

12 November 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: FINAL DECISION (OCTOBER 2008)**

Thank you for the opportunity to comment on the Essential Services Commission's (ESC's) October 2008 *Review of Regulatory Instruments – Stage 1: Final Decision (October 2008)* ('the ESC's Stage 1 Final Decision').

The Energy and Water Ombudsman (Victoria) (EWOV) appreciates the consideration that the ESC has given to EWOV's previous comments.¹

We note that the ESC has taken up some, but not all, of EWOV's suggestions. However, as the ESC's decision is final, EWOV will not be restating its suggestions.

Instead, the comments below focus on whether the wording in the proposed new versions of the codes – as distributed by the ESC on 22 October 2008 – aligns with the intent of the ESC's Stage 1 Final Decision. We also have some formatting suggestions, and some questions about the transition to the new versions of the codes.

ENERGY RETAIL CODE

Purpose

EWOV notes that, as at 12 November 2008, Orders in Council have not yet been gazetted to define which customers the Energy Retail Code – and Energy Marketing Code – will apply to from 2009.

However, from discussions, EWOV understands the Victorian Government's intent is for the codes to apply from 2009 to *all* domestic customers, to small business customers using less than 40 MWh of electricity per year, and to small business customers using less than 1,000 GWh per year.²

¹ EWOV's comments, dated 11 September 2008, about the ESC's *Review of Energy Regulatory Instruments – Draft Decision (August 2008)* are on www.ewov.com.au, under 'Responses to regulatory authorities'.

² This is different to what has been proposed for electricity for the National Energy Customer Framework coverage from 2010. In June 2008, the Ministerial Council on Energy Standing Committee of Officials recommended a threshold of up to 100 MWh per year for business customers.

With the current wording of the second sentence under ‘Purpose’, the placement of the comma suggests the code does not apply to domestic customers using more than 40 MWh per year. It could also be misread as not applying to small business customers for *both* electricity *and* gas, if they *either* use more than 40 MWh of electricity per year *or* more than 1,000 GJ of gas per year.

If EWOV has correctly understood the Victorian Government’s intent, then we suggest the ESC amends the second sentence, so it reads:

‘The Code applies:

- *to all domestic customers;*
- *for electricity purposes, to small business customers who consume less than 40 MWh of electricity per year; and*
- *for natural gas purposes, to small business customers who use less than 1,000 GWh of natural gas per year.’*

Relevant legislation

The introductory sentence appears incomplete. EWOV suggests adding the words ‘to apply’ after ‘are determined by the Commission’.

Clause 4.2 (o) – distributor’s details on bill

EWOV suggests rewording the last sentence in clause 4.2(o), so it reads, ‘This number should be identified as belonging to the local distributor and include their name.’

With this change, customers would see, for example, ‘Faults and emergencies 24 hours: Jemena (your local distributor) 131 626’. This is more helpful for customers than just, ‘Faults and emergencies 24 hours (your local distributor) 131 626’.

Clause 5.3 – bill smoothing

EWOV is pleased this clause will apply to small business customers, as well as to residential customers.

Clause 6.2 - undercharging

Whilst the words ‘failure of the retailer’s billing system’ are bolded in clause 6.2, there is currently no definition in the Energy Retail Code. Instead, in error it seems, there is a definition in the new version of the Energy Marketing Code. Further, that definition does not reflect what is written in the ESC’s Stage 1 Final Decision (at page 20), namely the ESC’s new view that, ‘... the restriction on billing should only apply to faults in the retailers’ systems, not where distributors have not provided relevant meter information to retailers’. As such, EWOV suggests a new definition should be included in the Energy Retail Code. (We also foresee that, in the complaint handling context, it will sometimes be difficult to confirm whether the fault was caused by the retailer or the distributor.)

EWOV notes that substantive changes are being made that increase the capacity of energy retailers to recover undercharges from 2009. These changes may raise some transitional issues, which we suggest warrant the ESC's consideration.

The introduction to the new version of the 2009 Energy Retail Code states that it will apply, 'to any market contract made before or after 1 January 2009'. Whilst the ESC's intent is clear, this seems likely to result in complaints. Customers who entered fixed-term market contracts prior to 2009 are likely to be dissatisfied if energy retailers seek recovery of undercharges for a longer period of time than is provided for in the contract they agreed to. Such a variation – which would effectively be retrospective – to the terms and conditions of a market contract could also raise issues in relation to Part 2B of the Fair Trading Act 1999.

Some more specific transitional issues could arise. For example, under the current version of the Energy Retail Code, if a customer repeatedly blocks access to a meter, resulting in an undercharge, the retailer's recovery of the undercharge is limited to 12 months from the date on which the retailer notifies the customer that the undercharge has occurred. Under clause 6.2(b) of the new version of the Energy Retail Code, no such restriction applies. Does this mean that energy retailers will be entitled to re-backbill some customers?

Clause 14(a) – no disconnection

It may be worth stating that the minimum disconnection amount of \$120 for domestic customers is inclusive of GST.

Definitions

We welcome the inclusion of the definition of 'relevant default'.

ENERGY MARKETING CODE

Clause 7.1 – reference to EWOV

The second dot point in clause 7.1 should refer to the Energy and Water Ombudsman (Victoria) (EWOV) instead of the Energy and Water Ombudsman, Victoria. (Some other formatting corrections are also needed – for example, to the numbering in Appendix 1.)

Definitions

The requirement for 'explicit informed consent' is a vital aspect of EWOV's day-to-day complaint investigations relating to marketing and transfer issues.

The definition of 'explicit informed consent' in the new version of the Energy Marketing Code is not as comprehensive as it currently is in section 5 of the ESC's Guideline No. 10: Energy Industry – Confidentiality and Informed Consent. In particular, 'competency' is not defined. This is a shortfall given the issues that have arisen in relation to energy marketing to the elderly and culturally and linguistically diverse communities.

As such, we recommend a sentence from Guideline No. 10 be added to the definition that is now in the Energy Marketing Code (at (c)), so it would read, ‘...(c) by a person competent to do so. In order for a customer to be competent to give consent, the customer must be capable of understanding issues, forming views based on reasoned judgement and communicating their decision.’

As stated above, the definition of ‘failure of a retailer’s billing system’ should be deleted from the Energy Marketing Code.

COMPLIANCE POLICY STATEMENT

We would prefer section 3.4.6 of the Compliance Policy Statement to read ‘EWOV will ...’, rather than ‘EWOV must ...’.

EWOV welcomes the inclusion of the detail that is currently in Appendices A and B of the *Operating Procedure: Compensation for Wrongful Disconnection* in the Compliance Policy Statement (as sections 4.2.2 and 4.2.3). This level of detail provides a valuable and practical tool for energy retailers and EWOV to assess whether a disconnection complied with the terms and conditions of the customer’s contract and the Energy Retail Code.

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.

Yours sincerely



Fiona McLeod
Energy and Water Ombudsman (Victoria)