



Submission to:

ENERGY COMPETITION COMMITTEE

**Electricity Full Retail Competition:
Submission on Energy Ombudsman Bill, Charter
and Energy Ombudsman Advisory Council**

**Centre for Credit and
Consumer Law, Griffith University
With funding from the National Consumers Electricity
Advocacy Panel
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List of Abbreviations

AC	Advisory Council
EO	Energy Ombudsman
CCCL	Centre for Credit and Consumer Law
EIOSA	Energy Industry Ombudsman South Australia
EWON	Energy and Water Ombudsman New South Wales
EWOV	Energy and Water Ombudsman Victoria
FRC	Full Retail Competition
MoU	Memorandum of Understanding
QCA	Queensland Competition Authority

About the Centre for Credit and Consumer Law

The Centre for Credit and Consumer Law is an academic centre, hosted by Griffith University Law School.

The Centre for Credit and Consumer Law was established in March 2004 to be a source of expertise, and a centre of excellence, on credit and consumer law issues, and it has the overall objective of promoting the attainment of a fairer, safer, and more efficient marketplace, particularly for low income and vulnerable small end-users.

The Centre for Credit and Consumer Law is funded by the Queensland Government's Consumer Credit Fund (administered by the Office of Fair Trading) and Griffith University. However, this submission is possible because of funding received by the Centre for Credit and Consumer Law from the National Consumers Electricity Advocacy Panel to respond to the proposed FRC legislation and regulations. Without this funding and without the availability of an expert consultant the Centre would not have had the capacity to respond substantively to these proposals. At the current time in Queensland there are no state funding resources for consumers to respond to these proposals.

About this Submission

The Centre for Consumer and Credit Law (CCCL) welcomes the opportunity to make submission to the Energy Competition Committee in relation to the *Energy Ombudsman Bill 2006* (the Bill) and related materials regarding the proposed Energy Ombudsman scheme (the EO). While the main focus of this submission is on the Bill we have made some points in relation to the Charter and Advisory Council. However, we anticipate the need for further opportunities to comment on the Charter and Advisory Council in more detail in consultation with relevant stakeholders. As stated in our previous Submission there has been insufficient time to respond to the proposed legislation, regulation and code in sufficient detail, notwithstanding our limited resources.

This submission was authored primarily by Catriona Lowe on behalf of the Centre for Credit and Consumer Law with the assistance of Dr Tenzin Jane Bathgate and Karen Chalmers-Scott. The Queensland Consumers Association, through the input of Ian Jarratt, also provided feedback on this submission.

This submission follows on from and endorses the comments previously made by the Centre for Credit and Consumer Law in our previous submission to the Energy Competition Committee on the Electricity and Legal and Regulatory framework.¹

¹ Centre for Credit and Consumer Law, 8th September 2006, Submission to the Energy Competition Committee. Electricity Full Retail Competition: Submission on FRC Electricity Legal and Regulatory Framework.

The submission is structured in four parts.

- Part 1 discusses the independence of the Energy Ombudsman.
- Part 2 provides comments on the Bill.
- Part 3 make brief comment in relation to the documents relating to the EO Charter and the EO Advisory Council.
- Part 4 comments on issues raised during the FRC Workshop -Ombudsman Bill Preliminary Submissions Outcomes held on 3 October 2006 (the Workshop).
- Part 5 provides concluding comment and a final recommendation.

Part 1 – Independence of the Energy Ombudsman

We warmly welcome key points in the Bill, which indicate a move away from previously fixed policy positions, which reduced the independence of the Ombudsman. We strongly support provisions such as Section 14 which requires that the EO act independently, impartially and in the public interest, Section 16 which makes it explicit that the EO will not be subject to direction that would otherwise interfere with their independence and Section 49 which provides that the EO will not be appointed by the Minister are welcomed. Ultimately we welcome any moves that will ensure that the scheme meets the National compliance benchmarks for Industry-based customer dispute resolution schemes.²

The above proposals are important elements in the independent functioning of the EO as are key points outlined during the workshop which strengthen the above independence and accountability of the office. For example, we welcome proposals:

- To include more of the EO's governance framework in the Bill;
- That the appointment of AC members will be based on recommendations from the QCA Customer Consultative Committee;
- That the Chair of the AC will not be required to obtain Ministerial approval prior to making public comment

We also welcome the confirmation that other than budget approval the EO will remain free from direction by the Minister.

