

Energy and Water Ombudsman (Victoria) Limited

ABN 57 070 516 175

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Manager – MCE Secretariat
Department of Industry, Tourism and Resources
GPO Box 9839
CANBERRA ACT 2601

By email: MCETMarketReform@industry.gov.au

Dear Madam/Sir

Re: Ministerial Council on Energy Public Consultation on a National Framework For Energy Distribution and Retail Regulation

Thank you for the opportunity to comment on the May 2005 paper prepared by NERA Economic Consulting and Gilbert + Tobin entitled *Public Consultation on a National Framework for Energy Distribution and Retail Regulation* ('the consultation paper').

The following comments – on selected parts of the consultation paper – are grounded in the Energy and Water Ombudsman (Victoria) (EWOV) scheme's experience in the handling of Victorian customer complaints in electricity and gas distribution and retailing. To 31 December 2005, EWOV had assisted more than 80,000 consumers to resolve their energy issues.

PART A: INTRODUCTION

A3. Overview of the recommended legal architecture and key recommendations

The 'legal architecture' recommended in the consultation paper – as illustrated in Figure 1 on page 7 – is significantly different to the framework that was suggested in the Ministerial Council on Energy's (MCE's) August 2004 *National framework for electricity and gas distribution and retail regulation issues paper* ('the issues paper').

Whereas the issues paper suggested that there should be electricity and gas distribution and retail licences containing fundamental obligations, the consultation paper argues against licences (apart from technical and safety licences for distributors).

The issues paper suggested that there should be a single Consumer Protection Code, whereas the consultation paper envisages a mixture of Rules made by the Australian Energy Market Commission (AEMC) and Statements of Requirements issued by the Australian Energy Regulator (AER).

It would be helpful to know whether the MCE Standing Committee of Officials favours the model put forward in the issues paper or in the consultation paper, as well as its responses to the comments put forward by stakeholders in relation to both papers.

PART B: PRICE REGULATION OF DISTRIBUTION

B1. Overview

EWOV acknowledges and supports the inclusion in the consultation paper (at page 11) of a list of criteria that characterise *best practice* distribution price regulation. EWOV suggests that *best practice* principles should be applied to all aspects of the development of the national energy regulatory framework (not just to distribution price regulation).

EWOV repeats the suggestion made in response to the issues paper³ that the following nine principles of *best practice* regulation – which were identified by the Utility Regulators Forum⁴ – should be applied to all aspects of the development of national energy regulation:

- communication (information to stakeholders on a timely and accessible basis)
- consultation (participation of stakeholders in meetings)
- consistency (across market participants and over time)
- predictability (a reputation that facilitates planning by suppliers and customers)
- flexibility (by using appropriate instruments in response to changing conditions)
- independence (autonomy, freedom from undue political influence)
- effectiveness and efficiency (cost-effectiveness emphasised in data collection and policies)
- accountability (clearly defined processes and rationales for decisions, with appeals)
- transparency (openness of the process).

B2. The Scope of Distribution Price Regulation

EWOV supports the proposal (at pages 16-17 and 48) to bring private networks / resellers within the scope of the national energy regulation framework.

B4. Regulatory requirements in relation to tariff setting

The consultation paper recommends (at page 27) that the policy criteria for the setting of network tariffs should be limited and should relate to clear, economic criteria. This recommendation may be too narrow.

³ Fiona McLeod, Energy and Water Ombudsman (Victoria) *Response to the Ministerial Council on Energy's National Framework for Electricity and Gas Distribution and Retail Regulation Issues Paper* (3 November 2004)

⁴ *Best practice utility regulation*, Utility Regulators Forum, July 1999

In Victoria, electricity distribution charges represent around 40 per cent of an average household electricity bill.⁵ Accordingly, it is important for regulators to carefully consider how network tariffs affect the affordability of electricity (and gas) for all customers – including the social impacts of disconnections for non-payment.

B5. Service performance targets and B7. Information disclosure

EWOV supports the consultation paper’s recommendation (at page 31) that there should be guaranteed service level (GSL) payments, which provide some compensation to customers when minimum performance targets are not met by distributors.

