



# Issues paper

## Access to dispute resolution services for exempt customers

June 2017

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# 1 Introduction

Under the National Energy Retail Law (Retail Law), small customers of authorised retailers and distributors have access to free and independent dispute resolution provided by their state or territory's energy ombudsman, or tribunal in the ACT.<sup>1</sup>

However, small customers of exempt energy sellers and exempt network service providers (exempt NSPs) are generally unable to access such dispute resolution services.<sup>2</sup> Currently, the ombudsman schemes, with the exception of NSW, cannot hear complaints from exempt customers. This is because they preclude membership by exempt entities or explicitly preclude the consideration of complaints by customers of exempt entities. Where access for exempt customers is currently available, the NSW ombudsman is unable to bind exempt entities by their decisions because exempt entities are not members of the scheme.

The significant growth of embedded networks, alternative selling models and other forms of exempt sales is leading to an increased number of customers without recourse to free and independent dispute resolution services.

We recognise the significant role of ombudsman schemes in building consumer trust and confidence in the retail energy market by providing industry expert dispute resolution services for energy issues. To this end, we are working collaboratively with the Australia and New Zealand Energy and Water Ombudsman Network (ANZEWON) to consider what changes need to be made to the regulation of exempt sellers/NSPs and scheme membership and participation requirements respectively in order to improve exempt customer access to ombudsman schemes where it is required. This issues paper is the first step in formally seeking stakeholder views to inform our position on this issue. We have undertaken some preliminary information gathering with a smaller group of stakeholders to assist in reaching this point.

Recognising that the exempt seller and exempt NSP are often the same entity, in this issues paper we use the term 'exempt entity' to collectively refer to the entity holding either/both the retail and network exemptions, where we are not seeking to distinguish between two functions. However, where necessary we distinguish between the selling and network service provision functions of the exempt entity by referring to the exempt seller/exempt NSP respectively.

## **Our role in administering the exemptions frameworks**

We administer both the retail and network exemptions frameworks.

Under the retail framework, we regulate the sale of energy where a retailer authorisation is not appropriate or practical, such as for incidental sales. We do this through the Retail Exempt Selling Guideline (Retail Guideline), which sets out the process for registering and

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<sup>1</sup> For the purposes of this issues paper, we refer to the energy ombudsman schemes in Retail Law jurisdictions and the ACT Civil and Administrative Tribunal collectively as 'ombudsman schemes'.

<sup>2</sup> The exception to this is in New South Wales (NSW), where the Energy and Water Ombudsman NSW (EWON) is able to hear disputes from exempt customers, but exempt sellers are not bound by its decisions.

applying for exemptions, and outlines the various exemption classes, their eligibility criteria and exemption conditions.<sup>3</sup>

For networks, private electricity networks not registered with the Australian Energy Market Operator (AEMO) as participants in the wholesale National Electricity Market (poles and wires businesses) are regulated through our Electricity NSP Registration Exemption Guideline (Network Guideline).<sup>4</sup> The regulation of exempt NSPs covers access to retail competition, safety, dispute resolution, metering and network pricing. Similar to the Retail Guideline, the Network Guideline sets out the electricity network activities deemed exempt, which activities must be registered and how to register. It also sets the conditions for all the exemption classes.

Under the Retail Law, and the National Electricity Law (NEL) and National Electricity Rules (NER) we may impose conditions on individual exemption holders and classes of exempt sellers/exempt NSPs through the Retail and Network Guidelines respectively.<sup>5</sup> We are able to change the exemption conditions and the types of arrangements and classes they apply to by amending the Guidelines, which involves formal consultation processes.

Both the Retail and Network Guidelines put conditions on specific classes of exempt sellers and exempt NSPs to have in place dispute resolution processes. We explain the approach to dispute resolution taken by each Guideline in **Chapter 2**. While the consumer protections contained within the exemption conditions mirror to some extent those provided by an authorised retailer, the inability to access an independent energy ombudsman scheme means most exempt customers receive lower protections relating to dispute resolution.