We also support other considerations that emerged out of the workshop that will benefit small end-users such as the following:

² Simon Cleary and Fiona Guthrie (2006) 'Structure matters: Solving disputes between consumers and electricity companies' and Appendix 1 (for Dist Benchmarks and history of development of scheme) in Jane Bathgate (Ed) (2006), *Electricity Issues: Interstate perspectives on full retail competition for residential consumers*, Centre for Credit and Consumer Law, Griffith University. For specific reference to National Benchmarks for Industry-Based Customer Dispute Resolution Schemes <http://www.consumersonline.gov.au/downloads/selfreg/benchmarks/BMARK1.rtf>
Hon Chris Ellison, Minister for Customs and Consumer Affairs, Benchmarks for Industry-based customer dispute resolution schemes, Canberra, 1997.

- That customers will have access to the Energy Consumer Protection Office (ECPO) in the pre-sales period particularly as the Code will not yet be in operation and provide sufficient protection from inappropriate marketing (protections that are offered in the Code).
- That the appointment of Advisory Council members will be based on nominations from the Queensland Competition Authority (QCA) consultative consumer committee and industry representatives. In this vein we note that it is critical that the QCA consultative consumer committee be established prior to the go-live date for FRC on the 1st of July as they will play a pivotal role in the establishment of the consumer component of the Advisory Council
- That the functions of the EO will be expanded to include promotion of access to the scheme and to identify and review issues arising out of complaints. We note that we have also identified concerns regarding the scope of functions of the EO in section 2 below.
- That there will be a MoU with the QCA regarding systemic issues.

These are all important proposals that will impact significantly on accountability, effectiveness and the independence of the scheme.

We otherwise refer to and reiterate comments made in previous submission regarding the EO. In particular, we reiterate key issues relating to independence, structure and decision making that have not been addressed, or adequately addressed in the Bill and related documents as enunciated in our previous Submission.³

In particular, despite the positive elements noted above designed to improve the independence of the EO, the structure of the EO remains a fundamental impediment to independence. We also note that structure proposed directly contradicts the policy outlined by the ECC, namely that the ECC's preferred policy is to follow the South Australian model. However in the case of the Ombudsman, the Tasmanian model has been followed. No explanation or justification for this approach has been provided.

If it is suggested that the Tasmanian model represents best practice then this should be made explicit and other aspects of the FRC model should also contain key best practice elements, as we have previously stated, rather than simply following the South Australian model. Examples include reference to the Victorian approach to hardship and wrongful disconnection payments (including payment levels).

In addition to the general points raised above, we make the following additional comments, now that more detail is available regarding the way in which the proposed statutory model will be affected. Concerns regarding independence are exacerbated by **Part 8** of the Bill that makes it clear that the EO office can effectively be an extension of a government department. The issues of independence this raises on a principle and practical level are significant.

³ Centre for Credit and Consumer Law, 8th September 2006, Submission to the Energy Competition Committee. Electricity Full Retail Competition: Submission on FRC Electricity Legal and Regulatory Framework.

Even if not attached to a government department, employees would still be public servant under the suggested model, which is a split loyalty between the scheme and the executive that employs them. Whilst during tenure with the EO, these public servants would report to the Ombudsman, there is express provision for them to be redeployed within the public service following service with the EO.

In addition to the independence issue there is a concern that the removal of the contract that would arise between members and the company under a company limited by guarantee model may leave the EO's decisions more open to review by the courts (as the contract between the members and EWOV was a key factor in the court's consideration in *Citipower v. EWOV*). It is not easy to replicate these circumstances in a statutory model (which compels membership on the terms outlined) as it was the voluntary nature of the contract between the parties that was influential i.e. a voluntary agreement between the company and its members (albeit underpinned by a licence condition).

