.

TERRY'S STORY

Terry works with a community agency that helps disadvantaged people living in public housing. He rang EWON when he found a number of his clients in one unit block had been approached by energy marketers.

He said 7 out of 8 families had signed contracts which he found disturbing because at least two of the account holders suffered disabilities that would make it hard for them to make an informed decision. One customer had told Terry that the marketers said their current energy supplier was going out of business and if they wanted to stay connected, they would need to sign a contract. When the customer said he didn't want to sign, one marketer verbally abused him and stormed off.

Terry complained to EWON because he felt the residents had been targeted as a group. He was concerned that most of them did not really understand what was being offered and the fine print was so small it would be difficult for someone with literacy issues to read.

EWON discussed Terry's complaint with the retailer who acknowledged there had been a breach of the Marketing Code and that this would be reported to the regulator. The contracts were cancelled.

As noted above, in the absence of consistent generic consumer protection legislation, EWON favours a comprehensive, energy-specific marketing regime. The enactment of such national protections would be to the advantage of consumers and those retailers who are currently required to adopt individual and costly compliance regimes for different State jurisdictions.

Who would marketing obligations apply to?

EWON supports an approach that would see the Law establishing a requirement that retailers and others identified as engaged in energy marketing be required to comply with regulatory requirements as currently applies in New South Wales. (In customers' minds, a marketer/agent is simply the visible face of the retailer. For this reason EWON favours Option 1.) We would also see value in the Law defining persons engaged in marketing activities where ambiguity may arise (eg product bundling, 'aggregators', brokers). If the Law were to identify those core

activities where marketing rules are applicable then EWON would endorse the key areas nominated by the Utility Retailers' Forum[20]:

- General standards of conduct
- Times for marketing
- Duties of marketers
- Conduct when customers do not wish to proceed or to be contacted
- Informed consent to energy contracts
- Training, testing and auditing of marketers

On the basis of complaints made to EWON, we also consider that there would be considerable value in the auditing of 'no contact' lists and visit records, and in ensuring that there are careful constraints in place for retailers when dealing with minors.

One area in which EWON has faced significant difficulty is 'non-account-holder signings'. We have been contacted by a number of customers who have had their original energy account closed as a direct result of a third party – either a spouse or fellow occupant of the property – signing a new negotiated contract in response to direct marketing activity. The customer is usually very concerned that their account, which they considered a private matter between themselves and their retailer, could be closed without their knowledge or consent in this way. A typical scenario entails a marketer who comes to the door to promote an offer to switch energy retailers. The existing account holder is not home, but the occupant who opens the door to the marketer (whether a spouse, family member or flat-mate) agrees to sign a contract. They may then forget to advise the account holder, so the protection of the 10-day cooling off period does not apply. The first thing the original account holder knows is when they receive a final bill from their original retailer, or correspondence (either a 'Welcome Letter' or the first bill) from the new retailer. Often, if they wish to return to their original retailer, they may be liable to pay a termination fee for cancelling the new contract that they had never authorised. EWON would welcome a degree of regulatory certainty in relation to this area as it is clear that many customers object to the practice, and that it is not encouraged or allowed in other, comparable contestable markets.

[20] Utility Regulators' Forum, *Regulation of Marketing Conduct in the National Market*, Utility Regulators' Forum Position Paper, September 2006, pp4-11.

YOUSSEF'S STORY
Youssef had his 83 year old mother-in-law visiting. When he and his partner were both out at work, a marketer came and wanted her to sign up for a green energy contract. She told him she didn't live there and wasn't authorised to sign. The marketer came back later and persuaded her to sign, saying it could always be changed later. Youssef found out about what had happened only after he received a final account from his regular retailer, containing a termination fee.

EWON will respond to specific terms and conditions necessary for effective consumer protection in the area of energy contract marketing in Attachment 2.

Conclusion

The electricity market objective, as outlined in the National Electricity Law, seeks to balance the interests of electricity businesses and consumers such that the long term benefits of a secure and mature market can be shared between consumers and investors. The Working Paper questions if the presence of the phrase 'long term' may inhibit the ability of the AEMC and the AER to 'give effect to equity issues and shorter term consumer welfare considerations'.[21]

EWON believes that it is important to recognise the significant efforts energy retailers have made in recent years to work with customers and other key stakeholders to ensure that lighting, heat and power remain within reach of everyone. The development of various assistance measures, particularly customer hardship programs, has provided a necessary flexibility in credit management that has allowed customers to more effectively manage limited resources. Such developments, together with an increased attention to consumer protection for energy customers on the part of the jurisdictional ministers, suggest that equity and consumer welfare issues are already significant considerations for the large majority of energy retailers.

