



11 September 2008

Ms Wendy Heath
Review of Regulatory Instruments
Essential Services Commission
Level 2, 35 Spring Street
MELBOURNE VIC 3000

By email: EnergyRegulatoryReview@esc.vic.gov.au

Dear Ms Heath

**RE: REVIEW OF ENERGY REGULATORY INSTRUMENTS
– STAGE 1: DRAFT DECISION (AUGUST 2008)**

The Energy and Water Ombudsman (Victoria) (EWOV) thanks the Essential Services Commission (ESC) for this opportunity to comment on the ESC's August 2008 Draft Decision – and for the opportunities to participate in workshops in May – August 2008.

This submission concentrates on the proposed changes to the *Energy Retail Code* and the *Code of Conduct for Marketing Retail Energy in Victoria* (the 'Energy Marketing Code'). It follows the structure in Appendix B of the Draft Decision – but initially we would like to make some key points.

EWOV generally supports the ESC's Draft Decision. EWOV regards most of the ESC's proposed changes as striking a good balance – removing a significant amount of redundant and duplicated regulation, whilst retaining a strong energy consumer protection framework. The ESC has managed to strike this balance with an eye on the horizon – to the proposed National Energy Customer Framework, which has taken a clearer shape since the ESC began its review.

EWOV is particularly pleased that the ESC has decided to retain small business coverage of clause 6.2 of the *Energy Retail Code*, relating to the recovery of undercharges. As noted in our earlier comments¹, EWOV was concerned that small business customers could be liable for extended backbilling, through no fault of their own.

¹ EWOV comments on the ESC's *Energy Regulatory Review - Application of undercharging provisions to small business customers*, 3 June 2008, on www.ewov.com.au under 'Responses to regulatory authorities'.
EWOV_cmts_ESC_Reg_Review_Dft_Dec_Sept_2008

EWOV also supports the ESC's view that there is still a need for energy-specific regulation in the area of marketing. The number of retail competition issues received by EWOV has not reduced markedly – there were 4,145 issues in 2007/08, down only marginally on the 4,211 issues in 2006/07.

There are, however, parts of the ESC's Draft Decision that EWOV does not support. Our main concerns are with:

- part of the proposed change to the wording of clause 6.2 of the *Energy Retail Code* – relating to the recovery of undercharges
- the proposal to delete clause 7.4 from the *Energy Marketing Code*, relating to sales to minors and authorised consumers.

These concerns, and other suggestions and comments, which are founded on EWOV's casework experience, are detailed below. Our comments follow the ordering in Appendix B of the ESC's Draft Decision.

Proposed changes to the Energy Retail Code

Clause 2: Retailer's obligation to connect: EWOV understands the reason for the proposal to insert the clause 'if a retailer has an obligation to connect...' and is not opposed to it. However, we note it is not straightforward for a community worker or layperson to work out which retailer is subject to an obligation to connect. It might assist if 'obligation to connect' were made a defined term so that this information could be made available in the *Energy Retail Code*.

Clauses 3.1: Retailers to issue bills and 3.2: Billing cycles: The change proposed is sensible.

Clause 3.3: Bulk Hot Water Charging: No comment.

Clause 4.2: Information: EWOV is pleased to see that 4.2(f) (advising customers about substituted data) will be retained, although we are open to a discussion of a threshold level of substituted data, above which notification would be required. At the 5 August 2008 forum, there was considerable retailer opposition to the proposed change to 4.2(o) (to include the distributor's name for faults/emergencies), but EWOV considers the advantages of having the distributor's name on the bill outweigh the disadvantages. Retailers should be given enough time to respond to the change, since it involves changes to their bill format.

Clause 4.3: Bundled Charges: It is sensible to retain this clause in the light of the proposed national framework.

Clause 4.5: Payments for Electricity and Gas: EWOV does not anticipate adverse consequences from repealing this clause for small business customers.

Clause 4.6: Payments for other goods or services: EWOV accepts the removal of small business customers from the coverage of this clause – so long as the fourth dot point of clause 14(a) is to be retained.