### Previous considerations

We have considered the exemption conditions relating to dispute resolution, including whether (and how) external dispute resolution services such as ombudsman schemes should be referenced, in previous amendments to the Network and Retail Guidelines.

Most recently, we amended the Network Guideline in December 2016.<sup>6</sup> In that consultation process, we sought stakeholder feedback on the inclusion of a condition that required an exempt NSP to join an ombudsman scheme where membership is available in a jurisdiction or to otherwise abide by decisions made by an ombudsman scheme. Stakeholders strongly supported requiring access to ombudsman schemes. However, stakeholders also raised two qualifying factors that we took into account in the final decision to impose a hierarchical approach to access to dispute resolution. These were that:

1. existing dispute resolution mechanisms should continue to apply; and

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<sup>3</sup> The AER (Retail) Exempt Selling Guideline, Version 4.0 can be accessed at <https://www.aer.gov.au/retail-markets/retail-guidelines/retail-exempt-selling-guideline-march-2016>.

<sup>4</sup> The AER Electricity Network Service Provider - Registration Exemption Guideline, Version 5 can be accessed at [https://www.aer.gov.au/system/files/AER%20electricity%20NSP%20Registration%20Exemption%20Guideline%20-%20Version%205%20-%201%20December%202016\\_1.pdf](https://www.aer.gov.au/system/files/AER%20electricity%20NSP%20Registration%20Exemption%20Guideline%20-%20Version%205%20-%201%20December%202016_1.pdf).

<sup>5</sup> Retail Law, section 112; NEL, section 13 and NER, clause 2.5.1.

<sup>6</sup> For detail on the decisions to amend the Network Guideline, refer to: AER, Reasons for Decision - Amended Network Exemption Guideline - Version 5, <https://www.aer.gov.au/system/files/AER%20Reasons%20for%20Decision%20-%20Amended%20Network%20Exemption%20Guideline%20-%20Version%205%20-%201%20December%202016.pdf>

2. many of the ombudsman schemes will need to make administrative changes before exempt NSPs can join ombudsman schemes.

We published the latest version of the Retail Guideline in March 2016. One of the issues raised during the Retail Guideline consultation was exempt customers' access to ombudsman schemes, which stakeholders generally considered would be appropriate. In the Final Notice of Instrument, we stated that 'we consider it is important that small energy customers have access to cheap, robust and effective dispute resolution mechanisms. We encourage the ombudsman schemes to extend participation to exempt sellers and we will work collaboratively with the schemes to determine the best way of ensuring exempt customers and sellers can access effective dispute resolution services.'<sup>7</sup>

Our current work with ANZEWON, of which this consultation is a part, builds on this statement and the broad support for expanding ombudsman access to exempt customers encountered to date. As administrators of the retail and network exemptions frameworks, we have control over the extent to which the conditions imposed require an exempt entity to be a participant in an ombudsman scheme where they are able to be accommodated by the scheme. We explore in this paper, and seek views on, the issues influencing the extent of this obligation.

## 1.1 Purpose of consultation

This paper sets out our initial thinking on expanding exempt customer access to ombudsman schemes. Our thinking has drawn on early, constructive engagement with industry and consumer groups representing a range of exemption classes over the first half of 2017. These discussions have identified a number of issues on which we are seeking further detail to inform our position on the extent to which exempt entities should be participants in ombudsman schemes.

Following on from this initial consultation, we anticipate we will make changes to the Retail and Network Guidelines. These changes will be consulted on separately, in accordance with the consultation processes under the National Energy Retail Rules (Retail Rules) and NER.

We are not consulting on the changes the ombudsman schemes are considering making to their membership and fee structures to accommodate exempt entities, as this is for each scheme to decide. We do, however, provide in this issues paper the general principles the ombudsmen will have regard to when making their decisions about membership and fee structures (**section 2.3.1**).

## 1.2 How to respond

We would like to hear your views on any of the issues in this document. We would especially welcome responses to the specific questions at the beginning of each section set out in **Chapter 3**.

