

30 June 2011

General Manager
Small Business and Deregulation Branch
Department of Innovation, Industry, Science and Research
GPO Box 9839
Canberra ACT 2601

Thank you for the opportunity to comment on the *Resolution of Small Business Disputes Options Paper May 2011*.

The Energy & Water Ombudsman NSW (EWON) is the government approved dispute resolution scheme for New South Wales electricity and gas customers, and some water customers. This service is provided free to customers.

Energy ombudsman schemes are referred to at clause 1.4 of the *Options Paper* – though I note that EWON was not included in the list of Small Business Dispute Resolution Services listed in Appendix 1. It may assist you if we provide further information on our jurisdiction relating to small business disputes, based on both the current NSW legislation and our Constitution, to avoid any unnecessary overlap in jurisdiction with any potential small business dispute resolution scheme.

Current NSW legislation provides for both price regulation and a range of consumer protection measures for ‘small retail customers’, which are defined according to their annual consumption of energy:

- for electricity, consumption under 160 MWh per year¹
- for gas, consumption under 1000 gigajoules per year².

These small retail customers have the right to apply to the approved jurisdictional ombudsman scheme for review of a decision in a dispute or complaint with their energy provider.³ (These thresholds are due to be redefined with the proposed introduction of the *National Energy Retail Law* in 2012.)

¹ *Electricity Supply (General) Regulation 2001*, clause 7

² *Gas Supply (Natural Gas Retail Competition) Regulation 200*, clause 8

³ *Electricity Supply Act 1995*, section 96A (1)

While many small businesses will fit the description of a ‘small retail customer’ in these two *Regulations*, there are many whose annual energy use exceeds these thresholds, but who may only have a few employees and are effectively no different from other small business operations.. Examples include general stores and cafés which have high usage due to use of multiple freezers and fridges, and small engineering works which use high powered tools and equipment.

We note that the *Issues Paper* also refers (at page 24) to the ‘widely accepted Australian Bureau of Statistics definition’ of a business employing less than 20 people.

The *EWON Constitution*⁴ makes no distinction between small and large retail customers. EWON regularly investigates disputes from businesses whose energy usage exceeds the definition in the *Regulations* of a ‘small retail customer’, but have less than 20 employees, so meeting the ABS definition of a small business.

This is consistent with the views expressed in the *Utility Regulators Forum Position Paper 2006*:

*Small customers, including some small business customers, are not sufficiently informed, experienced or motivated to ensure that their energy market contracts contain efficient, fair and reasonable terms without the support of basic customer protections.*⁵

*There may be a case to argue that these customers do not require the same level of protections considered necessary for domestic customers. Conversely, there are some very small business customers who consume large amounts of electricity (for example, fish & chip shop and delicatessen owners,) who may not be any more sophisticated than some domestic customers and, in some areas, may have significant English-language and comprehension difficulties.*⁶

To illustrate the sort of small business disputes that come to EWON for resolution, I provide the following two case studies.

⁴ http://www.ewon.com.au/ewon/assets/File/Constitution/Constitution_detailed.pdf

⁵ *Regulation of Retail Service Standards in the National Market Utility Regulators’ Forum Position Paper September 2006*, p3

⁶ *Ibid*, p13

MARIA'S STORY

Maria runs a small wholesaling food business so, even though hers is a very small enterprise, it uses a lot of electricity because of industrial refrigerators and cooling rooms. Recently she received a letter from her retailer advising her that she was required to be supplied electricity under a market contract rather than a standing contract.

Maria asked the retailer why they had not automatically offered her this contract when she opened her account, but she did not receive a response. Maria then received a letter advising that unless she signed a contract, she would be charged "mandated" rates, which were significantly higher than the rates she had been paying.

Because she had not yet received a response to her query, Maria did not sign a contract. In response, her retailer then issued her a bill on the "mandated rates". Maria contacted the retailer to dispute this invoice and was advised that because she had not paid the bill by the due date she would have to pay a \$3000 security deposit in addition to the \$2600 "mandated rates" invoice. She was told that if she did not pay these amounts within one week, her premises would be disconnected.

Maria was very upset at this request, as electricity supply was vital for her freezers. She managed to pay the amounts under protest, and contacted EWON about the retailer's actions. She felt that she should not have to pay the higher "mandated rates" which were not listed anywhere on the contracts she'd seen, and that she should not have to pay a security deposit in these circumstances.

EWON was willing to assist despite Maria despite her usage exceeding the threshold provided in the Regulation for the definition of a small energy customer because it was clear that she operated a small business.

JOE'S STORY

When Joe opened a small café he arranged supply and regularly paid his electricity bills. After two years his retailer contacted him to advise that he had been incorrectly billed, that he should have realised this, and that he owed \$40,000 for the backbill. The retailer initially refused to apply the protections of the regulations as they argued the customer consumed over 160MWh per annum. Joe argued that if his billing had been correct, he would easily have been able to reduce his electricity to below 160MWh and thus would have been eligible for the backbilling protections that limit recovery to up to 12 months prior to when the undercharge is discovered. EWON assisted in negotiating a payment plan and Joe is now on a standard supply contract with all of the relevant protections applying.

With the proposed introduction of the *National Energy Customer Framework* in July 2012, the consumption thresholds for the definition of a small business customer will be further limited as follows:

7—Business customers—upper consumption thresholds for determining status as small or large customers (section 6(2)(a) of the Law)

(1) This regulation determines the upper consumption thresholds for determining whether business customers are small or large customers.

Note— A small customer includes a customer who is a business customer who consumes energy below the upper consumption threshold (see section 5(2) of the Law). A large customer is a business customer who consumes energy at or above the upper consumption threshold (see section 5(3) of the Law).

(2) The upper consumption threshold for electricity is 100 MWh per annum.

(3) The upper consumption threshold for gas is 1 terajoule (TJ) per annum.

8—Business customers—lower consumption thresholds for determining status as small market offer customers (section 6(2)(a) of the Law)

(1) This regulation determines the lower consumption thresholds for determining which business customers who are small customers are small market offer customers.

Note— A small market offer customer is a small customer who is a business customer who consumes energy at or above the lower consumption threshold prescribed by the Regulations (see section 5(4) of the Law).

(2) The lower consumption threshold for electricity is 40 MWh per annum.

(3) The lower consumption threshold for gas is 400 gigajoules (GJ) per annum.⁷

Despite this change in definition, it is anticipated that EWON will continue to deal with disputes from small businesses with under 20 employees, regardless of their annual energy consumption. Given the limited resources of many small businesses and the significant power imbalance between them and large retailers or distributors, access to affordable dispute resolution is essential for them.

As EWON does not represent the views of small businesses, we do not intend to address any of the specific questions asked in the *Issues Paper*, nor to comment on the four options presented. These comments are only intended to provide a fuller description of EWON's jurisdiction in relation to small business disputes, in the interests of avoiding any unnecessary duplication.

⁷ *National Energy Retail Regulations*



Energy & Water
Ombudsman NSW

PO Box K 1343
Haymarket NSW 1240

Admin (02) 8218 5250
Fax (02) 8218 5233
Freecall 1800 246 545
Email omb@ewon.com.au
Web www.ewon.com.au

ABN 21079 718 915

If you would like to discuss this matter further, please contact me or Chris Dodds,
Senior Policy Officer on 82185250.

Yours sincerely

A handwritten signature in black ink that reads "Clare Petre".

Clare Petre
Energy & Water Ombudsman NSW