Clause 5.3: Bill smoothing: Complaints to EWOV about highly inaccurate bill smoothing amounts have reduced. Accordingly, EWOV sees no problem with taking the period of re-estimation from six to nine months in line with the undercharging collection provisions in clause 6.2. A nine month period will also give providers a greater ability to take seasonal variations into account.

We note on page 13 of the Draft Decision that Clause 5.3 is one of elements of the *Energy Retail Code* to be amended with respect to small business customers, although this is not mentioned in Appendix B. EWOV is uncertain as to the effect of removing small business customer coverage from this clause. Is it to make bill smoothing unavailable for small business customers? If so, this would seem to be contrary to the interests of both retailers and small customers; bill smoothing by direct debit would seem to be in the interests of both parties. This is another instance in which EWOV cannot see what is to be gained by making this provision apply only to residential customers.

Clause 5.6: Unmetered supplies for electricity: EWOV agrees with the decision of the ESC to retain the application of this clause to small business customers. Residential customers are unlikely to have unmetered supplies so it would not make much sense to exclude small business customers from the clause.

Clause 6.2: Undercharging: As noted above, EWOV welcomes the ESC's proposal to retain clause 6.2 for small business customers. There are two aspects of the proposed changes to this clause on which EWOV also wishes to comment.

Firstly, EWOV wishes to comment on the proposal to change the limitation of nine months to those situations in which the retailer's billing system is at fault. That is, where the distributor is at fault, it is proposed the limitation period will be 12 months, instead of nine months as it currently is. EWOV understands the reasoning that it is unfair that retailers lose three months of billing when it has been the distributor whose systems or processes have been flawed. We also understand what was said at the forum that this had originally been put in place on the understanding that retailers would be able to recover from distributors, and this has turned out not to be the case. However, it is not logical that this should lead to a reduction in standards for customers who are not at fault. Surely the logical answer is to make distributors effectively responsible for reimbursing retailers for their own errors and deficiencies. It is not up to EWOV to suggest how this might be done, but we do know that retailers commonly attribute billing delays to distributors not providing billing data. The ESC's proposed change will lead to many customers having to pay 12 months backbilling, rather than nine months. Improving the capacity of retailers to recover from distributors would be more difficult for the ESC to achieve, but it would provide a fairer outcome for customers.

Secondly, EWOV thanks the ESC for its response to our point about ‘fault’ of the customer and regards the proposed wording of the provision about blocking meter access to be more reasonable. However, we recommend that cross-reference is made to clause 13.3 – so that backbilling without the 12 month limitation on the ground of denying access to the meter only happens when the customer has been fairly informed of their responsibility to provide access.

Clause 6.3: Overcharging: The proposed approach whereby amounts overcharged below a threshold will be automatically credited to the customer’s account is sensible.

Clause 7.2(b): Payment methods: In our submission of May 2007 on this point of entering into direct debit arrangements over the phone, EWOV could see reason to support the proposal given appropriate safeguards.² We believe that energy retailers should send written confirmation of the arrangement made. There is also merit in the phone calls being recorded, both to verify consent and to help resolve any subsequent disputes.

Clause 7.4: Late payment fees: EWOV is uncertain as to which sub-clauses of this clause are considered to be redundant. The text in Appendix B suggests that 7.4(b), &.4(c) and &.4(d) are all considered redundant. EWOV considers that in particular 7.4(c) contains some valuable protections which could be of significant value to customers other than small retail customers, both residential and small business. EWOV agrees that 7.4(e), establishing that late payment fees should be fair and reasonable, must be retained.

Clause 7.5: Fees and charges for dishonoured payments and merchant service fees: EWOV notes the effect of repealing this 7.5(a) for small business customers may be that they incur fees even when the mistake has not been theirs.

Clause 7.6: Vacating a supply address: Simplifying the wording is a good idea.

Clause 8.1: Refundable advances: domestic customers: EWOV supports the inclusion of the detail that was in Guidelines 1 and 4 in this clause of the *Energy Retail Code*. EWOV notes that there have been minimal complaints to EWOV about refundable advances for a considerable time and that energy retailers in Victoria are generally not seeking them from residential customers.

Clause 8.2: Refundable advances: business customers: EWOV supports the ESC’s intention to require that any advances are fair and reasonable.