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<sup>7</sup>

AER, Notice of Final Instrument - AER (Retail) Exempt Selling Guideline, Version 4.0, <https://www.aer.gov.au/system/files/Notice%20of%20Final%20Instrument%20-%20Revised%20AER%20Retail%20Exempt%20Selling%20Guideline%20-%20March%202016.pdf> , page 32.

We are flexible in how we obtain your input. If providing a written submission, please email your response 'Attention: Sarah Proudfoot, General Manager, Retail Markets Branch' to [AERInquiry@aer.gov.au](mailto:AERInquiry@aer.gov.au) by **Friday 14 July 2017**.

If you would like to provide your views through means other than a written submission, please contact us at [AERInquiry@aer.gov.au](mailto:AERInquiry@aer.gov.au) to set up a time prior to **Friday 14 July 2017** to discuss your views, or to make other arrangements.

For any email correspondence, please use the subject line '*Exempt customer dispute resolution issues paper*'.

### **1.2.1 Publishing of submissions**

We prefer that all submissions be publicly available to facilitate an informed and transparent consultative process. Unless marked confidential, all responses will be published on our website, [www.aer.gov.au](http://www.aer.gov.au). If you wish to submit confidential information you should:

- clearly identify the information that is the subject of the confidentiality claim
- provide a non-confidential version of the submission a form suitable for publication.

For further information regarding our use and disclosure of information provided to us, see the [ACCC/AER information policy \(July 2014\)](#), which is available on our website.

We will publish a summary of submissions and details of further work along with our draft Guidelines in the third quarter of 2017.

If you have any questions on this issues paper or about providing submissions, please send an email to: [AERInquiry@aer.gov.au](mailto:AERInquiry@aer.gov.au) with the subject line '*Exempt customer dispute resolution issues paper*'.

## 2 Current dispute resolution arrangements

This chapter discusses the current dispute resolution requirements under the authorisations and exemptions frameworks. It also outlines the current jurisdictional ombudsman scheme arrangements in relation to exempt entities.

The Retail Law requires authorised retailers and distributors to be members of, or subject to, ombudsman schemes in jurisdictions where they operate. Exempt sellers and exempt NSPs perform similar roles to authorised retailers and distributors in terms of their relationships to customers. However, because they fall under the retail and network exemptions frameworks respectively, the ombudsman scheme provisions of the Retail Law do not apply to these entities. There are currently no equivalent requirements under the Retail and Network Guidelines for exempt entities to be members of relevant ombudsman schemes.

With the exception of NSW, exempt customers in Retail Law jurisdictions must rely on exempt entities' internal dispute resolution processes, and other external dispute resolution mechanisms (which vary according to the customer type, exempt entity type and jurisdiction) to resolve any energy disputes.<sup>8</sup>

### 2.1 Retailers and distributors

#### 2.1.1 National Energy Retail Law

Part 4 of the Retail Law covers complaints and dispute resolution for small customers of authorised retailers and distributors. Section 86 of the Retail Law provides that:

1. A retailer must –
  - (a) be a member of, or subject to, an energy Ombudsman scheme for each jurisdiction where it sells energy to small customers or engages in an energy marketing activity; and
  - (b) comply with the requirements of that scheme.
2. A distributor must -
  - (a) be a member of, or subject to, an energy Ombudsman scheme for each jurisdiction where it has small customers connected to its distribution system; and
  - (b) comply with the requirements of that scheme.

Section 83 of the Retail Law provides that small customers can make a complaint or refer a dispute concerning a retailer or distributor to their jurisdiction's ombudsman.

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<sup>8</sup> The Retail Law currently applies in the ACT, NSW, Queensland, South Australia and Tasmania.



## 2.2 Exempt sellers and NSPs

### 2.2.1 Retail Exempt Selling Guideline

The Retail Guideline details an exempt seller's dispute resolution obligations under Condition 15:

1. In the event of a dispute concerning the sale of energy to an exempt customer, and in the absence of a determination of the relevant tenancy tribunal if the customer is a tenant, the exempt person must:
  - (a) make reasonable endeavours to resolve the dispute; and
  - (b) advise the exempt customer of any right that the exempt customer has to access the energy Ombudsman scheme or any other relevant external dispute resolution body in the state or territory in which the exempt customer is located, if applicable.

