



EnergyAustralia

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Dear Ms Bryne

Submission on draft charter of consultation and regulatory practice

1. Introduction

EnergyAustralia welcomes the opportunity to make a submission to the Essential Services Commission (the Commission) on the draft Charter of Consultation and Regulatory Practice (Draft Charter).

We are one of Australia's largest energy companies, with over 2.6 million household and business customer accounts in NSW, Victoria, Queensland, South Australia and the Australian Capital Territory. We also own and operate a multi-billion dollar portfolio of energy generation facilities across Australia, including coal, gas and wind assets with control of over 4,500MW of generation in the National Electricity Market.

In Victoria, we provide gas and electricity to around 20 percent of households. We also service 12 percent of small business electricity needs and 19 percent of their gas needs.

In principle, we support the Commission promoting a culture of engagement. EnergyAustralia is always willing to actively engage in forums and to make use of information published by the Commission and consumers. Equally, as we have demonstrated, we are willing to share information or insights that we have gained as an industry participant. We believe that two-way communication and flow of information is valuable to all industry stakeholders and essential to achieving improved customer outcomes via regulatory processes.

While we can see that there is some value in a principles-based approach that provides for efficient, flexible and responsive regulation, the Commission is an independent statutory authority and as such its functions and powers are set out in the *Essential Services Act 2001* (the Act) and the Essential Services Commission Regulations 2011 (the Regulations); including the requirement to develop and publish a Charter of Consultation and Public Practice (Charter). In carrying out its functions and exercising its powers, the Commission is bound by the

requirements of the legislation and against this backdrop it appears the Commission has a misguided understanding of what it is authorised to achieve.

2. Legislative Objective

The development of the Charter of consultation and regulatory practice is a requirement of the Commission under the Act,¹ and in doing so they must seek to achieve the objective of the Act.

The Commission's legislative objective is stated as follows:

In performing its functions and exercising its powers in relation to essential services, the Commission must in seeking to achieve the objective of the Act, (that is to '*promote the long-term interests of Victorian consumers.*'²) have regard to price, quality and reliability of essential services.

In regulating essential services (i.e. exercising its functions and powers) and seeking to promote the long-term interests of consumers, the Commission must also have regard to the matters prescribed in section 8A. These matters include (among others) efficiency, incentives for investment, financial viability, social legislation, costs and benefits of regulation and national consistency.

However, we note that in the Draft Charter the Commission has stated its legislative objective incorrectly to be:

*"...to promote efficiency and competition in essential services to achieve the best outcomes for Victorian consumers in the long term."*³

Clearly there is difference between the objectives set out in the Draft Charter and what the Commission is authorised to do under the legislation. Achieving the *best outcomes for consumers* suggests that the Commission has a paternalistic role to define and achieve measurable targets that are deemed 'best' for consumers. It doesn't appear to cater for different consumers having different and sometimes competing needs and interests, or for any difference in 'best outcomes' as compared to 'best interests'.

Promoting (rather than *achieving*) is suggestive of a process of facilitation and encouragement rather than pursuit of a defined target. Such a process allows the Commission to flexibly exercise its powers and functions to regulate essential services as markets develop overtime and consumer interests evolve.

Our concern is that in attempting to achieve the **best outcomes** for customers there will be a different assessment of the matters listed at Section 8A, and therefore a different approach to consultation. We consider it likely that greater weight would be attributed to matters such as social legislation and the costs and benefit of regulation to consumers than would otherwise be the case if the Commission were **promoting** consumer interests in the regulation of essential services. This could lead to Commission decisions that, in isolation, produce beneficial for some customers, but raise costs, increase risks and depress service levels or innovation among essential service providers. If the Commission's objectives are too narrow, then these flow on effects may not be assessed as part of the decision-making process and could lead to adverse outcomes that are not in the best, long term interests of all consumers.

¹ *Essential Services Commission Act 2001*, s17.

² *Essential Services Commission Act 2001*, s8(1).

³ Essential Services Commission, *Charter of consultation and regulatory practice – draft*, December 2017, p 1.

Consultation and regulatory practice in pursuit of an erroneous objective, is likely to result in poorly targeted engagement and consultation and an imbalanced weighting of the matters which must be considered. We contend that the Commission's role is to regulate essential services and in doing so to seek to promote the long term interest of Victorian consumers. It is not to define and achieve the best outcomes for Victorian consumers; the Commission is an industry regulator not a social service provider. We request that the Commission amend the Draft Charter to ensure it accurately reflects what it is authorised to do; that is – "in performing its functions and exercising its powers in relation to essential services, the Commission must in seek to *promote the long-term interests of Victorian consumers.*'

3. Engagement versus consultation?

The Draft Charter provides for a shift toward 'engagement' away from 'consultation'. The Commission has not provided any explanation or justification for this shift, other than that the '*shift mirrors an international shift*'.⁴ While that may be the case, the requirement under the legislation is to develop and publish a Charter for *Consultation* and Public Practice.⁵ While the Commission is authorised to include any other matters it considers appropriate,⁶ this should not be to the exclusion of matters prescribed in the legislation – i.e. consultation.

Consultation is generally understood to mean targeted two-way flows of information and ideas; seeking stakeholder input into particular issues for further consideration. Whereas the concept of *engagement*, as it is used throughout the Draft Charter, seems to indicate the dissemination of information to stakeholders by the Commission – i.e. a one-way flow of information.

