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Manager – MCE Secretariat
National Energy Market Branch
Department of Industry, Tourism and Resources
GPO Box 9839
Canberra ACT 2601
MCEMarketReform@industry.gov.au

Dear Sir / Madam,

Thank you for the opportunity to comment on the Ministerial Council on Energy Standing Committee of Officials Consultation Paper, *National Framework for Energy Distribution and Retail Regulation*.

The Energy & Water Ombudsman NSW investigates and resolves complaints from customers of all electricity and gas providers in NSW, and customers of some water providers. We have previously provided comments on the Issues Paper in relation to our experiences with customers in the NSW energy market and welcome the opportunity to respond to the issues raised in this Paper.

Please contact me or Chris Dodds, Policy Officer, on 8218 5262 if you would like to discuss this matter further.

Yours sincerely

A handwritten signature in black ink that reads "Clare Petre".

Clare Petre
Energy & Water Ombudsman NSW



Energy & Water
Ombudsman NSW

Ministerial Council on Energy

National Framework for Energy Distribution and Retail
Regulation.

Consultation Paper

May 2005

Response by the
Energy & Water Ombudsman NSW

January 2006

Introduction

We note that the purpose of this paper is to seek comments on the consultation paper *National Framework for Energy Distribution and Retail Regulation May 2004* released by the MCE Standing Committee of Officials (SCO).

While we are not in a position to comment on all areas raised in the consultation we have provided our comments from the perspective of EWON's experience as an independent dispute resolution agency for customers of electricity and gas providers in NSW.

We note that this consultation paper "*does not represent a settled view of SCO or the MCE*" (Energy Market Reform Bulletin No 50).

While the paper sets out a proposed best practice approach on a higher policy level, we understand that a considerable amount of work will be needed to develop the details of the various issues at an operational level.

We understand that the consultation paper is not the final step in the consultation process, and it is clear that there are a number of issues that will require consultation with stakeholders, such as the development of the details of consumer protection. We look forward to being involved further in the consultation process as issues are reviewed and national models developed.

For ease of reference we have adopted the same numbering as the issues paper.

Part A: Introduction

Part A.2 Preamble

EWON supports the recommended approach as outlined in this section. In particular we support 2 (b), consistency between gas and electricity regulatory arrangements especially in the context of a growing section of the market offering dual fuel contracts.

We believe that the matters identified for continuing and separate jurisdictions are appropriate especially jurisdictionally based designation of alternative dispute resolution schemes for small end customers.

Part A.3: Overview of recommended legal architecture and key recommendations

We note that the overall legal architecture appears to be defined in the context of Rules rather than a licensing model. As we understand it, with a licensing model there is an audit regime, which provides an assurance of compliance, while a rules approach tends to be reliant on a civil penalty regime enforced by the AER. Under a Rules approach there might not be a defined list of energy providers. This has implications for consumer protection and arrangements for customers in the event of the failure of their retailer. We will address this issue in more detail in Section D.2

While the aim of simplifying the myriad of differing instruments is desirable a nationally consistent set of licences and codes alongside a set of Rules provides the opportunity for significantly less complexity than exists at present while not losing some of the flexibility that such an approach provides.

It has been our experience that even with the best of will, Rules and Legislation can have unintended consequences. It has also been our further experience that gaining a change to a licence, code or a guideline is significantly easier and quicker than seeking amendments to Legislation and Rules. To lose this flexibility would, in our opinion, be a significant loss.

We note that the consultation paper (page 8) signals the intention for distributors to have “*a simplified business authorisation or licence issued by State or Territory technical regulators*”. In the absence of a national licence regime we suggest that this requirement should also apply to retailers. This is particularly important in the context of identifying those companies, which would be required to participate in an alternative dispute resolution scheme.

A rapid move to light handed regulation in the energy industry may have a potential to lose some consumer protections unless it is complemented by strong industry self-regulation.¹

¹ A useful model to examine in this context may be telecommunications. Here the regulatory regime (which still includes licences) appears to have been supplemented by a strong commitment to self-regulation. The Australian Communications Industry Forum has developed a range of codes and guidelines that cover a number of technical business to business matters as well as consumer protection.

The second issue raised in this section is the need to avoid duplication with ‘generic’ consumer protection. We suggest that the nature of energy as an essential service requires specific consumer protection, and that it is preferable to have nationally consistent Rules or a Code for consumer protection. It is clear that there is significant disparity in the generic consumer protection legislation from state to state (we discuss this further in Section C). We believe that energy consumers should have access to nationally consistent legislation, and that the levels of protection should not depend upon the consumer’s postcode. Given the development of a national market the differing requirements around, for example, marketing are an unnecessary cost to retailers. Nationally consistent requirements could significantly reduce this cost.

Part B: Price Regulation of Distribution

B.1 Overview

EWON supports the recommended policy criteria and the split in roles with the AEMC making the rules and the AER as regulator.

