

10 September 2017

General Exemption Order Review
Energy Markets Policy and Regulation
Department of Environment, Land, Planning and Water

By email: geo@delwp.vic.gov.au

Dear Sir/Madam,

Re: Review of the Victorian Electricity Licence Exemptions Framework – Final Position Paper

Thank you for the opportunity to comment on the Department of Environment, Land, Planning and Water's Final Position Paper on the Review of the Victorian Electricity Licence Exemptions Framework.

The Energy and Water Ombudsman (Victoria) (EWOV) is an industry-based external dispute resolution (EDR) scheme that helps Victorian energy and water customers by receiving, investigating and resolving complaints with their company. Our complaint handling is efficient and effective: in satisfaction surveys, more than three-quarters of customers consistently rate our service as 'good' or 'excellent'.

We are keen to make this service more widely available and have long supported extension of our jurisdiction to exempt entities. We therefore welcome the Department's decision to ensure that all customers of grid-sourced electricity are able to access free and independent EDR through EWOV. In broadening our jurisdiction, however, we are also keen to maintain the quality of our service and avoid reputational risk.

With those considerations in mind, our submission includes some general comments on the implementation approach set out in the Final Position Paper and draft General Exemption Order (GEO). The expansive approach to EWOV membership, combined with a tight timeline, is likely to be challenging to implement while making it difficult for EWOV to build the productive relationships that underpin good dispute resolution. At the same time, the initial lack of certainty about which customer protection provisions apply will remove a central plank of EWOV's 'fair and reasonable' complaint handling process, while the lack of any enforcement framework could disincentivise compliance with our processes and decisions.

We also make some further comments on how well the draft GEO achieves the Department's objectives, including some suggestions for amendments.

Expansive approach to EWOV membership

In principle, we agree with the Department's final position that all customers of grid-sourced electricity should have access to EWOV. However, as noted in our August 2016 submission to this review, our strong preference is for a staged approach to broadening our jurisdiction.

While we welcome the decision not to make EWOV membership a requirement of multiple activity exemptions at this stage, we are concerned that the draft GEO expands EWOV jurisdiction to all holders of retail and network exemptions, including deemed exemptions. This expansive approach will quickly bring an unknown (but potentially large) number of very small entities into our jurisdiction, including those that sell or supply electricity only to related body corporates, fewer than ten small commercial customers, or short-term holiday accommodation residents.

This will present major practical difficulties, particularly given the short timeframe. The first challenge will be accepting exempt entities as members by 1 July 2018. Before being admitted as a member of EWOV, entities must make an application, which the EWOV Board can approve only when it is satisfied that the applicant is willing and able to meet its obligations under the EWOV Constitution, including the obligation to pay EWOV levies. To date, all EWOV members have been licensed and have therefore already satisfied the Essential Services Commission's (ESC) licensing criteria by demonstrating financial and technical viability. Because EWOV relies in part on the due diligence of the ESC, our membership application process to date has been relatively straightforward. To accept new exempt members while meeting the requirements of our Constitution, however, we may need to conduct a more thorough assessment.

Even for entities with registrable exemptions, this will be challenging. The ESC's Register of Exempt Persons will enable us to identify and contact these prospective members. However, with the Register operational for just three months before the EWOV membership requirement comes into effect, our Board will have only a short time to contact these entities and receive, consider and approve their membership applications.

The challenges with deemed exemptions will be greater. With no ESC record of deemed exemptions, EWOV will have no way of proactively contacting these entities. It is likely that many will be unaware of both the requirement to join EWOV and their other obligations under the GEO: our discussions with the Australian Energy Regulator (AER) about its exemption regime suggest that often entities only become aware of their obligations when the AER contacts them about a customer complaint. Consequently, the first contact that many deemed entities have with EWOV will be when we call to advise them that they must become a member, pay membership and complaint fees and deal with us in accordance with our policy and processes. This will not be conducive to productive working relationships or a constructive approach to complaint handling.

In explaining the decision to deem some exemptions, the Department has suggested that requiring blanket registration of exempt entities is ‘not practical’, although the registration process is expected to be ‘simple’ and a ‘marginal regulatory burden’. Given that the administrative and financial burden of joining and working with EWOV will be greater, we question the practicality of this decision. We also note that this approach will make EWOV’s membership record a de facto (but incomplete) register of deemed exemptions, a function more appropriately performed by the ESC.

Lack of certainty on applicable consumer protections

The initial lack of certainty about applicable consumer protections will also challenge our capacity to provide effective and efficient dispute resolution for new exempt members and their customers. In resolving disputes, EWOV considers what is ‘fair and reasonable’ in the circumstances of each complaint. As a central part of this process, we take account of relevant laws, codes and regulations, which are taken as minimum standards.