Clause 8.3: Credit management guideline: The repeal of this clause is logical.

Clause 9.1: Retailer’s right to apply a shortened collection cycle: Appendix B of the Draft Decision has not referred to this clause, but EWOV would like to make the point that, in practice, it is quite onerous for customers to meet the requirements for *removal*

² EWOV comments on the ESC's March 2007 *Direct Debit and the Energy Retail Code: Discussion of Proposed Amendments*, 3 May 2007, on www.ewov.com.au under ‘Responses to regulatory authorities’.

from a shortened collection cycle. We suggest the word ‘consecutive’ be removed from 9.1(b)(B).

Clause 9.3: Transitional provision for gas: No comment.

Clause 10.2: Former franchise customers: No comment.

Clause 12.2: Requirements for an instalment plan: EWOV agrees that a specific requirement to provide energy efficiency advice when customers are entering into an instalment plan is largely redundant, in view of the provisions of the *Energy Retail Code* that require energy efficiency advice when a customer is experiencing payment difficulties (clause 11.2(4)) and on request (clause 26.6).

Clause 12.3: Instalment plans: business customers: EWOV notes the reasoning for the retention of this provision and that other provisions of the *Energy Retail Code* have the effect of requiring the additional retail charge to be reasonable.

Clause 13.3: Denying access to the meter: EWOV understands that this clause should be retained but notes:

- retailers appear not to use the provision, preferring to backbill the customer when a meter read is achieved
- a significant number of customers are not able to control access to the meter, such as tenants and people living where there is a body corporate – which may or may not cooperate with a request to provide access to the meter.
- shops often have their meters inside so that access depends on the times the shop is open for business. In EWOV’s experience, there is not always sufficient flexibility shown by the meter reader.

Clause 13.4: Refusal to provide acceptable ID or refundable advance: EWOV is pleased to see that the ESC intends to retain its current obligation which makes the requirement to provide acceptable identification a ‘condition subsequent’.

Clause 14(a): No disconnection: EWOV agrees that the proposed re-drafting should not have an adverse effect on small businesses.

Clause 16(b): No limitation of liability: No comment.

Clause 19.1: No inconsistency with the Code: EWOV supports the logic of the ESC in making the *Energy Marketing Code* apply to pre-contractual situations and the *Energy Retail Code* apply to the situation after the contract has been entered into.

Clause 19.2: Creation of a new market contract: As for 19.1.

Clause 19.3: Quarterly billing cycles for gas contracts: No comment

Clause 20: Variation requirements: As currently drafted, (a) and (b) could appear contradictory. EWOV's experience is that the expectation of customers is that a contract will be made available to them at the prices they were quoted in the marketing contact and that this does not always happen.

Clause 21.1: Gazetted tariffs and gazetted terms and conditions: No comment at this stage.

Clause 22.1: Commencement: No comment

Clause 23.1: Customer's right to cancel an energy contract: EWOV agrees with the proposal to move this provision to the *Energy Marketing Code*.

Clause 23.2: No right to cancel a deemed contract: Agreed

Clause 23.3: Effect of cancellation: EWOV agrees that this provision is better placed in the *Energy Marketing Code*.

Clause 23.4: Documenting energy contracts and customers' cancellation rights: EWOV agrees that this provision is better placed in the *Energy Marketing Code* but notes that customers often say that they did not receive the contract documents until after the expiry of the ten day period. The provision is unclear as to what impact a delay in receiving the documentation has on the cooling-off period. At the moment, customers are generally told by the provider that their cooling-off right has expired and it becomes a matter for negotiation. EWOV considers that that retailers should record the date on which contract documents were mailed or given to the customer and that the cooling off period should be 10 days from that date.

Clause 26.2: Retailer's charter: EWOV supports the ESC's intention to retain this clause.

Clause 26.6: Energy efficiency advice: EWOV notes that this is another provision from which it is intended that small business customers will no longer benefit. Given that the energy efficiency advice only has to be provided when requested, its continued applicability to small business does not seem to be a particularly onerous obligation for retailers.