While it is clearly the case that retailers are not, and cannot be expected to be, the welfare providers of last resort, they are well situated to identify and address many of the indicators of disadvantage and to educate customers about managing their demand. There is also an obligation on government to provide sufficient support to social programs to ensure vulnerable customers are protected, and to provide legislative leadership to create a compliance regime to ensure industry best practice. Community welfare organisations have a key role in distributing emergency and other forms of assistance, and providing financial counselling. There is an obligation on external dispute resolution schemes such as EWON to assist customers to resolve their disputes with retailers in a timely, efficient and effective way and to continue to raise with key stakeholders the nature of the issues raised by customers. Finally, there are the specific responsibilities of regulators to ensure that services are provided to consumers in the context of a healthy market that respects the differential capacities of customers and provides a degree of protection for those least able to protect themselves.

EWON believes that the development of a national regulatory regime that seeks to determine best practice consumer protection, rather than to settle upon the 'lowest common denominator', is a welcome sign of maturity in the energy market. The Working Paper appropriately signals that new national regulation must be responsive to market developments and allow for minor – or even major – adjustments as and when required. EWON supports this position and looks forward to the opportunity to contribute our experience of the issues raised by

[21] Working Paper 1, p45.

New South Wales customers to the development and subsequent review of national energy regulation.

Attachment 1 – Regulation of standing offer and market contract terms

Part A: Terms proposed in Consultation Paper

Calculation of Charges		
Tariffs and charges	Charges are to be made on the basis of tariffs and charges specified in the contract or published in accordance with prescribed publication requirements (such as in the Gazette and/or a general circulation newspaper and/or on the retailer's internet site). Any variation to tariffs and charges must be notified to the customer in advance of the variation taking effect. Upon request, a retailer must provide a customer with reasonable information on network charges, retail charges and any other charges relating to the sale or supply of energy.	Agreed. Customers have informed EWON that they consider it important to be informed individually (eg by mail) of any alteration to tariffs or charges. Some – particularly those in regional or remote areas – have complained that they do not receive a local newspaper or have internet access. Any notice of alteration to tariffs must be sufficiently in advance of the change that customers are aware and can seek alternative offers should they wish.
Use of meter data	Unless otherwise permitted, a retailer must base the calculation of charges for a small customer's bill on metering data provided by the distributor or other responsible person. A retailer may base the calculation of charges under a bill on an estimation of a small customer's consumption of energy in the following circumstances: • where the customer consents to the use of estimates by the retailer; • where the retailer is not able to reasonably or reliably base the bill on a meter reading; or	Agreed.

	• where metering data is not provided to the retailer by the distributor or other responsible person.	
Meter reads	A retailer must use its best endeavours to ensure that a meter reading takes place at least once in each [6/12] month period.	EWON's recommends that a meter be read at least once in each 6-month period (as currently pertains in New South Wales). This would help to ensure that households whose metered consumption far exceeds their estimated charge receive adequate notification of the real cost of their consumption and are not put at a financial disadvantage due to ongoing meter accessibility issues.
Estimations	Where estimations are permitted to be used as the basis for the calculation of energy charges under a bill for a small customer, the estimations may be based on: • the customer's reading of the relevant meter; • historical meter data for the relevant customer; or • where there is no historical meter data for the relevant customer, the average usage of energy by a comparable customer over the corresponding period.	Agreed.
Meter access	A customer must allow the retailer or its agent access to the supply address for the purposes of reading the meter. If a failure to provide access results in a charge being based on an estimation and the customer subsequently requests an actual read, the retailer may charge the customer its reasonable costs of complying with the request.	Agreed. However, should a customer wish to offer a self-read to their retailer for the purposes of correcting an estimated charge after an estimated bill has been issued to the customer, EWON recommends this should be allowed.
Termination		
Retailer termination	A retailer may terminate a small customer supply contract where: • the retailer has a contractual right to disconnect, disconnection has occurred and there is no contractual right to	Agreed (though note our comment above that we consider it is important that a retailer be required to offer a customer the opportunity to pay a security deposit or connection charges in instalments rather than to have the failure to pay provide grounds for a retailer to refuse supply/reconnection).