Information provision requirements detailed in Condition 2 of the Retail Guideline oblige an exempt seller to inform exempt customers about their rights in relation to dispute resolution. This includes informing the exempt customer of the exempt seller's dispute handling procedures and any right the exempt customer has to access the energy ombudsman scheme or any other relevant external dispute resolution body.

The Retail Guideline sets out the exemption classes that must comply with Condition 15. Consistent with dispute resolution being a core consumer protection provided to small customers of authorised retailers, Condition 15 only does not apply to exempt sellers in exemption classes where energy is sold temporarily (D3 and D4), to a related company (D8), to large customers (R5) or through power purchase agreements to grid connected customers (R8).

As it is the Retail Law that allows us to make the Retail Guideline, the Retail Guideline only applies in jurisdictions where the Retail Law has effect - that is, the ACT, NSW, Queensland, South Australia and Tasmania.

### 2.2.2 Electricity NSP Registration Exemption Guideline

Condition 6 of the Network Guideline requires exempt NSPs to take a hierarchical approach to dispute resolution. While Condition 15 of the Retail Guideline is captured within the condition, it only applies if either an external energy dispute resolution mechanism or energy ombudsman is not available to the exempt customer. Condition 6 of the Network Guideline provides that:

6. Where charges are to apply for services provided by, or in connection with, an embedded network, a private network must have in place dispute resolution procedures. To fulfil this condition, the exempt embedded network service provider must:
  - (a) Inform a customer who has a dispute of the availability of a specific external dispute resolution body where an external dispute resolution mechanism or Tribunal exists under non-energy specific legislation with authority to make determinations on disputes which include energy matters.

- (b) If 6(a) does not apply and an Energy Ombudsman in a State or Territory advises that an exempt embedded network service provider is eligible to join an Ombudsman scheme, the exempt embedded network service provider must join that scheme and inform a customer who has a dispute of the availability of the specific Ombudsman scheme.
- (c) If 6(a) or 6(b) do not apply, a suitable dispute resolution mechanism must be specified in the formal agreements between the network owner or its appointed agent and the end-use customer. These procedures must allow a customer to request, and be provided with, written details of all charges applicable to that customer. In addition:
- i. In the event of a dispute concerning the sale of energy to an exempt customer, and in the absence of a determination of the relevant tenancy tribunal if the customer is a tenant, the exempt embedded network service provider must:
    - make reasonable endeavours to resolve the dispute, and
    - advise the exempt customer of any right that the exempt customer has to access the energy Ombudsman scheme or any other relevant external dispute resolution body in the State or Territory in which the exempt customer is located, if applicable.
  - ii. The exempt person's dispute resolution process must meet, at a minimum, Australian Standards: AS/NZS 10002:2014 Guidelines for complaint management in organisations.

Similar to the Retail Guideline approach, the dispute resolution condition is considered a core protection for customers of exempt NSPs. Condition 6 does not apply to a limited number of deemed exemption classes (ND4, ND5, ND7 and NDO6), which do not involve small customers. It applies to all registrable exemption classes and individual exemptions.

In contrast to the Retail Guideline which only applies in jurisdictions where the Retail Law is in effect, the Network Guideline is made under the NEL. It applies in all states and territories excluding Western Australian and the Northern Territory and only to electricity private networks.

## 2.3 Jurisdictional ombudsman schemes

**Table 1** summarises the ombudsman schemes in relation to exempt entities in the jurisdictions where the Retail and Network Guidelines are in effect. Each jurisdiction's ombudsman scheme is constituted differently, with expansion of an ombudsman scheme's membership and fee structures potentially requiring changes to either its charter, constitution or, in some cases, constituting legislation.