Clause 28.1: Complaint handling: While the reference to the Australian Standard is being updated, the reference to the Benchmarks for Industry Based Customer Dispute Resolution Schemes could be deleted. The Benchmarks set standards for external dispute resolution schemes and are not directly relevant to the complaint handling standards of energy retailers.

Clause 29: Privacy and Confidentiality: EWOV agrees that this clause can be repealed.

Proposed changes to the Energy Marketing Code

Clause 4.1: Training: EWOV is pleased that the ESC intends to retain the clause about the training of sales representatives. We consider that it is valuable to have these expectations set out.

Clause 4.2: Product and Code knowledge: EWOV considers that the removal of duplication is sensible, as long as there is a clear reference, at least in a footnote, to where the relevant legislation is to be found. It is very important that anyone reading the *Energy Marketing Code* can readily find out what all their key rights and obligations are, and how to find them. This transparency and clarity is consistent with the principles of good regulation. We take it that the substantive obligations on retailers will be retained, either in the *Energy Marketing Code* or in the *Fair Trading Act 1999*.

Clause 4.3: Training records: EWOV supports the retention of this clause. It can be useful for the ESC itself in auditing activities.

Clause 5.1: Contact hours: Repeal is sensible since this clause duplicated the *Fair Trading Act*.

Clause 5.2: Personal contact: The comments in the Draft Decision column do not make clear whether the ESC intends to act on EWOV's suggestion that marketing representatives should be obliged to state the purpose of their visit at the start of any door-to-door sales contact.

Clause 5.3: Telephone contact: EWOV supports the repealing of bullet point 1 given that it is a duplication of the *Fair Trading Act*, but has some reservations about the plan to repeal the fourth sub-bullet point of bullet point 2. We have had cases, not many, where the customer's efforts to get in touch with the retailer have been unsuccessful. All the sales representative has to do is to leave a card. EWOV does not think this requirement is onerous.

Clause 5.4: No contact lists: EWOV is pleased that the ESC will retain these provisions, applying them to sales visits. We find it is often helpful in resolving a dispute that an energy retailer can put a customer on its internal 'do not contact' list.

Clause 5.5: Visit records: As EWOV made clear at one of the workshops, we find this provision to be valuable and so are pleased that it is to be retained.

Clause 5.6: Telephone records: As for 5.5.

Clause 6.2: Conduct: EWOV understands the reasons for repealing this provision, but these conduct provisions are at the heart of good marketing practice and it is important that the *Fair Trading Act* be clearly referenced in the Code.

Clause 6.3: Contract information: EWOV understands that the bullet points that are not duplicated in the *Fair Trading Act* will be retained, but is unsure of the status of parts of this clause that are not in the bullet points, specifically the part that reads, 'A retailer must

provide the consumer with a reasonable opportunity to consider this information before entering into the contract'. This sentence relates to the period *before* the contract is formed and the cooling-off period commences. EWOV continues to receive complaints from consumers who state they were pressured into agreeing to a contract, or had just agreed to receive materials but subsequently found their account had been transferred. As such, EWOV considers it is important that the *Energy Marketing Code* retains this practical statement of a customer's pre-contractual entitlement to consider information.

Clause 7.1: Consumer Transfer: EWOV is concerned that changes to this clause may mean it is harder to find what is meant by *explicit informed consent*. The definition of this term in both the *Energy Retail Code* and the *Energy Marketing Code* is unhelpful, referring the reader to energy retailers' licence conditions. EWOV strongly believes that if Guideline 10 on Confidentiality and Explicit Informed Consent is to be repealed, there needs to be a fuller definition of *explicit informed consent* in the *Energy Marketing Code* and the *Energy Retail Code*. This definition should incorporate the major elements of the discussion of the term in Guideline 10.

Clause 7.2: Consent audit – audit process: EWOV agrees that much of the detail in clause 7.2 is more appropriately placed in the ESC's Audit Guidelines. However, we believe there is an argument for retaining the first part of the clause, that is up to and including the bullet point, *'he or she understands the cooling-off period that exists on entering into a contract'*.

Clause 7.3: Consent audit – records: EWOV agrees that this could be placed in the ESC's Compliance Policy Statement.