Before making submissions in relation to the specific clauses contained in the Bill we wish to reiterate a general point in relation to the jurisdiction, powers and functions of the EO. Schemes such as EWON, EWOV and EIOSA have been operating very successfully for a number of years. As such we suggest that a positive case needs to be made for any departure from these tried and tested models.

As noted above in relation to the structure of the EO, no case has been made for the very significant differences proposed in relation to the EO's structure. This is similarly the case with a number of the departures referenced below.

Part 2 – Response to the Bill

2.1 Jurisdictional issues

- **Clause 6(2)** makes it clear that excluded customers are not covered by the scheme. As specified in the earlier CCCL submission, customers excluded from FRC should have access to the EO scheme.

Steps have been taken by the NSW and Victorian Schemes to begin to extend jurisdiction in this area. Whilst coverage of 'excluded customers' in these jurisdictions is not complete, there is an opportunity for Queensland to build on these steps to provide access to dispute resolution for this vulnerable group of consumers. We note suggestions that the Department of Energy will retain jurisdiction to resolve disputes for these classes of customer. We strongly suggest that it is preferable that the EO deals with all customers.

- **Clause 7(1)** sets out the energy entities covered by the EO. It is not clear why transmission issues are not included in the EO jurisdiction (as they are in other States). This could prevent customers obtaining compensation in relation to losses suffered as a result of acts or omissions by transmission companies or make such recovery more complex. We welcome suggestions at the Workshop that further consideration will be given to this issue.
- **Clause 8** of the Bill on its face appears to define energy entity functions more narrowly than is necessary to provide coverage of the sorts of disputes outlined in the Service Charter. For example, it is clear from the service charter that a broad scope of disputes around things such as vegetation, voltage variation claims and others are covered. We support the scope of dispute outlined in the Charter. As a matter of general principle, the scope of **the** disputes the EO can consider should be consistent with the other jurisdictions and adequate to cover the majority of the disputes arising between energy providers and their customers or affected parties.

Thus for example, EWOV and other interstate schemes do have coverage in relation to land issues. This has proved an active area of dispute, encompassing a range of sub-issues such as:

- damage
 - easement (access)
 - pipes – gas (damage, maintenance, placement, safety)
 - pipes/channels/drains/dams – water (damage, maintenance, placement, safety)
 - pole cabling (damage, maintenance, placement, safety)
 - street lighting (placement, repair/GSL)
 - substation (maintenance, placement, safety)
 - transmission towers (maintenance, placement, safety)
 - treatment plant (maintenance, placement, safety)
 - vegetation management
- **Clause 11** We strongly support the functions conferred on the EO by this clause of the Bill. As noted above we also strongly support the proposal that these functions be extended to include a requirement to promote access to the scheme. Comments regarding proposals to narrow the functions are set out in Section 3 below.
 - **Clause 12(g)** of the Bill, which excludes disputes between energy entities, is problematic to the extent that the dispute could relate to whether the distributor or retailer is responsible for the cause of a customer complaint. Clearly the EO must have capacity to consider disputes of this kind.

We understand from comments made at the Workshop that this is not the intention of the Clause. Nevertheless it is arguably the effect of the Clause and therefore an amendment to the Bill is required to make it clear that disputes of this kind are not excluded.

- **Clause 17(1)** of the Bill requires amendment. In particular, the words “that directly affects the customer” should be removed. Not only is this an unnecessary complication (whether the customer is directly affected should be determined as part of the consideration of the dispute, not as a pre-condition), the issue is also dealt with under clause 19(c). It is foolhardy from an interpretation point of view to allow the duplication to remain in the Bill as it open to interpretation that the fact the wording is included twice means it is intended to serve two purposes.
- **Clause 19(e)** is unclear in the sense that it is not clear what situation it is intended to capture. Examples of the sorts of rights that should be exhausted prior to accessing the scheme should be provided. If none are available (or justifiable) this sub clause should be deleted.

