Energy and Water Ombudsman (Victoria)

Resolving your electricity, gas & water complaints. Independently.

12 June 2009

Manager, MCE Secretariat
Department of Resources, Energy and Tourism
GPO Box 1564
CANBERRA ACT 2601

By email: MCEMarketReform@ret.gov.au

Dear Sir or Madam

Thank you for the opportunity to make a submission about the First Exposure Draft of the National Energy Customer Framework.

The Energy and Water Ombudsman (Victoria) (EWOV) is making a submission in two parts. The first part is this letter in which we set out our major concerns, and the second part is the table provided for submitters into which we have put our comments, signaling agreement as well as reservations.

We think it is common ground that the state-based regulatory framework in Victoria provides the most robust consumer protection of any state. That means Victoria potentially has the most to lose in moving to a national framework. The option remains, of course, for Victoria to leave in place some of its protections that are not incorporated into the national framework, but that detracts from national consistency and clearly the best option is to have a framework upon which everyone can agree as far as possible. There are some areas in which the Standing Committee of Officials (SCO) has chosen an option which makes that agreement more difficult.

Definition of payment plan

As mentioned in our comments in the accompanying table, EWOV has some serious concerns with the definition of payment plan. The same definition is being used for two quite different purposes and we do not believe it can do that effectively. In some contexts it is being used to describe an instalment plan entered into by customers who may not be in hardship. In most contexts it is being used in connection with hardship customers. The definition suits the first purpose, but not, we believe, the second.

It is the reference to 'all arrears' that causes us to question the suitability of the definition in the context of the payment plan offered to hardship customers. That reference takes away options that have been used successfully in Victoria such as incentive plans and debt waiver programmes. At a more basic philosophical level, it needs to be recognised that there are some customers who will always have difficulty in paying for their usage, particularly as energy prices increase. Some people, especially those on government benefits but also the increasing number of working poor, are in chronic hardship.

We also see the reference to 'all arrears' as inconsistent with the requirement that in setting a payment plan, a retailer must take the customer's capacity to pay into account. We suggest that the definition as currently drafted be used as a definition of an 'instalment plan'. The term 'instalment plan' should be used when talking about payment by instalments by customers not in hardship. Then the definition of 'payment plan' could be similar, but without the reference to 'all arrears'.

Hardship provisions

EWOV recognises that the NECF cannot adopt all the elements of hardship programmes in Victoria as a matter of political practicality. However, we believe the provision of energy efficiency advice by retailers should be a mandatory item in a retailer's hardship policy. The advice can be given over the phone or on the retailer's website, so it is not a large cost item for the retailer. Where a hardship customer is using more energy than they can afford, looking for ways to curtail that usage is a positive step towards long term affordability. For the retailers, it has the advantage of possibly limiting their exposure to debt. Many retailers do it already so it is not a burdensome imposition. EWOV strongly urges the inclusion of energy efficiency advice in the mandatory elements of a hardship programme in section 233 of the National Energy Retail Law.

EWOV notes that the Australian Energy Regulator (AER) is not to approve hardship policies, merely to audit and report on them according to the hardship indicators. We believe that AER approval is essential. There has to be a standard for hardship policies. We are concerned that without an approval process, a retailer could have a seriously deficient programme and there would be no remedy for that except for some negative publicity some years later.

The definition of a hardship customer is also a cause of concern. As presently drafted in section 103 of the National Energy Retail Law, it is a recipe for inconsistency. The use of the passive voice ('who is identified') makes the definition vague and offers retailers an opportunity not to make an effort to identify a customer as being in hardship. We would like to see a definition that places retailers under an active obligation to identify hardship customers and to place those customers on their hardship programme.

Provisions relating to Ombudsmen and complaint handling

EWOV thanks the Retail Policy Working Group for the provisions relating to Ombudsmen and complaint handling, but we see a couple of opportunities to strengthen these provisions.

We believe there ought to be a provision in the Rules that the complaint handling procedures of retailers and distributors should comply with the Australian Standard on Complaint Handling. We note that the provision appears in both the standard retail contract and the deemed distribution contract, but is not in the Rules. It would have more force if it was paralleled in the Rules.

Rule 242 requires retailers to deal with complaints in accordance with (a) their standard complaints and dispute resolution procedures and (b) the procedures of the recognised energy industry ombudsman. While valuing this recognition, we wonder if it makes clear enough that the procedures of the recognised energy industry

ombudsman only come into play when the retailer's dispute resolution procedures have failed. We would prefer the provision to read something like:

(a) the retailer's standard complaint and dispute resolution procedures which must comply with the Australian Standard; and
(b) where these procedures have failed to resolve the matter, the procedures of the recognised energy industry ombudsman.