	reconnection; • the small customer and the retailer have entered into a new customer contract; or • the small customer has transferred to another retailer.	
Customer termination	A small customer may terminate a standing offer contract upon [three] business days notice to the retailer. A small customer may terminate a market contract upon [28] days notice to the retailer.	Agreed. It is important to note that in NSW, it appears many (perhaps even the majority) of customers on standing contracts do not terminate their account when they move from a property. Rather, the account is terminated when a new party moves into the property and seeks to open an account. (This practice has become more widespread since network providers in NSW have tended not to physically disconnect supply between accounts.) This has led to a situation in which there is considerable discussion in some contexts around liability for consumption between tenancies and where, for instance, a meter isn't read for several months and the resident/s for this period (otherwise able to be charged via a deemed supply arrangement) have moved into and out of a property and are no longer contactable.
Security		
Provision of security	A retailer may require a small customer to provide a security deposit where: • the small customer still owes that retailer or another retailer in relation to the supply of electricity to another address; • the customer has unlawfully used energy within the past two years; • the customer has refused to provide acceptable identification to the retailer; or • the retailer reasonably considers that the customer does not have a satisfactory credit history and the customer has refused an	Agreed. (We wonder on what basis a retailer would be aware that a customer owes another retailer for arrears at a different address unless this information were publicly available – eg via a credit listing). We also consider that a customer who elects to pay via a direct debit arrangement – including via Centrepay – should not be required to pay a security deposit. We consider that some customers who receive low, fixed incomes should also be able to pay the security deposit itself via instalments. We also note that at present in NSW security deposits for domestic customers may only be levied at the establishment of an account. We consider there is value in this model being applied nationally. The term 'reasonable' should be inserted in the last sentence: "…the customer has refused a reasonable instalment plan

		Comments by EWON
	instalment plan offered by the retailer.	offered by the retailer".
Information about credit history	If a retailer requires a security deposit on the basis that a small customer has an unsatisfactory credit history, the retailer must inform the customer: • that the retailer has decided the customer has an unsatisfactory credit history; • the reasons for the retailer's decision; • of the customer's rights to raise a complaint; and • that the customer has the right to obtain details in relation to the information on which the retailer's decision was based.	Agreed. As with all retailer decisions that impact in a potentially adverse way on a customer, EWON supports the requirement that a retailer inform the customer of the reasons for their decision. We also consider that, as an element of the 'customer's rights to raise a complaint', the retailer should inform the customer of internal and external dispute resolution services.
Amount of security	The amount of security may not exceed [1.5] times the average quarterly bill (for customers on a quarterly billing cycle) or [2.5] times the average monthly bill (for customers on a monthly billing cycle).	Agreed. EWON considers that retailers should also be encouraged to exercise their discretion to reduce the amount of the security deposit or allow it to be paid in instalments if the customer indicates that payment of the security deposit upfront and in full would pose an unreasonable burden for them.
Interest	The retailer must pay interest on a security deposit to the customer in accordance with a specified interest rate.	Agreed. This is not currently required in New South Wales but would appear to be appropriate.
Application of security	The retailer may only apply a security deposit to off-set amounts owed to it under a standard form supply contract where the customer: • has failed to pay a bill which results in disconnection by the retailer and there is no contractual right to reconnection; • vacates the property; • requests disconnection; or • transfers to another retailer.	Agreed (though note our comment above that we consider it is important that a retailer be required to offer a customer the opportunity to pay a security deposit or connection charges in instalments rather than to have the failure to pay provide grounds for a retailer to refuse supply/reconnection).
Repayment of	The retailer must repay a	Agreed. EWON is aware of circumstances

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security	security deposit to the customer after the customer has completed 12 months of on-time payment of energy charges or where the customer ceases to take supply at the relevant address.	in which a customer has been refused the repayment of the security deposit on the grounds that one of four (or more) bills has been paid late by a matter of days – even though no reminder or notice of impending disconnection has been sent. We consider this a very narrow definition of 'on-time payment'. The underlying intention of the requirement for a security deposit is to protect retailers from bill default. An occasional reminder notice is not an indicator of intention to default. EWON would recommend that consideration be given to refunding the security deposit following four on-time payments, rather than four *consecutive* on-time payments as occurs at present.
Billing, apportionment of payment, disputes		
Frequency of bills	Energy bills must be issued by the retailer at least every three months.	Agreed.
Content of bills	A bill should include the following content: • customer's name, account number and address; • meter identifier; • bill period; • relevant tariff; • whether the bill was issued as a result of a meter read or an estimation and, if issued as a result of a meter read, the date of the meter reading; • details of consumption or estimated consumption [(including a consumption graph)]; • pro rata billing information (if applicable); • any amount deducted, credited or received under a Government rebate or concession scheme or	A bill should also include the meter readings at the start and end of the billing period (unless the consumption was estimated). If the bill was issued as a result of an estimation, the bill should contain information on the steps the customer can take to read the meter themselves, provide a self-read to their retailer, or request a special meter read by the retailer's contractor. The fact of the estimation should also be prominent on the bill to avoid customer confusion. Where the content of the notice suggests an impending sanction (eg disconnection, referral to a mercantile company or default/credit listing), the bill should also list the name and contact details for external dispute resolution services. The bill should be required to inform customers (in English and in community languages) of translation/interpreting services and of customer assistance measures available for those experiencing