Electricity distribution GSL payments have recently been strengthened in Victoria.⁶ It is important to note, however, that GSL entitlements do not always fully resolve a customer’s issue and may not adequately compensate a customer for their loss. Customers who have received GSL payments must still be advised of their right to raise their complaint at a higher level within the distributor’s management structure and, if it remains unresolved, with an external dispute resolution body.

EWOV questions the recommendation (at page 31) that average and minimum service performance targets should be determined by each jurisdiction or, where the jurisdiction has not specified any targets, by the AER. EWOV suggests there are some distribution service performance targets – such as call centre response times – that should be nationally consistent.

The consultation paper mentions (at page 37) the need for distributors to report on their service performance measures but does not clarify whether this means public reporting or only reporting to a regulator. EWOV supports public reporting of electricity and gas distributors’ performance against their service performance targets. Comparative performance reports – as currently published by the Victorian Essential Services Commission (ESC) – provide customers with important information and insight into how their experiences compare with the bigger picture.

PART C: CONSUMER PROTECTION

C1. Overview

The energy consumer protection framework that currently operates in Victoria is robust and sound and is widely regarded as constituting *best practice*. The development of a national energy consumer protection framework must not result in a diminution of this framework. Rather, the goal must be to provide a *best practice* energy consumer protection framework across all jurisdictions. The current Victorian framework should represent a benchmark for the AEMC when it makes Rules.

⁵ Victorian Essential Services Commission (ESC) *Review of Electricity Distribution Prices 2006-10 – Final Decision – Fact Sheet 1* (October 2005)

⁶ Victorian ESC *Electricity Distribution Code* (revised January 2006) section 6

C2. Distributor obligation to provide connection services

EWOV confirms its support of the recommendation (at page 45) that there be a triangular relationship between retailers, distributors and end-use customers, which creates a direct contract between distributors and end-use customers.

The consultation paper refers (at page 46) to distributors having ‘a right to disconnect for non-payment etc’. Victorian codes currently only provide retailers with a right to disconnect for non-payment (distributors act on the retailers’ instructions to effect disconnection)⁷. EWOV does not support providing distributors with an independent right to disconnect for non-payment. As bills are issued by retailers, the right to disconnect for non-payment should continue to rest only with retailers.

The consultation paper recommends (at page 47) the AEMC would make Rules for the standard terms and conditions for the supply of standard connection services. EWOV considers that the content of such Rules must be considered at a more detailed level - through further consultation and discussion with industry, consumer and other stakeholders. For example, the maximum timeframes for an electricity distributor to connect (energise) supply will need to be considered.

The consultation paper envisages (at page 48) that the Rules would cover ‘liability and warranties’. EWOV confirms its view that, in relation to electricity supply, the national regulatory framework should adopt the content of the Victorian Voltage Variation Compensation Guideline, as it constitutes *best practice*.

C4. Distributor: small end customer dispute resolution

EWOV notes the consultation paper recommends (at page 51) that distributors be required to belong to jurisdictionally based alternative dispute resolution (ADR) schemes designated by Jurisdictional Ministers.

The processes to be followed by Jurisdictional Ministers when designating an ADR scheme, the frequency of such designations and the criteria that an ADR scheme will be required to meet to be eligible for designation all require clarification.

EWOV feels strongly that ADR schemes should be designated by an independent regulator – namely the AEMC – rather than by Jurisdictional Ministers, so that they are, and are seen to be, independent of government. The independence of ADR schemes from industry, consumers and government is fundamental to the success of the schemes. Currently, most of the energy Ombudsmen schemes operating in Australia are designated by a regulator.

The consultation paper recommends that ‘small-end customers’ should have access to dispute resolution arrangements.⁸ Currently, access to dispute resolution schemes, such as EWOV, is not limited to customers below designated usage levels. EWOV

⁷ The Victorian ESC’s *Electricity Distribution Code* and *Gas Distribution System Code* provide distributors with limited direct rights to disconnect – such as for safety reasons or where supply is being obtained ‘illegally’.