B. 2 The Scope of Distribution Price Regulation of Distribution

EWON notes on p17 “ *private networks/resellers would then be able to be regulated on a basis other than price-cap, through specific Rules determined by the AEMC*”. We have some specific experience with residential/caravan park matters and would be keen to contribute to consultation about the development of specific Rules in this area

B.3 Price cap regulation of distribution

No Comment on this section

B.4 Regulatory requirements in relation to tariff setting

We note that in the regulatory policy criteria proposed for tariff setting it is recommended that requirements should be limited to clear economic criteria.

In EWON’s experience, an essential principle to be taken into consideration in distribution pricing is the need to ensure that essential services such as gas and electricity remain affordable for all customers. Many of the customers who contact EWON are struggling to pay their accounts, and many of these customers are facing disconnection of their electricity supply or have been disconnected from supply, in some cases for weeks or even months. In the 2004/2005 financial year, 35% of all issues raised with EWON by electricity customers and 31% of all issues raised by gas customers related to disconnection of supply or difficulty in payment. We also note that figures from IPART and DEUS show that in the same year over 25,000 NSW electricity customers were disconnected for non-payment.² This indicates that there are significant numbers of customers who are already finding it difficult to pay for energy supply.

We suggest that it is appropriate to include policy criteria related to affordability in any set of principles or objectives regarding the determination of pricing for energy.

B.5 Service Performance Targets

EWON notes the necessity of both national and individual state targets for service performance. We support the proposed key principles and in particular the importance of 5.1 (a) (iii)

“minimum service performance targets should:

- A. reflect attributes of service performance that customers care about;*
- B. be specified in a meaningful manner; and*
- C. be measurable.”*

We note that service quality such as voltage fluctuation is to be considered as a safety and technical consideration hence subject to state regulation. In NSW such regulation is limited, and not all electricity networks operate to the same standards with the

² EWON Annual Report 2004-2005, p.22.

consequence that consumers in NSW may have different service quality depending on the network, which supplies them.

B.6. Process for regulation of price capped services

No comment

B.7. Information disclosure

No comment

B.8. Connection and capital contribution requirements

No comment

B.9. Distribution network expansion rules

No comment

Part C: Consumer Protection

C.1 Overview

In EWON's response to the previous Issues Paper (*EWON Submission on Ministerial Council on Energy Standing Committee of Officials' Issues Paper, National Framework for Electricity and Gas Distribution and Retail Regulation October 2004*) we supported the concept of a best practice consumer code to be applied on a national basis. We are concerned about the different approach proposed in the Consultation Paper. We suggest that the proposal to depend on generic consumer protection legislation has a number of difficulties.

In particular, this approach would defeat the overall objective of ensuring the maximum consistency possible on a national basis in both distribution and retail regulation.

The differing requirements of State Fair Trading Acts can be easily identified. The current paper *Fair Trading Laws in Relation to Telemarketing Options for Harmonisation August 2005* identifies a number of issues relating to this one aspect alone. EWON understands that the different cooling off periods between NSW and Victoria (5 and 10 days respectively) are unlikely to be 'harmonised' given that both states moved to their respective positions as recently as 2003.

Section 163 of the Victorian Fair Trading Act protects customers against unfair consumer contracts, stating that contracts must be easily legible, clearly expressed, and where the contract is printed or typed, in a minimum 10-point font. The Code also requires telecommunication providers to take reasonable steps to ensure that the material terms of the contract are in a minimum of 10-point font. This font requirement is not in the NSW Fair Trading Act. There are other significant differences between Victorian and NSW legislation, even without considering the South Australian, Queensland, or the Tasmanian legislation.

EWON would support a single national set of consumer protection rules, which are comprehensive and reflect industry best practice. We suggest that nationally consistent consumer protection is a desirable outcome for a national market, especially as a number of retailers now operate in multiple jurisdictions.

We acknowledge that there may not be agreement amongst stakeholders as to what constitutes best practice in relation to the various matters to be included in a consumer protection code. We would be interested in receiving further information from the MCE about how best practice models are to be identified. We would wish to be further involved in this aspect of the consultation process.

C.2. Distributor obligation to provide connection services

On the issue of the nature of the contractual relationships between customer, retailer, and distributor, EWON suggests that whether a triangular or linear approach is adopted, it is essential that end-use customers are made fully aware of the nature of their relationship with their retailer and network operator, the rights and obligations they have in relation to each party, and when and how to contact the appropriate party. In our experience, the introduction of full retail competition has caused some

difficulties for customers in knowing which retailer or network operator to contact in relation to any problems with supply, billing etc. These difficulties are more pronounced in situations where both the retailer and distributor are involved in a customer's complaint.

We suggest that clear lines of communication and effective business to business processes need to be developed between retailers and distributors regardless of whether the approach is linear or triangular. We also suggest that protocols for dealing with customer complaints that involve both retailer and distributor should be considered in this context.

EWON agrees with the definition of small end user as consumption less than 10Tj or 160 MWh per annum.

We suggest that it is appropriate to include protocols and procedures relating to compensation for damage arising from events on the distribution system.