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	under an instalment plan; • the amount of any security deposit; • the network charge and any other miscellaneous charges; • details of the available payment methods; • telephone number for account and fault enquiries; and • contact details for complaints. Amounts billed for goods and services (other than the supply of energy) must be included in a separate bill or as a separate line item on an energy bill.	hardship.
Apportionment	If a bill includes amounts payable for other goods and services provided by the retailer (apart from the supply of energy), any payment made in relation to such a bill must be applied firstly to the payment of the energy charge, unless otherwise directed by the customer or agreed by the customer. In the case of dual fuel bills, payment is to be made as agreed with or directed by the customer. If there is no such agreement or direction, payment is to be applied in proportion to the relative value of the electricity and gas charges.	Agreed. In EWON's experience some retailers do not currently have back-end systems to ensure compliance with this requirement.
Disputes	A retailer must review a bill upon the request of a small customer in accordance with [the retailer's standard complaints and dispute resolution procedures/the retailer's billing complaints procedure.] Retailers may require a customer to pay the greater of: • the portion of the bill under	Agreed. EWON has an expectation that any amount not in dispute is paid by a customer.

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	review which is not in dispute; or • an amount equal to the average amount of the customer's bills over the previous year (excluding the bill in dispute), and any future bills that are properly due. Where, after conducting a review of the bill, a retailer is satisfied that the bill is: • correct, the customer must pay the amount outstanding; or • incorrect, the retailer must adjust the bill accordingly and refund any fee paid in carrying out any metering test.	
Undercharging and overcharging		
Undercharging	A retailer may recover from a customer any amount undercharged during the previous 12 months. Interest is not payable on the amount undercharged and the customer must be given a corresponding period of time to pay any undercharged amount. Any amount undercharged must be listed and explained as a separate item on the customer's next bill or on a separate bill.	Agreed, though given the significant impact of undercharging on customers we consider that consideration should be given to the period of the back-billing to be 9 months (as applies in most circumstances in Victoria at present) rather than 12 . EWON acknowledges this would strengthen the current NSW requirement that a retailer only provide corresponding time to pay if requested by a customer. We note that advice provided to EWON by the Department of Energy, Utilities and Sustainability suggests that a customer is free to pay the entire undercharged amount at the end of the period.
Overcharging	A retailer must repay any amount overcharged. If the amount overcharged is less than a threshold amount, the retailer must credit that amount to the next bill. If the amount overcharged exceeds the relevant threshold, the retailer must repay the amount as directed by the customer or, where there is no such direction, credit the customer's	Agreed. The overcharge should be repaid with interest at stipulated rates (eg at present in NSW the rate is 9% as outlined in the *Uniform Civil Procedure Rules 2005* under the *Civil Procedure Act 2005*) as applies at present in NSW. We note in this context that interest on overcharging is not currently paid in Victoria but consider that it is an appropriate inclusion in national regulation.

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	next bill.	
Payment methods and difficulties		
Payment methods	A retailer must accept payment by a small customer by any of the following payment methods: • in person; • by mail; or • by direct debit or [credit card] arrangement. Where a direct debit arrangement is entered into, the retailer and the small customer must agree the amount, date and frequency of the direct debits and the customer's cancellation options.	Agreed. EWON has received complaints from some NSW customers that certain market contracts do not allow for payment at post offices. For some customers, this form of payment is a preferred option.
Payment difficulties	A retailer must offer a small customer an instalment plan where the customer informs the retailer that it is experiencing payment difficulties or it becomes apparent to the retailer that the customer is experiencing payment difficulties. Where customers are experiencing payment difficulties, retailers must provide information to those customers in relation to available concessions or Government assistance, financial counselling services and their ability to have the bill redirected to a consenting third party. A retailer is not required to offer an instalment plan if the customer has had two instalment plans cancelled due to non-payment in the previous 12 months.	Agreed. Some degree of flexibility is required in relation to the second paragraph. EWON has noted that some instalment plans have been cancelled after one late, missed or part payment following several on-time payments. It would appear punitive if this action were then to impede a customer's opportunity to re-enter or alter the terms of an instalment arrangement. We suggest that the word 'reasonable' be inserted in the second paragraph, ie 'A retailer is not required to offer an instalment plan if the customer has had two **reasonable** instalments plans cancelled due to non payment in the previous 12 months'.
Bill smoothing	Where a retailer is entitled to use estimations as the basis for the calculation of charges under an energy bill, estimated bills may be provided under a	Agreed. In EWON's experience, Centrepay is a method of bill smoothing now accepted by all three government-owned electricity