⁸ ‘Small-end customers’ is not clearly defined in the consultation paper but page 46 suggests a definition of customers using less than 10 terajoules or 160 kilowatt hours per annum.

receives a significant number of complaints from medium-usage and larger-usage business customers, particularly electricity customers using more than 160 megawatt hours per annum. It is incorrect to assume that these customers always have adequate skills and information to resolve their energy issues. Accordingly, it is critical that medium-usage and larger-usage business customers – that is, gas customers using more than 10 terajoules per annum and electricity customers using more than 160 megawatt hours per annum – continue to have access to dispute resolution schemes.

It should also be noted that ADR schemes – namely EWOV, the Energy and Water Ombudsman NSW, the Energy Industry Ombudsman SA, the Energy Ombudsman Tasmania and the Energy Ombudsman Western Australia – currently handle complaints about electricity transmission issues and this jurisdiction should continue.

In our response to the issues paper, EWOV expressed support for a national industry-based energy ombudsman in one location, subject to the finalisation of the national regulatory framework and a comprehensive feasibility study. The consultation paper suggests there is currently no appetite for a national-industry based energy ombudsman. However, EWOV suggests the issue of a national energy ombudsman should not be lost and should be revisited – via a comprehensive consultation process – following the finalisation of the national energy regulatory framework.

C5. Retailer obligation to supply to small end customers

EWOV supports the recommendation (at page 54) of the retention of an obligation on Local Retailers to provide supply to customers on a standing offer basis. Electricity and natural gas are essential services and, as the consultation paper notes (at page 53), customers are not always able to enter into a favourable negotiated contract.

The consultation paper recommends (at page 54) that Local Retailers (also called Designated Retailers) be required to make standing offers to ‘Specified Classes of Customers’ – this phrase requires clarification.

The consultation paper puts forward (at pages 55-56) a list of topics to be included in standard terms and conditions under which Designated Retailers would be obliged to supply Specified Classes of Customers. The terms and conditions should also address:

- complaints and dispute resolution – that is, the provision of information to customers about their internal and external dispute resolution options
- the contents of a bill
- the provision of energy efficiency advice
- hardship policies and programmes
- debt collection
- communication with customers – including access to interpreters and the National Relay Service.

These standard terms and conditions will need to be considered at a much more detailed level – through extensive consultation and discussion with industry, consumer and other stakeholders.

C6. Retailer: small end customer market contracts and C7. Retail: small end customer marketing

The consultation paper states (at page 57) that, ‘where full retail competition is effective no energy specific regulation of Market Contracts should be needed’. EWOV questions whether energy retail competition can ever be ‘effective’ for all customers and maintains its view that there remains a clear need for a strong and robust, industry-specific consumer protection framework, tailored to fit the electricity and gas industries. Accordingly, EWOV is of the view that any Model Terms for Market Contracts and Marketing Rules need to be comprehensive.

EWOV regards the Model Terms for Market Contracts that are recommended in the consultation paper (at page 58) as being too limited. Model Terms for Market Contracts should also address:

- the topics covered in the standard terms and conditions (see above)
- disconnection and reconnection for all customers, not just customers on life support systems
- notification prior to the expiration of a fixed-term contract
- the consequences of a fixed-term contract expiring – in particular, information about the tariffs that will apply.

In relation to Marketing Rules, EWOV’s view is that the goal should be to provide greater consistency across jurisdictions without reducing the quality of the regulatory framework that currently applies in any jurisdiction. EWOV suggests the best way to achieve this goal is through a comprehensive set of Marketing Rules. Without such Rules, the framework will largely fall back to State-based fair trading legislation, which contains some significant inconsistencies.

The consultation paper states (at page 61) that, ‘energy sector specific consumer protection should be limited to those areas in which general fair trading legislation is inadequate to address the specific issues arising in respect of energy’. In Victoria, the inadequacies of the general fair trading legislation have been clearly recognised. This is reflected in the content of the Victorian ESC’s *Code of Conduct for Marketing Retail Energy in Victoria* (October 2004 version). It includes a number of requirements that are specifically footnoted as supplementing the Victorian *Fair Trading Act* 1999 and which cover topics such as:

- the training of marketing representatives (section 4)
- no contact lists and visit records (section 5)
- consent audits (section 7) – these have proved useful in detecting and redressing poor marketing practices
- sales to persons under 18 years of age (section 7).