2.2 EO Powers

- **Clause 15** of the Bill vests a general power in the EO to do “anything necessary or convenient to be done for, or in connection with, the ombudsman’s functions.” This is supported. However, we submit that particular powers are so important to the effective operation of the EO that they should be explicitly stated. One example is the capacity for the Ombudsman to require reconnection of a customer whilst a dispute is resolved.

Following the Workshop, we understand that it is intended that this power is included within the EO procedures documentation. This approach is supported provided that consultation with stakeholders is required prior to making any significant amendment to the procedures.

- **Clause 26** We strongly support the proposal that the EO have power to require provision of documents or information by a relevant energy entity. Such a power is critical to the effective functioning of the office and the EOs ability to form a view regarding the proper determination of a dispute where it cannot be resolved between the parties. Further it ought not be left to the relevant entity to determine that a document should be withheld due to confidentiality requirements.

Following discussion during the Workshop we note the proposal by energy entities that this element of the EO framework be amended such that a penalty applies where an entity fails to provide the relevant documents or information (as an alternative to the power of the EO to require provision). We strongly suggest that this alternative proposal would significantly lessen the ability of the EO scheme to function in the interests of consumers. In particular, it likely there will be a not insignificant number of instances where it is preferable for the entity to bear the penalty than provide the information or documentation on a cost/benefit basis. This may leave affected customers without adequate redress in circumstances where the relevant documents or pieces of information available would demonstrate the entity was at fault.

- **Clause 32** The scope of orders available to the EO under clause 32 needs to be expanded e.g. to reverse a transfer, amend terms of a contract or release a consumer from contractual obligations.

Not only are such powers standard across other jurisdictions, they are necessary to enable the EO to address issues that will inevitably arise in the marketplace. Numerous examples of questionable selling practices can be found in reports produced by the various energy ombudsman schemes and fair trading agency.

In one example, Consumer Affairs Victoria obtained an enforceable undertaking from Energy Australia in relation to “misleading and deceptive conduct, and making false representations in the course of [a] door to door marketing campaign.”⁴ Conduct included:

- Claims to consumers regarding terms and conditions that did not exist in the contract;
- Advice that termination fees were lower than they actually were;
- Incorrectly asserting to consumers that rebates applied to individual bills;
- Sales pitches to consumers on the basis of bill payment systems that did not exist.

Whilst the enforceable undertaking can address such conduct going forward, it is clear that an effective scheme faced with complaints arising out of this conduct may need to either release consumers from contracts that are fundamentally different to that represented, or to make amendment to contracts such that they operate as was represented to the purchasing consumers.

- **Clause 33** does not make it clear that decisions of the EO must be made with reference to fairness, the law and good industry practice. This requirement is a critical decision-making framework used by all of the schemes and should be made explicit.

We understand following the workshop that it is proposed to include a requirement that the EO act in a fair, reasonable, informal, just and expeditious manner. Each of these values is supported however we reiterate that the specific wording outlined above should also be included. As noted this is a critical element of all other schemes decision-making framework, and also reflects relevant benchmarks for industry based Alternative Dispute Resolution (ADR).

⁴ See <http://www.consumer.vic.gov.au/CA256F2B00224F55/page/List+of+Enforceable+Undertakings-2005?OpenDocument&1=950-List+of+Enforceable+Undertakings~&2=090-2005~&3=~>