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	smoothing arrangement if: • the amount payable each month is initially the same; • the retailer's estimate is based on the customer's historical billing data or, if no such data exists, the average consumption of a similar customer; • the retailer re-estimates consumption after six months; and • the difference between the initial estimate and the re-estimate is greater than 10%, the retailer resets the amount payable under each of the remaining bills to reflect the difference.	retailers in NSW. Centrepay generally consists of an agreed fortnightly payment deducted from a customer's Centrelink benefit by their electricity retailer. Centrepay (or a generic description of this form of smooth billing) should perhaps be specifically mentioned in the national regulation. EWON would like to see Centrepay offered as a smooth billing method by all retailers.
Disconnection		
Rights to disconnect	A retailer may disconnect or discontinue supply where: • a small customer has not paid a bill; • access to a meter has been denied for three consecutive bills; • the customer has refused to provide acceptable identification or security; • a customer has used energy illegally; or • a customer has obstructed an authorised person in relation to acts to be done under the contract.	Agreed. Where disconnection is to occur due to lack of access for three consecutive bills, it is very important that customers be made aware of the basis for the disconnection and afforded an opportunity to rectify the situation (sometimes, particularly in apartment complexes, meter rooms are locked and some customers have informed EWON of significant difficulty in organising access).
Limitations on right to disconnect	Other limitations will apply to the right to discontinue supply in circumstances where a small customer has not paid a bill on account of having insufficient income. In these circumstances, the retailer is required to comply with its obligations in respect of customer payment difficulties (eg to offer instalment plans or special payment arrangements	Agreed. Some further work may be required in order to establish an agreed list of "life support or other medical equipment". EWON has learnt from some customers, for example, that a refrigerator is an essential appliance for people with diabetes as their medication must be kept at a constant temperature or it will perish. The process of when and how a customer should be required to advise their retailer of specific medical requirements affecting their reliance on a constant electricity supply, and how their retailer should handle

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	and to make referrals to counselling services, etc) before proceeding to disconnect a customer. Retailers are not entitled to disconnect while an application for Government assistance or a payment plan is pending. In addition, premises registered as containing life support or other medical equipment may not be disconnected and retailers may only carry out disconnections before certain times of the day and on certain days.	this information, needs also to be clarified. EWON also considers it very important that retailers not be permitted to disconnect customers for amounts in dispute and which are the subject of ongoing investigation either by the internal dispute resolution system or an ombudsman. (In NSW at present this limitation is confined to three days only. This period is insufficient for the purposes of independent investigation).
Notice	Disconnection may not [be] effected until the retailer has provided the customer with: • a reminder notice; and • **[**two**]** disconnection notices. In addition, the retailer must make a reasonable attempt to contact the customer by telephone.	EWON considers this requirement is only useful if it specifies the minimum intervals that must occur between the issuing of the three notices. Further, records must be maintained of all attempt/s to contact the customer by telephone or in person must be recorded so they can be verified afterwards, should a dispute over the reasonableness of notice provided, arise. In NSW at present, retailers are required to make a minimum of two attempts at contact (if required), at least one of which is outside business hours. EWON strongly recommends that this approach be adopted as it is clear that a number of customers are simply uncontactable during business hours. EWON also considers it crucial that any disconnection notice be required to provide a customer with avenues of assistance available to remove the grounds for disconnection, eg: details of hardship programs, information about government assistance programs/rebates, and details of external dispute resolution services.
Dual fuel contracts	If disconnection is permitted, a retailer must ensure that a small customer on a dual fuel contract is initially disconnected from gas supply and that disconnection from electricity supply occurs within a certain period after the disconnection notice.	EWON does not have a strong opinion on whether or not gas should be disconnected before electricity, provided adequate notice (as noted above) has been provided to the customer. Although electricity is more likely to be nominated as an essential service in Australian homes, EWON notes that gas might also be viewed by some customers as an equally essential service, particularly if both their cooking appliances and hot water system are gas-reliant.
Reconnection	A retailer must notify a small	Agreed. EWON considers that