**Table 1: Summary of jurisdictional ombudsman scheme arrangements in relation to exempt entities**

Jurisdiction	Energy ombudsman scheme	Details
ACT	ACT Civil and Administrative Tribunal (ACAT)	Functions are provided for under the <i>Utilities Act 2000 (ACT)</i> . Exempt customers can bring complaints to ACAT in relation to the customer's contract with its exempt seller. Any changes required to access the scheme more broadly would require legislative change.
NSW	Energy and Water Ombudsman NSW	<p>Functions are provided for under the <i>Electricity Supply Act 1995 (NSW)</i> and <i>Electricity Supply (General) Regulation 2014</i>. Small customers of exempt entities can bring complaints to EWON and EWON can deal with disputes between small customers and exempt sellers.</p> <p>EWON's constitution does not exclude exempt entities from being members of the scheme, but membership is not mandatory.</p> <p>Changes may be required to EWON's governing instruments to amend fee structures.</p>
Queensland	Energy and Water Ombudsman Queensland (EWOQ)	Functions are provided for under the <i>Energy and Water Ombudsman Act 2006 (Qld)</i> . As the Act excludes customers of on-suppliers from EWOQ's jurisdiction, legislative change is required for exempt customers to access the scheme.
South Australia	Energy and Water Ombudsman South Australia (EWOSA)	<p>Able to hear complaints about exempt entities, but has not received any applications for voluntary membership.</p> <p>Exempt entities are eligible to be members under the Scheme's Constitution, but in the absence of any regulatory requirement to join, no exempt entities have applied.</p> <p>EWOSA's membership fee structure was amended several years ago to provide for small member entities in other industry under its jurisdiction. Any further changes may require amendments to governing instruments.</p>
Tasmania	Energy Ombudsman of Tasmania	Functions are provided under the <i>Energy Ombudsman Act 1998 (Tas)</i> . Able to hear complaints about exempt entities but the retail exemptions framework does not apply in Tasmania, with the exception of certain individual exemptions.
Victoria	Energy and Water Ombudsman Victoria (EWOV)	<p>Victoria has not adopted the Retail Law. However, the Victorian Government is currently reviewing its retail and network exemptions framework.</p> <p>EWOV are unable to hear complaints relating to exempt</p>

NSPs under the AER's exemption framework.  
Changes to EWOV's governing instruments will be required to amend membership and fee structures.

### **2.3.1 Ombudsman schemes' principles underpinning jurisdiction expansion**

The changes we are considering making to the regulation of exempt entities to facilitate exempt customer access to ombudsman schemes are only one part of the changes required. The ombudsman schemes themselves are actively considering the changes that need to be made to their scheme membership, participation requirements and fee structures to accommodate changes to their jurisdictions. Expansion of jurisdictions will have significant operational impacts on the schemes.

Through ANZEWOV, the ombudsman schemes have developed the below principles that are guiding their considerations in expanding their jurisdictions.

#### **2.3.1.1 Role of energy ombudsmen in external dispute resolution**

Consumer protections should be available on an equitable basis to all consumers, regardless of how their energy is supplied. Specifically, residential and small business customers should have access to fair, free and independent external dispute resolution.

While there are other avenues of dispute resolution available, including state-based tribunals, these are not specifically equipped to deal with energy and water disputes. They generally operate with a greater level of formal/legal process than ombudsman offices and consumers may incur costs. Ombudsman schemes utilise flexible dispute resolution methods, such as investigation, conciliation and mediation, to bring the parties together to resolve the dispute.

#### **2.3.1.2 Broader role of ombudsman schemes in the energy sector**

Ombudsman offices and external dispute resolution bodies must remain as an important check and balance for the energy sector, regardless of changes in its structure. At the time the energy external dispute resolution framework was first developed in Victoria in 1995, it was recognised that the energy sector needed independent external dispute resolution schemes. As contestability and privatisation expanded, other Australian states recognised and reinforced this stance and the fact that where consumers have access to ombudsman offices, there is a reduced need for further regulation.

Schemes maintain a strong voice in the industry and produce submissions and reports which influence policy, nationally and at a state level.

Consumer confidence in the industry needs to be increased and, when at a level which is acceptable to the sector, maintained. Ombudsman offices have well established reputations

as independent external dispute resolution schemes in the industry and play a key part in gaining consumer confidence.