Under the draft GEO, the requirement for exempt entities to become EWOV members comes into effect on 1 July 2018. However, the Department anticipates that the ESC will consult on applicable retail customer protection requirements throughout 2017 and 2018, possibly meaning a six-month period during which EWOV will be handling disputes without reference to applicable customer protection standards. In effect, this will require EWOV to make judgments about the standards that exempt entities should meet, and is likely to have a negative impact on the effectiveness and efficiency of our case handling.

Lack of enforcement

The lack of any enforcement regime for exempt entities will compound these difficulties. The Department has indicated that it will begin developing a compliance and enforcement framework after the ESC completes its licensing review and more is known about exempt entities and their customers. This suggests that it may be quite some time before this framework is put in place.

In the meantime, if an exempt entity does not join EWOV, in practice we will have no contractual relationship with them and limited recourse to compel them to join. Similarly, without enforcement powers, the ESC can do little to compel membership.

Even where exempt entities do join EWOV, the lack of enforcement may undermine our work. EWOV membership is a licence condition for our existing members, meaning that at least in theory, they are at risk of losing their licence should they not comply with EWOV case handling policies, resolutions or binding decisions. This helps to ensure compliance with our processes. In the absence of any potential enforcement action, there is a risk that exempt entities will resist compliance with our policies, resolutions and binding decisions, leading to poorer and unequal outcomes for customers of exempt entities.

Disclosure and explicit informed consent

In addition to our more substantive concerns about the Department's approach, we have some comments on the drafting of the GEO.

Division 3 Section 9 (2) sets out several information disclosures that retail and network exemption holders must make before obtaining a customer's explicit informed consent to the sale of electricity. Several of the required disclosures are highly technical, and are likely to create customer confusion unless they are carefully worded. Yet there is no requirement that the information be disclosed in plain English. In contrast, the Energy Retail Code under 3C(1)(a) specifies that explicit informed consent requires retailers' disclosures to be made in plain English. Similarly, the draft GEO, Division 2 Section 23(2)(a) requires persons holding a multiple activity exemption to inform customers of relevant Australian Consumer Law provisions in plain English. Given the complexity of the information to be provided and the potential for customer misunderstanding, we suggest that a similar plain English condition should be attached to the disclosures in Division 3 Section 9.

We have noted above that regulatory uncertainty about which provisions of the Energy Retail Code are applicable will complicate EWOV case handling during the initial period. Similarly, the requirement to disclose 'that the exempt person is not subject to all the obligations of a licensed retailer and the customer will not receive the same protection as it would if it were purchasing from a licensed retailer' is likely to create customer confusion in the absence of clear information about what protections the customer **does** receive. Equally, if, once these protections have been specified, they are substantially similar to those enjoyed by customers of licensed retailers, the Section 9(2)(b) disclosure may be misleading and cause unnecessary concern. It may be more helpful to require exempt entities to disclose **which** protections do and do not apply – for example, by making reference to the Retail Exemptions Guideline that the ESC is to develop.

Finally, we note that the disclosures in Section 9 seem to be relevant only to retail exemptions. This is not made explicit, however, and their placement in Division 3 could be read as suggesting that they are conditions of both network and retail exemptions.

Dispute resolution scheme

In setting out the requirement that entities with network and retail exemptions must join EWOV, the draft GEO states that they must 'enter into a customer dispute resolution scheme approved by the Essential Services Commission' (Division 3, Section 11(2)). Similarly, Division 3, Section 9(2)(c)(iii) requires these entities to disclose customers' right to access 'an external dispute resolution scheme approved by the Essential Services Commission'. This suggests that, as the ESC needs to approve the customer dispute resolution scheme, another dispute resolution body could be established. The Final Position Paper suggests that the policy intent is that EWOV will be this approved EDR scheme. However, we note that any approval process may need to be expedited given the tight implementation timeframe.

We also note that it would be highly undesirable for entities to use the above wording in their disclosure to customers: ambiguity about the specific scheme would present a barrier to access. Instead, entities should identify EWOV by name and provide our contact details. This reinforces our point above concerning plain English disclosure.

Telecommunications services

Deemed exemptions apply to any entities selling or supplying electricity 'in conjunction with, or ancillary to the provision of telecommunications services'. Some established embedded network operators (such as the Melbourne-based Active Utilities) appear to sell both telecommunications services and electricity to residential customers in large strata developments. We assume that it is not the Department's policy intention to exclude these entities from the requirement to register, but this may require clarification in the wording of the GEO or in the associated guideline.

We trust the above comments are helpful. Should you require further information or have any queries, please contact Matt Helme, Research and Communications Manager, on (03) 8672 4289 or matt.helme@ewov.com.au.

Yours sincerely



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