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	customer of the arrangements which the customer will need to make in respect of reconnection, including any costs payable by the customer. Any payment arrangements for reconnection must allow for fair and reasonable payments at fair and reasonable intervals. A retailer must reconnect premises if the breaches described above are remedied within 10 business days. Retailers must make appropriate arrangements with the relevant distributor to ensure that reconnection occurs as soon as possible for the customer.	instalment/payment arrangements should include any disconnection/reconnection fee, rather than have a requirement that such a fee be paid in full prior to reconnection. We also consider that, as with late payment fees in New South Wales, the fee should not be levied 'on a case by case basis as considered appropriate by the standard retail supplier or the electricity industry ombudsman under an approved electricity industry ombudsman scheme' EWON has also received complaints that payments have been made but that reconnection has not been possible after, for instance, 2pm, 3pm or 4pm – depending whether the person is a franchise customer. EWON considers that it is appropriate that there should be no differentiation between franchise and market customers and that same-day reconnection should be available if the account has been paid within standard business hours. This is particularly important given the safety implications of lack of supply (ie 'candles and kerosene').
Liability and warranties	A retailer must not include any term or condition in an energy contract that limits the liability of the retailer for breach of the contract or negligence by the retailer, provided that: • the retailer's liability may be limited as contemplated by section 68A of the *Trade Practices Act* or by equivalent State or Territory legislative provisions; and • there is no variation or exclusion of relevant legislative provisions which provide that the retailer is not liable for damages for failure to supply due to circumstances beyond its control (ie section 120 of the NEL). A retailer may not include in an energy contract with a small customer a term pursuant to which the customer indemnifies the retailer, so that the retailer	Agreed. EWON welcomes the regulation of such terms. For further detail on EWON's observations regarding this issue see Energy & Water Ombudsman NSW, *Submission to the Inquiry into Unfair Terms in Consumer Contracts* [New South Wales Legislative Council Standing Committee on Law and Justice, October 2006], October 2006.

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	may recover from the customer an amount greater than the retailer would otherwise have been able to recover at general law for breach of contract or negligence by the customer in respect of the contract.	

Part B: Possible additional terms and requirements

		Comments
Dispute resolution and complaints	A retailer must handle a complaint made by a small customer in accordance with the relevant Australian Standard and the relevant jurisdictional dispute resolution process. When a customer contacts a retailer in relation to a complaint, the retailer must inform the customer that: • the customer has the right to raise the complaint to a higher level within the retailer's management structure; and • if after raising the complaint to a higher level, the customer is still not satisfied with the retailer's response, the customer may refer the complaint to a external ombudsman.	Agreed. EWON considers that this is a crucial consumer protection and, as such, should be among those elements for inclusion in all standing and market contracts and thus not simply a 'possible additional term/requirement'. We also consider that a retailer should not simply inform customers of external dispute resolution services but be required to provide contact details and, specifically, a Freecall number (if available).
Communications with customers	A retailer must provide access to multi-lingual services (for languages common to the relevant customer base) in order to meet the reasonable needs of its small customers.	Agreed. This provision should apply to all energy contracts.
Provision of energy efficiency advice	On request, a retailer must provide energy efficiency advice to a small customer.	Agreed. EWON notes that two of the three government-owned electricity retailers in NSW currently offer their customers an energy efficiency home visit service. EWON would recommend that retailers be required to actively identify those customers who might benefit from energy efficiency advice and / or an available refit program, and provide relevant advice to such customers.
Assessing credit risk	In deciding whether a small customer has an unsatisfactory credit rating, a retailer may only have regard to any relevant	Agreed. This is particularly important in the case of small customers supplied via a standing contract.

		Comments
	utility related default by that small customer.	
Prepayment meters	A customer cannot be required to use a prepayment meter.	Agreed. EWON supports the trialling of this technology as a payment option for consumers who wish to better manage their payments and consumption.
Payment terms	The due date for payment of a bill may not be less than a prescribed period after the date on which the bill is sent out.	It is important that customers receive reasonable notice of when a payment is due, and that those customers who are more likely to be facing financial hardship and who may have a history of late payment, are not penalised by receiving a shorter time period for payment than those customers with a good payment history. Whatever period is prescribed (we suggest that 14 days would be a reasonable minimum), this should take into account the position of customers in rural and remote areas who might experience regular delays in receiving mail.
Rights to information	An energy contract must set out for a small customer how the small customer can receive information on his or her rights, entitlements and obligations.	Agreed.
Historical billing information	A retailer must provide historical billing data for the previous 12 months without charge to a small customer. Any information provided prior to that period may be subject to a charge.	Agreed, though we would recommend the period be 2 years (as it currently is in NSW) rather than 12 months.
Cooling-off period	A retailer must ensure that each market contract entered into with a small end customer enables the customer to rescind the contract within 10 business days after the contract is entered into.	Agreed.
Early termination charges	The retailer may only impose an early termination charge under a small end customer market contract if: • the market contract includes details of the amount or manner of calculation of the	Agreed.