C.3. Distributor Disconnections and reconnections

As indicated earlier disconnection issues are a significant part of EWON's work. As the result of our experience, we would wish to have the opportunity to contribute to the consultation in regard to development of the detailed Rules.

It is not clear to EWON what is meant by a civil penalty regime and how compliance will be monitored and improved.

C.4 Distributor: small end-customer dispute resolution

EWON supports the policy criteria and the recommended approach in this section. In particular we support the view that

"Small end-customers should have access to informal, fair and efficient dispute resolution arrangements."

and

"Consequently, effective ADR schemes are likely to be jurisdictionally based."

C.5 Retailer obligation to supply small end-customers

We raise for consideration of inclusion in the standard terms and conditions the following issues:

Miscellaneous charges. While we note that security deposits are covered in 5.2 (i) (iii), there is no reference to other forms of miscellaneous charges that might be applied to customers by their retailer, or charged by the distributor and passed through to customers. It is important that customers are fully aware of all fees and charges and the circumstances when these apply. We note that the type and amount of miscellaneous charges vary considerably in the different jurisdictions.

Debt collection. We note that some jurisdictions have regulated the ways in which utilities can conduct debt collection. We suggest that this issue should be considered in the national Rules.

Communications with customer. It is essential for customers to be able to contact their supplier for information about their energy supply. In NSW, suppliers are required to operate certain telephone information services that customers can contact for no more

than the cost of a local call. We suggest that the national Rules should ensure that contact with their supplier remains inexpensive and simple for all customers. As well, information in community languages about the availability of interpreter services and the relevant telephone numbers should be a requirement.

Compensation claims for damage. We suggest that it is appropriate to include procedures relating to compensation for damage arising from events on the distribution system. This extremely complex issue is approached very differently in each jurisdiction. We suggest that this is an area where national Rules could be useful in identifying and promoting best industry practice. We note that the description for the provision “Interruptions to supply” includes a reference to “liability”, and it may be appropriate to include this matter under this provision.

Dispute resolution. While dispute resolution is mentioned in 6.2 (market contracts) and 2.3 (distributor obligations), it is not mentioned in the proposed standard terms and conditions. We assume this is an oversight.

In the issues listed in this section of the consultation paper we query the value of 5.2 (i) (vii) “*bill smoothing*”. This would appear to be more appropriately dealt with as one of a number of payment methods under 5.2 (i) (vi)

C.6 retailer: small end-customer contracts

We suggest that the same issues raised in the previous section are worthy of inclusion. Further we would also consider it important to include the following in the Model Terms.

Duration of the contract. Such a model clause would also provide information on both extension and renewal options as well as what occurs at the end on the contract such as reversion to default terms and tariffs.

Disconnection and reconnection. The reference in this section 6.2(d) (vii) is specific to life support systems. In the section 2.3 and 5.2 (i) the reference is just to “*disconnections and reconnections*” which would cover life support systems but also covers a range of other rights and obligations. We suggest that this section should provide for the same definition as section 2.3 and 5.2 (i).

C.7 Retail: Small end-customer marketing

We have already commented in the overview of this section on the need for a consistent set of marketing rules for energy. We repeat our concern that a reliance upon state legislation will lead to significant variation in levels of consumer protection and added cost for energy retailers.

We have experienced a situation where NSW customers were contacted by telemarketers in a call centre in Victoria where every contract was void because the contracts did not reflect NSW regulations. Given the differences between generic consumer protection legislation, we suggest that the only way to avoid is to develop a national code that provides a comprehensive set of protections for consumers.

In particular, we are concerned about 7.3 (c) (iii), which proposes a 5 day cooling off period. This reduces the present cooling off period in NSW by half.

C.8 Retailer – small end-customer dispute resolution

EWON supports the policy criteria and the recommended approach in this section, in particular the view that

“Small end-customers should have access to informal, fair and efficient dispute resolution arrangements.”

and

“Consequently, effective ADR schemes are likely to be jurisdictionally based.”

Part D: Other Distribution and Non-price Retail Regulation

D.2 Business Authorisation

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. The only reference to compliance is “subject to a civil penalty regime enforced by AER.”

The consultation paper proposes that:

“Relatedly, where a licence or authorisation requirement is used to impose obligations via administrative rather than legislative action, there is the risk that the obligations are not subjected to the rigorous drafting process that is specifically designed to ensure that legislative instruments are expressed with precision. In these circumstances there can be a proliferation of obligations, which by their numerous nature and/or by not being subject to the legislative drafting process, may create an environment in which compliance is actually less likely to be achieved.”(p65)

EWON’s experience suggests the opposite position. We have found that administrative arrangements are more flexible and reflect more accurately the real conditions of the market while legislative instruments are more difficult to adjust to the conditions as they evolve.

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.

D.3 Distributor Interface with Retailers

No comment

D.4 Distributor interface with embedded generators

No comment

D.5 Balancing regime and settlements, effecting customer transfer in balancing and settlements system

No comment

D6 Metering

No comment

D.7 Load shedding and curtailment

No comment

D.8 Retailer failure arrangements

No comment

D.9 Jurisdictional Directions

No comment