The Victorian ESC’s *Energy Retail Code* also supplements the Victorian *Fair Trading Act* 1999 by extending some cooling-off periods.

These supplementary requirements are appropriate given that the marketing activity relates to the essential services of electricity and natural gas. They should be included in any national Marketing Rules.

The development of national Model Terms for Market Contracts and Marketing Rules needs to be considered at a much more detailed level – through extensive consultation and discussion with industry, consumer and other stakeholders. EWOV and other dispute resolution schemes would appreciate being involved in these processes so that our experiences of customers’ retail competition issues are taken into account.

C8. Retailer: small end customer dispute resolution

EWOV’s comments in relation to distributors and dispute resolution – on pages 4 and 5 of this response – also apply in relation to retailers and dispute resolution.

PART D: OTHER DISTRIBUTION AND NON-PRICE RETAIL REGULATION

D2. Business authorisation

The consultation paper recommends (at page 66) that there should be no national regime for the licensing or authorisation of energy retailers and (at pages 48, 56 and 62) that obligations should instead be imposed by legislation or Rules. It envisages that non-compliance would be subject to a civil penalty regime but does not address its scope or nature.

EWOV suggests that the strengths of a licensing model should not be overlooked. One of the strengths is that a participant who continues to behave inappropriately can be excluded from the market through the revocation of their licence. It is important for a regulator to have the capacity to exclude such a participant from the market. The model put forward in the consultation paper does not explain how this outcome could be achieved in the absence of a licensing regime.

It is currently a licence requirement for electricity and natural gas providers in Victoria to participate in an approved dispute resolution scheme.¹⁰ As such, providers are aware that failure to comply with this requirement would potentially put their licence, and hence their capacity to operate, at risk. The model put forward in the consultation paper does not address how continued non-compliance with a requirement to participate in a designated dispute resolution scheme would be dealt with. This needs to be addressed as it would be an important aspect of the effectiveness of designated dispute resolution schemes.

A second strength of a licensing regime is that it lends itself to compliance audits and compliance monitoring, which can prevent non-compliance with regulatory requirements. The consultation paper does not directly address compliance monitoring.

¹⁰ The Appendixes to the consultation paper note that entry into an approved dispute resolution scheme is a licence requirement in Victoria for electricity retailers (Appendix A at page 174), natural gas distributors (Appendix B at page 305) and natural gas retailers (Appendix B at page 329) but omit reference to this requirement for electricity distributors (in Appendix A at pages 145-146).

A third positive feature of a licensing model is that it provides certainty as to whom the participants are. The absence of licences in Victoria for electricity on-sellers or embedded networks, for example, makes it hard to know how many there are.

The consultation paper suggests (at page 65) that licences and administrative instruments (codes, procedures, guidelines, etc) may be subject to less rigorous drafting processes, and hence prone to being less precise, than legislative instruments (i.e. Acts, Regulations and Rules). This suggestion does not reflect EWOV's experience. EWOV's experience has been that the licences and administrative instruments drafted by the Victorian ESC have been subject to rigorous processes and extensive consultation. It can be more difficult to adapt legislative instruments so that they promptly address practical and changing issues. Accordingly, in the model proposed in the consultation paper, the Rules made by the AEMC will need to be capable of being amended in a timely and flexible manner.

D3. Distributor interface with retailers

EWOV supports the recommended requirements (on pages 69-70) for Use of System Agreements between distributors and retailers.

D6. Metering

The consultation paper does not specifically mention pre-payment meters, which are provided for in Tasmania and South Australia and this will require specific attention in the development of metering arrangements in the national energy regulation framework.

D8. Retailer failure arrangements

The consultation paper lists (at pages 89-91) a number of recommendations in relation to retailer failure arrangements. In addition to these, EWOV suggests the Rules should require the Step-in Retailer to provide affected customers with clear information on the status of their contracts, account balances, applicable tariffs and when they can switch to another retailer.

We trust these comments are helpful. Should you require any clarification of, or expansion on, EWOV's comments, please do not hesitate to contact Stephen Gatford, Manager Public Affairs and Policy, on (03) 9649 7599.

Yours sincerely



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