Clause 7.4: Sales to minors and 'authorised' consumers: As stated earlier, EWOV has misgivings about the effect of repealing this section. Nowhere in the *Energy Marketing Code* does it say that marketing efforts ought to be directed towards the account holder wherever possible. If clause 7.4 is repealed, it will not even say that retailers should be trying to conduct negotiations with authorised persons. The issue of 'who is marketed to' is very important – and a continued source of complaint to retailers and EWOV. As such, it should be regulated in the *Energy Marketing Code*, not relegated to the Compliance Policy Statement. EWOV suggests that if the current clause 7.4 is repealed, it should be replaced by one that says, *'the retailer will endeavour to conduct contract negotiations with the account holder. Where that is not possible, the retailer should take reasonable steps to obtain the account holder's verbal consent to conduct negotiations with another person who has the authority to enter into a contract for electricity and/or gas supplied to the actual site'*.

Clause 8: Commencement of retail services: EWOV agrees that it is sensible to retain this clause.

Definitions: As mentioned above, EWOV considers that the Code should define *explicit informed consent* fully, and not by reference to another regulatory instrument.

Proposed changes to Guidelines No 1: Gas Industry – Credit Assessment and No 4: Electricity Industry – Credit Assessment

EWOV notes the ESC's intention to repeal this guideline, incorporating relevant parts of it into either the *Energy Retail Code* or other relevant instruments. We are pleased to see that the present definition of relevant default will be retained. Otherwise, we have no comment on the proposals for these guidelines.

Proposed changes to Guideline No 10: Confidentiality and Informed Consent

Part 2: Confidentiality: EWOV notes that the effect of repealing this Part will be that corporate client information will not be subject to privacy protection. We are uncertain about the effects of this, but have no evidence from complaint data that they will be adverse. We have, however, noted a significant increase in cases to EWOV assigned to the category 'customer service > privacy' in the period January to June 2008 – 155 cases were received in this category, up 48% compared to July to December 2007. We are not clear about the reasons for this increase, but it suggests that a fact sheet (as foreshadowed in the comments about Part 2) about what information retailers can collect, and what they can do with that information, would be valuable for both retailers and customers.

Clause 4.1: Entering into a contract: EWOV supports the inclusion of this provision in the *Energy Marketing Code*.

Clause 4.2: Estimated bills and different billing cycles: EWOV agrees that this provision is duplicated in the *Energy Retail Code*.

Part 5: Requirements for consent to be explicit and informed: As stated above, EWOV believes that there is valuable clarification in this clause about the requirements for there to be consent and for that consent to be explicit and informed. It needs to be incorporated elsewhere and it is of concern that Appendix B does not cover this part of the Guideline. As we have said, we believe much of it could be captured in a more extensive definition of explicit informed consent in the *Energy Retail Code* and the *Energy Marketing Code*.

Proposed repeal of Guideline No 12: Metering Reversion and Contract Termination

No comment.

Deferral of consideration of Guideline No 19: Energy Product Disclosure

EWOV will give the matter of this Guideline further consideration in stage 2 of the Review.

Proposed repeal of Guideline No 20: Bulk Hot Water Charging

EWOV agrees that this Guideline is largely redundant.

Proposed repeal of the Operating Procedure: Compensation for Wrongful Disconnection

EWOV has been concerned by the proposed repeal of the Operating Procedure because we find it invaluable in our detailed consideration of cases that may involve a wrongful disconnection payment (WDP). As set out in the Deputy Ombudsman's email to Mr Phil Waren on 25 July 2008, "*EWOV is concerned that [the removal of the Operating Procedure] may result in increased ambiguity and additional time and resources from retailers, EWOV and the ESC in making WDP assessments and ESC referrals and decisions.*" However, now we see the detail of what is proposed, our concerns are lessened. In particular, the retention of Appendix A and Appendix B of the Operating Procedure in the Compliance Policy Statement means that these valuable parts of the Procedure will still be available to retailers and EWOV when considering WDP cases.

Proposed changes to the Electricity Customer Metering Code

No comment.

We hope the above comments are helpful. If you have any queries or comments, please contact Stephen Gatford, Manager Public Affairs and Policy, on (03) 9649 7599 or stephen.gatford@ewov.com.au.

Yours sincerely



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