		Comments
	early termination charge; and • the imposition of the early termination charge is not prohibited under an applicable regulatory instrument, at law or in equity.	
Service standards	The retailer must comply with specified service standards.	Agreed.
Customer consultative groups	The retailer must establish a customer consultative group.	Agreed, though this may pose certain problems for smaller retailers and may perhaps be best dealt with as a general, though variable, licence condition. EWON also supports any requirement for information about the customer consultative group to be made available via the website of the relevant retailer.
Discrimination	A retailer must not refuse to supply or supply on inferior terms on the basis that the customer supplies or uses alternative forms or sources of energy or services that reduce the demand for energy.	Agreed.
Greenhouse gas emissions	Bills must include information concerning greenhouse gas emissions in accordance with guidelines.	Agreed.
Fees for late payment	Not permitted	Late payment fees are currently regulated in NSW. EWON's position is that if late payment fees are to be charged at all (and incentives for early payment may be preferable), they should be regulated and capped at reasonable levels, and that retailers should be able to demonstrate how they off-set the reasonable administrative costs of recovering an unpaid bill and what impact their application has on reducing late payment by customers. EWON considers that it is crucial that late payment fees not apply in set circumstances, such as when a customer has paid (or part paid) with assistance vouchers, has an ongoing dispute being investigated by the

		Comments
		retailer or an ombudsman, and (as currently applies in NSW) 'on a case by case basis as considered appropriate by the standard retail supplier or the electricity industry ombudsman under an approved electricity industry ombudsman scheme'.
CSOs	Retailers may be required to deliver government funded CSOs	Agreed.
Shortened billing cycles	Conditions under which a customer may be placed on a shortened billing cycle.	No comment.
Competitive pricing information	Retailers must publish information relating to the provision of pricing information to enable small customers to compare competing offers.	Agreed. EWON has also agreed (per the Move-in / Move-out working group) that IPART or another body should provide useful price comparisons across market contracts on a publicly accessible website.
Compensation for wrongful disconnection	Retailers must pay compensation to customers who are wrongfully disconnected.	At present there is no guaranteed service standard in NSW that requires a nominated amount of compensation for customers whose supply has been wrongly disconnected. EWON has negotiated such compensation on a case by case basis.

Attachment 2 - Regulation of marketing conduct

		EWON Comments
Pre-contractual disclosures		
Timing/form	A retailer must provide a small customer with certain prescribed information as follows: (a) **prior to formation of a market contract**: where the prescribed matters may be disclosed in writing, electronically or verbally; and (b) **[within 2 business days after formation of the market contract / at least 5 days prior to the expiration of the cooling-off period]**: pursuant to a single written disclosure statement (unless such disclosure statement has already been provided).	This area is currently under review in NSW, with regulatory amendments being considered by the Minister for Energy that might allow oral contracts to be initiated on the condition that the retailer provides a 'disclosure notice' (see 'required disclosures' below) to the customer within a prescribed period after entering into the oral contract, and the usual cooling-off period applies. Refer to the recommendations of the 'Move-in / Move-out Working Group' for further detail.
Required disclosures	The information which a retailer must provide in the manner described above is information in relation to: (a) **existence of commissions:** whether the marketer is entitled to receive a commission from the retailer for arranging the market contract; (b) **prices, charges, penalties, billing and payment arrangements:** all applicable prices, charges and penalties, security deposits, service levels, concessions or rebates, billing and payment arrangements and how any of these matters may be changed; (c) **contract duration:** the duration of the contract, the availability of extensions and whether the contract can be transferred to other premises if the customer moves out during the term of the contract; (d) **cooling-off period:** any rights to rescind an energy contract, including how to exercise these	EWON supports the continued provision of this information to customers entering market contracts either at the time of, or shortly after, entering into an agreement. We also consider that the term 'available dispute resolution options' should also reference an approved ombudsman scheme.