We noted that in the Model terms for the deemed standard distribution contract the distributor must insert the name and contact details of the relevant recognised energy industry ombudsman (clause 15.2). It was pleasing to see this reference to contact details and EWOV believes that the same wording should be used in the relevant part of the Model terms and conditions for standard retail contracts (Clause 19.2).

EWOV has given consideration to Clause 11.3 in the Retail support terms and conditions. We welcome the sentiment behind this, but upon reflection we see two problems with the clause:

- it makes binding provisions about a matter that we believe is better left to business-to-business processes, and
- it creates a potential for the Ombudsman scheme to become involved in disputes between industry participants which is clearly outside our jurisdiction.

In the end, the best way of dealing with the situation this provision contemplates is for the Ombudsman scheme to register the complaint against the party whose act or omission is alleged. EWOV takes considerable care to do this.

Threshold for inclusion in the full suite of protection

As we said in our submission of 28 July 2008, we believe that the thresholds incorporated into the National Energy Customer Framework (NECF) have been set too low. The obligation to offer a standard retail contract cuts out at 40 MWh per annum for electricity and 400 Gj for gas while the whole NECF does not apply at usage levels above 100 MWh for electricity and 1 Gj for gas. In opting for 100 MWh for the upper consumption threshold the lowest threshold among the existing ones used by the states has been chosen.

EWOV recognises the thinking behind the upper threshold, namely that customers with usage at that level are able to negotiate successfully for themselves and that they receive good treatment because they are valued customers. However, EWOV's experience is contrary to that. We have many examples of customers with usage above the threshold who have not received good customer service and who have not been able to resolve their issues with their provider. For example, one engineering company with gas usage above 1,000 Gj complained to EWOV that it had had difficulties over a period of four years in dealing with the account executives assigned to business customers, that it had had to fax a copy of its contract to the provider several times and that it had to repeat details each time it called. (G/2009/2907). Another example, also from 2009, was the instance of a restaurant the opening of which was delayed for four months by an inability to get a gas connection. The customer in that instance had not understood the procedure, but that further illustrates the inappropriateness of this threshold (G/2009/3091) when customers do not have the skills and information to deal successfully with providers.

It would be easy to expand the list of examples where customers with large usage have turned to EWOV for assistance in matters related to backbills, demand tariffs, transfer errors or a variety of other issues. Our experience is that these customers, notwithstanding their large usage, are not sophisticated consumers of energy. Often we find it is the company bookkeeper dealing with the issue.

This issue is particularly serious for those jurisdictions in which this threshold also defines access to external dispute resolution. In those jurisdictions the customers will have neither the protections offered by the NECF nor access to dispute resolution services, and EWOV believes this is neither fair nor productive in an economic climate which is harsh for small business. EWOV strongly believes the upper consumption threshold should be retained at the level it is for most states, 160 MWh per annum.

EWOV also believes those customers who have been designated as small market offer customers should have access to the standard retail contract. We are concerned that such customers may have difficulty accessing an affordable offer and we can see little rationale for the cut-off point of 40 MWh. (Clause 212 of the National Energy Retail Law).

Information about the deemed distribution contract

EWOV continues to be concerned about placing obligations on customers in a contract of which they are not aware, and therefore considers that the NECF has a deficiency in Rule 404 which says information need only be provided on request. How is a customer to know to request such information? We consider that a minimum requirement should be that (1) the distributor inform all new customers about the existence of the contract and how they can get a copy and (2) the distributor inform all its customers once every two years about the existence of the contract. These requirements could be met via the retailer, if an agreement to that effect was reached.

Liability of Distributors

EWOV has previously strongly argued for the national adoption of a version of Victoria's *Voltage Variation Guideline,* so is particularly disappointed that the model contracts take such an uncompromising attitude to distributors' liability, excluding it in all instances except where negligence or bad faith is involved. We were encouraged that at the forums there was discussion of this point and that there may be some movement away from the current unacceptable position. EWOV holds to the position that compensation requirements should be triggered where distributors had some control of the situation or could have mitigated it. We repeat our earlier comment that the provision of a claim to reasonable ('old for old') compensation saves the time and expense of prolonged complaint handling and helps to manage customer expectation.