2.3 EO Processes and procedures

- **Clause 19(1)(d)** Referral back to the company if the customer has not provided a reasonable opportunity to resolve the matter should be part of the policies of the EO office, not necessarily enshrined in legislation. Further the referral back process should be initiated and monitored by the EO as is the case with EWOV. Consumers can suffer from complaint fatigue if they are re-referred leading to a drop off in complaints without the source of the complaint being addressed.
- **Clause 19(2)** should make it clear that despite the ability for the EO to request a complaint is put in writing, oral complaints will be allowed in all but exceptional circumstances. We understand that it is proposed to address this issue in the EO policies and procedures document. This is welcomed.
- **Clauses 37(2) and (4)** repeat matters already outlined in Clause 35(2).
- **Clause 43** - It is not acceptable that a declaration by the EO under Clause 43 (namely a declaration that an energy company has complied with an order of the EO) binds the Customer, effectively depriving the customer of alternative avenues of redress (it is also questionable whether such a clause is legal as it effectively ousts the jurisdiction of the courts). Whilst it is obviously necessary to have a mechanism whereby a customer can be required to take certain steps necessary to enable an energy entity to comply with an EO order, it does not follow that a failure by a customer to comply with a direction should effectively lead to a finding that their complaint has been resolved (i.e. through the deeming of compliance by the energy entity).
- There should be a specific requirement that the EO publish its annual report as well as regular reports on complaints statistics and systemic issues. There should be capacity to name companies and their market share.

Part 3 - Charter and Advisory Council Document

We have only three general comments relating to the Charter and Advisory Council documents:

- As noted above, there are number of matters of detail in the charter that suggest the powers and jurisdiction of the EO are broader than currently outlined in the Bill. The Bill should be amended to ensure that the matters outlined in the charter can definitely be covered.
- It is not clear the status of the documents and how the matters outlined in them will be enshrined (as there are a number of matters in the EO AC that are not provided for in the EO Bill). This needs to be clarified.

- We confirm advice provided at the Workshop that the Advisory Council document contains a drafting error in that does not make it clear that there should be an equal number of representatives of small customers and representatives of businesses.

Part 4 – Issues identified at the Workshop

We have concerns with a number of proposed approaches to the “Top 14” issues canvassed in preliminary submissions received from energy entities. These are addressed with reference to the headings outlined in the Workshop presentation.

- **Functions of the Ombudsman** – We are most concerned at the proposal to remove the ability of the Ombudsman to carry out investigations of its own initiative. This power is a key element in an effective approach to systemic issues on the part of the scheme. If, as is suggested in the workshop, a power to the EO will retain a function to identify, review and progress issues arising out of complaints then the power to conduct its own investigations will to some extent be addressed.

Similarly other energy ombudsman schemes, and indeed other industry based dispute resolution schemes have played a key role in assisting members in their dealings with customers with a view to reducing the number of complaints proceeding to EDR. This is in the interests of all parties, including the businesses, which can thereby reduce their costs payable as a result of complaints proceeding to the EO. Examples of initiatives undertaken by other schemes include member training on internal dispute resolution and conferences or workshops on particular issues such as hardship.

- **Focus on facilitation of dispute resolution** – We suggest it should be clear that the role of the EO encompasses *both* facilitation of the resolution of disputes and determination of disputes where resolution cannot be achieved.

We are also concerned that proposals to permit interim Orders relating to mediation and negotiation suggest an unnecessarily legalistic approach to dispute resolution by the EO. We are not aware of any instance in other schemes where negotiation and conciliation are not attempted in some form. However the EO should retain the flexibility to adopt the approach it considers is most likely to achieve resolution of the dispute.

- **What can and cannot be investigated** – We refer to and reiterate our comments made in relation to Clause 32 of the Bill.

We note our support for the proposed approach in relation to the following issues:

- Ability to require documentation
- Ability to disclose confidential/sensitive documentation
- Binding nature of Order
- Final orders that can be made

Part 5 – Concluding comments

We wish to reiterate that we welcome the changes that have been made to enhance the independence and therefore effectiveness of the EO. We acknowledge that the government has not accepted all of our recommendations but also acknowledge that what is now proposed in the Bill is an improvement on previous policy indications. We expect the scheme to involve and improve over time and to support that we would welcome the government to committing to a review within three years of the schemes establishment to ensure that it is operating in the best interests of all parties – in particular small-end users in Queensland. ASIC legislation requires that all of the schemes in the financial services be reviewed on a regular basis and it is the practice of the current EO schemes in other jurisdictions to do this every three years or less.