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	rights; (e) **dispute resolution and complaints:** the available dispute resolution options provided by the retailer; (f) **electronic transactions:** if any marketing requirement is to be complied with by an electronic transaction, how the transaction is to operate and, as appropriate, that the customer will be bound by the electronic transaction or will be recognised as having received the information contained in the electronic transaction; and (g) **standard supply contracts:** the availability of standard form supply contracts and the relevant regulator's contact details.	
Cooling-off period	Unless such information has previously been supplied to the small customer, a retailer must send documentation to the small customer providing details of the customer's right to rescind the market contract, including information about how to exercise this right, at least [5] business days prior to the expiry of the cooling-off period.	Agreed. In EWON's experience there would be value in ensuring that such information was also available (at least in summary form) in recognised community languages.
Dispute resolution and complaints	A retailer must advise a small customer of its right to complain to the retailer in respect of any marketing activity conducted on behalf of the retailer and, if such complaint is not satisfactorily resolved by the retailer, of the customer's right to complain to the relevant industry ombudsman.	Agreed. It is also important that contact details of the ombudsman be provided to the customer including, where available, the Freecall number.
General conduct standards	Marketers must, and retailers must ensure that marketers: (a) comply with all applicable Commonwealth and State and Territory laws; (b) do not engage in misleading, deceptive or unconscionable conduct, whether by act or omission; (c) do not exert undue pressure on, harass or coerce a small customer; and (d) ensure that information	Agreed. An adequate product knowledge requirement for marketers would minimise the likelihood of a marketer provides the wrong tariff information to a customer. EWON has received complaints about this issue in the past, and customers have felt deliberately misled. In many cases, the problem has arisen because of the marketer's poor product knowledge or training.

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	provided to small customers is truthful and in plain language, is relevant to the small customer's circumstances and includes timely, accurate and verifiable comparisons. Marketers should have, and retailers should ensure that marketers have, adequate product knowledge. Adequate product knowledge covers knowledge of matters such as tariffs, billing procedures and the availability of rebates and concessions.	
Contact times	Except by prior appointment with, or at the request of, a small customer, a marketer must not visit or telephone a small customer for the purposes of marketing: (a) at any time on a Sunday or public holiday applying in the relevant jurisdiction; (b) outside of the hours of 9am and 5pm on a Saturday; (c) outside of the hours of 9am and 8pm on a week day; and (d) on Christmas Eve after 5pm.	Agreed. EWON has also noted that for elderly customers, marketing contact after 6pm, particularly outside of daylight saving months, is particularly unwelcome, and in some instances of door-to-door marketing, intimidating. It appears that, unlike several other States, NSW and Victoria allow for phone marketing on Sundays, and that this contrasts with the standards outlined in several instruments including the Australian Direct Marketing Association's *Direct Marketing Code of Practice*, the Ministerial Council on Consumer Affairs' *Direct Marketing a Model Code of Practice*, and the regulatory provisions in place under the *Corporations Act 2001* (Cth). While at this point energy retailers rarely appear to market on Sundays (so this has not been an issue in customer complaints to EWON to date), this appears to be an area in which national uniformity would provide common ground for both customers and retailers. Should Sunday marketing be deemed acceptable, the later start – 10am – regulated under the NSW *Energy Marketing Code of Conduct*, would appear sensible. There may also be value in considering the addition of a time limit in minutes beyond which a marketing call can exceed the final time allowable to call. The NSW *Energy Marketing Code of Conduct* at 6.2.4, for instance, provides that a call cannot continue more than 15 minutes beyond the final hour during

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		which telemarketing is permitted; thus if the call itself cannot be made after 8.30pm, then any such call should also not continue beyond 8.45pm.
Duties of marketers	At all times in connection with any marketing activity, a marketer must identify his or herself to a small customer. Identification involves the marketer using best endeavours to provide the small customer with: (a) the marketer's first name; (b) any relevant identification number; (c) the name of the retailer on whose behalf the marketing contact is being made; (d) sufficient contact details to enable the customer to contact the marketer; and (e) advice as to the purpose of the marketing contact. Where marketing is conducted in person, a marketer must wear an identification badge showing the marketer's photograph, first name and the name of the retailer on whose behalf the marketing contact is being made.	Agreed.
Contact records	Where a customer has indicated that he or she does not wish to be contacted for the purposes of marketing, a retailer must use its best endeavours to ensure that the customer is not contacted again. A retailer may satisfy this obligation by keeping records containing details of customers who have indicated that they do not wish to be contacted.	Agreed.
Training	Retailers must ensure that marketers are appropriately trained in relation to compliance with marketing obligations.	Agreed.
Record keeping	Retailers must keep records of all marketing related activities, including details of marketing visits which have been conducted, telephone marketing calls which have been placed and details of customers who have indicated that they do not wish to be contacted for one year after contact is	Agreed.

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	made. Retailers must also retain records of any explicit informed consent obtained by a marketer for two years after such consent is obtained.	
Compliance audits	A retailer must conduct a compliance audit in respect of the compliance by marketers with their marketing obligations at least once per year.	EWON recommends the value of such compliance audits, particularly as they assist in the identification of groups of customers who may (perhaps unknowingly) have been subject to inappropriate marketing.