Given the new emphasis by the Commission on engagement in the Draft Charter we ask that the Commission clarifies what is meant by the term 'engagement' and how it differs from consultation. This will allow stakeholders to be assured about the way in which the Charter of Consultation and Public Process will be applied in the future. This includes how we will receive information and that as stakeholders we will be able to provide feedback, and how our feedback will be used or acknowledged. It's vital that information-sharing and consultation (not just information dissemination) occur regularly, through appropriate channels and that sufficient time is provided to ensure that the consultation process is effective. This is particularly important as consultation (rather than engagement) is a key component of what is required under legislation.

The apparent shift away from consultation is clearly demonstrated when we compared the Draft Charter against the current Charter. The current Charter provides clear statements of intention for two-way flows of information and emphasises the value of stakeholder contributions in guiding public decision making. Some examples are:

- the Commission will provide all stakeholders with "*... all reasonable opportunity within a reasonable timeframe to participate in our consultation process*"⁷
- the Commission will "*reflect the comments that stakeholders make to our processes*"⁸
- the commission will be "*[a]ctive in engaging with [stakeholders]...to better inform our regulatory approach, especially on emerging issues.*"⁹
- the commission will be "*[a]ctive in working with regulated businesses...*"¹⁰

⁴ Essential Services Commission, Draft Charter of consultation and regulatory practice 2017, p5.

⁵ *Essential Services Commission Act 2001*, s14(1).

⁶ *Essential Services Commission Act 2001*, s14(2)(b).

⁷ Essential Services Commission, Charter of Consultation and Regulatory Practice 2013, p24.

⁸ Essential Services Commission, Charter of Consultation and Regulatory Practice 2013, p25.

⁹ Essential Services Commission, Charter of Consultation and Regulatory Practice 2013, p25.

¹⁰ Essential Services Commission, Charter of Consultation and Regulatory Practice 2013, p25.

- *"We rely heavily on the input of all our stakeholder groups and the wider community"*¹¹
- *"Wide publication and distribution....enables interested parties to provide additional information and analysis to influence our further analysis and findings."*¹²

The omission of statements like these from the Draft Charter is glaring, and gives no reassurance that the Commission values stakeholder input in its regulatory decision-making process. Indeed, it appears to us that the intent of the revised draft is to remove stakeholder expectations that consultation will be undertaken.

With this in mind, we query how the Commission will be able to meet its obligations under section 8A of the Act, particularly those matters that may only be known or be better understood by consumers (or their representatives) or industry. The limited references to consultation the Draft Charter and accompanying consultation paper provide no certainty or objectivity as to what the triggers for public consultation will be – other than to say *'[o]ur processes for public consultation will be tailored according to the potential impact of the decision to be made, the complexity of the problem to be solved and the time available...'*¹³

We request the Commission provide reasons why they intend to give less weight to consultation and stakeholder views going forward and how this seeks to promote the long term interests of Victorian consumers. In doing so, we also request that the Commission provides more clarity on what engagement and consultation will entail, and that it gives further consideration to the requirements of the Act.

4. Principles to guide engagement and consultation

The revised key principles set out in the Draft Charter differ significantly from the current Charter. The Draft Charter no longer includes commitments by the Commission to be:

- Independent, balanced and fair
- Consistent with statutory objectives¹⁴
- Representative and fair – reflecting comments that stakeholders make
- Effective in identifying priority issues
- Efficient by minimising costs of regulatory activities and seeking to ensure that the costs of regulation do not exceed the benefits¹⁵

Our concerns about the reduced role of consultation in section 3 above are heightened by the absence of principles that provide certainty, balance and that indicate independence and objectivity in the Commission's regulatory decision-making processes. It is our view that the deliberate removal of these commitments by the Commission and the reduced role of consultation in this context, will erode business and consumer confidence in the Commission's regulatory practice; we are uncertain how these changes will promote the long term interests of Victorian consumers.

5. Conclusion

Given the Draft Charter has some deficiencies with respect to achieving what is required under the Act and Regulations it seems to us that Commission may be moving beyond the scope of its authorisation. We encourage the Commission to amend the Draft Charter to correctly

¹¹ Essential Services Commission, Charter of Consultation and Regulatory Practice 2013, p31.

¹² Essential Services Commission, Charter of Consultation and Regulatory Practice 2013, p38.

¹³ Essential Services Commission, Draft Charter of consultation and regulatory practice 2017, p4.

¹⁴ The omission of this commitment is particularly glaring given the misstatement by the Commission's legislative objective discussed above.

¹⁵ Essential Services Commission, Charter of Consultation and Regulatory Practice 2013, pp24 and 25.

identify its legislative objectives and to provide an explicit definition of engagement and consultation, how they relate to each other, and why the Commission is so heavily focussed on engagement, when the clear legislative intent is for a consultative approach to regulatory practice.

We query the Commission's motivation for taking what appear to be deliberate steps to erode the role of stakeholders in informing the Commission's pursuit of its legislative objective. This shift away from the consultative two-way flows of information and from seeking stakeholder input into regulatory decision-making processes is inconsistent with what we understand is meant by consultation and the intent of the Act. This raises concerns of legislative truancy with respect to the ability of the Commission to comply with the requirement that it **must** have regard to certain matters;¹⁶ matters that we contend necessitate input from a range of stakeholders.

Without a comprehensive revision of the Draft Charter, we believe that the Draft Charter cannot possibly achieve what is required by section 14(2)(a) the Act, namely to 'ensure best practice by the Commission in performing its functions.'¹⁷

Should you require further information regarding this submission please call Samantha Nunan on (03) 8628 1516.

Yours sincerely

Melinda Green
Industry Regulation Leader

¹⁶ *Essential Services Commission Act 2001*, s8A.

¹⁷ As prescribed by regulation 6(f) of the Essential Services Commission Regulations 2011.