In making these comments, we refer in particular to the provisions in Clause 5.3 of the Model terms and conditions for standard retail contracts and Clause 5.5 of the deemed standard distribution contract. It seems to us to be unacceptable in a non-negotiated contract to have a clause that says 'you acknowledge that ...' The clause would have similar import if the sentence left that out and just started with 'The quality and reliability ...'. Similarly, the words 'you should understand' in 5.3(c) could be omitted, removing some of the harsh impact of the clause. It seems unreasonable

to urge small customers to take out insurance or install protective devices. Under current regulation in Victoria, business customers are expected to mitigate their losses, but residential customers are not.

We would like to see both Clause 7 of the standard retail contract and Clause 7 of the deemed distribution contract give greater coverage to the protections for customers in the *Trade Practices Act 1974*. Given that those protections are all that is being offered to customers, they should be recited in these contracts.

Provisions relating to marketing

EWOV is concerned that the National Energy Marketing Rules have abandoned setting training standards for marketers. We see this as a backward step, and likely to lead to more complaints about marketing.

Provisions relating to transfers

We are disturbed by the silence of the NECF on matters relating to transfers. Complaints relating to transfers consistently outnumber those relating to marketing, and there are some consumer protections relating to transfer which should be included in the NECF. We acknowledge that you have included the primary one which is the requirement for informed consent but there are others as well, including:

- a transfer should be based on an actual meter read
- customers should be kept advised of the progress of a transfer where it is going to take more than a month
- the grounds on which the current retailer may validly object to the transfer, that is, the level of debt a customer has
- the right of a customer to a retrospective transfer where a transfer has been made in error.

The details of a transfer process can be left to business-to-business procedures, but EWOV believes the above points constitute customer protections which ought to be enshrined in the NECF.

Late payment fees

EWOV is concerned about the absence of provisions relating to late payment fees. Except for the mention of them in the Model terms and conditions for standard retail contracts, the only reference seems to be Rule 303 which says they are to be waived for hardship customers. EWOV believes that any late payment fee should be no more than the retailer's administrative costs caused by the late payment, and is deeply concerned that there is nothing n the NECF which would hold such fees to a reasonable level.

Payment of security deposit

It seems to EWOV that a security deposit, where required, must be paid in order to obtain a service. Rule 226 says 'at the time the customer requests the sale and supply of energy'. This seems harsh to EWOV. We believe that the service should be provided first and the security deposit arrangements made subsequent to that. Otherwise a customer could be left without a service, especially if they do not agree that they need to pay the security deposit and there is a dispute on the point. This seems to go against the recognition of the provision of energy as an essential service.

Similarly, we are concerned by Rule 227(2) which limits the availability of instalment for the payment of a security deposit to instances where 'the customer and the retailer so agree'. The agreement should be limited to the amount and number of the instalments, not to the availability of instalments as a way of meeting security deposit requirements. It is industry practice not to require security deposits where customers sign up to pay by direct debit or Centrepay. EWOV is disappointed that a rule has not been included to capture this industry practice.

We are also puzzled by 227(5) and 228(6) which both say these rules do not apply to market retail contracts. If the market contract provides for security deposits, why would these protections not be available for those customers?

'De-energisation' as against 'disconnection'

EWOV acknowledges the reasons for which it has been decided to use the term 'de-energisation' in the NECF. Nevertheless, we believe the term 'disconnection' is preferable in those circumstances in which the stopping of the flow of energy is without the customer's consent. The term 'disconnection' is widely understood whereas 'de-energisation', while perhaps technically more correct, is likely to be an obstacle to understanding. Perhaps two definitions could be used, with de-energisation as the overarching term and disconnection being a subset, referring specifically to those circumstances where there is no customer consent.

Interpreter services

We note that in the Explanatory Material, the SCO has clarified that retailers only have to provide details of an interpreter service; they do not have to pay for these services. We regard this as unacceptable. It is meaningless to provide details of an interpreter service without accepting responsibility for paying for them. In making this decision, SCO has basically said retailers do not need to communicate effectively with this section of their customer base. If it is acceptable to market to non-English speaking customers, there is a clear obligation to communicate with them effectively.

Conclusion

There is much in the NECF that EWOV can support, and we have noted some provisions that are pleasing in the table. However, we are concerned by a few aspects as outlined in this letter.

If there are questions about EWOV's submissions, or you require clarification of any point, please contact Frances Wood, Manager Public Affairs and Policy, on (03) 9649 7599 or at frances.wood@ewov.com.au.

Yours sincerely

Fiona McLeod
Energy and Water Ombudsman (Victoria)