All schemes undertake extensive outreach work, connecting with communities and establishing pathways for improved communication and understanding between energy entities in relation to customer concerns. This is of value to all current and future members, particularly for large embedded networks.

### **2.3.1.3 Scheme membership**

Ombudsman offices operate on a membership basis. This allows members to actively participate in the operation of the scheme and benefit from what the various schemes offer their members. Benefits of membership include:

- access to resources and material to assist in the development and implementation of high quality internal dispute resolution processes
- promotion of members' internal dispute resolution processes to their customers and referral of customers directly to members where appropriate
- access to ombudsman scheme induction sessions and materials to ensure members are well aware of how the scheme works and can therefore maximise the benefits of external dispute resolution and minimise member costs through early resolution
- access to advice, reports and analysis of systemic issues which assist the sector overall and members to reduce their complaints
- opportunities to engage with consumers and industry peers at forums and consultative meetings
- opportunities to participate in the strategic direction of the scheme through representation on governance bodies and having a voice and a vote at annual general meetings and general meetings.
- a mechanism for referral of customers who have unrealistic expectations of members' internal dispute resolution and therefore require an independent voice for review of their complaint.

### **2.3.1.4 Fee structures**

Schemes operate on a fixed fee and user pays system with the aim of no cross-subsidisation of fees among members.

Scheme funding structures will be amended to minimise perceived cost barriers. It is unlikely that the fee structures of each scheme will be uniform, as the schemes operate differently and vary in size.

## 3 Issues for consultation

This chapter sets out the issues identified through our work with ANZEWON and initial discussions with industry and consumer groups representing a range of exemption classes. We are seeking further detail on these issues to inform our position on the extent to which exempt entities should be a participant in ombudsman schemes.

We are seeking stakeholder comment on four core questions:

1. What should be our approach to considering exempt customer access to ombudsman schemes?
2. What is the scale of the problem?
3. What is the nature of energy disputes experienced by exempt customers?
4. Can existing external dispute resolution mechanisms, other than ombudsman schemes, effectively deal with energy disputes?

### 3.1 What should be our approach to considering exempt customer access to ombudsman schemes?

**Question 1:** Do you agree with our approach to external dispute resolution? What are the barriers to pursuing this approach and how might these be overcome?

**Question 2:** Noting the different approaches to dispute resolution in the Retail and Network Guidelines, what considerations should we be aware of if we align the two Guidelines?

**Question 3:** Are there any issues specific to small scale operators to which we should have regard?

**Question 4:** Are there any other considerations we should balance when forming a position on this issue?

Under the Retail Law, when considering changes to the Retail Guideline we must have regard to the policy principle that 'exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under this Law and Rules.'<sup>9</sup> This principle is therefore our starting point when considering the extent to which exempt customers should have access to ombudsman schemes. Consistent with this principle, our early view is that an approach that considers the customer experience in resolving disputes is appropriate - that is, a customer should not be denied access to an ombudsman scheme merely because they are supplied by an exempt seller rather than an authorised retailer. An exempt customer should also not have to navigate different approaches to dispute resolution depending on whether their dispute falls within the exempt seller or exempt NSP's remit.

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<sup>9</sup> Retail Law, s114(1)(c)

While we are required to have regard to the above policy principle, the Retail Law also enables us to take into account the characteristics of exempt sellers and exempt customers when making decisions, where appropriate.<sup>10</sup> Relevant considerations in this respect include whether the level of regulation is overly burdensome or proportionate to the level of protection exempt customers need, recognising that exempt entities have markedly different resources expertise and motivations. We acknowledge in the Retail Guideline that customer needs vary according to the type of service they are receiving and their relationship with their energy seller. In general, the closer an energy seller's operations are in scale and scope to those of an authorised retailer, the more closely their exemption conditions will resemble an authorised retailer's obligations.<sup>11</sup>

We also consider whether the characteristics of the exempt customer or the circumstances in which energy is sold to them are such as to warrant exemption. The Retail Guideline recognises that, just as residential customers of authorised retailers need more protection than business customers, small exempt customers need a higher level of protection than large exempt customers (who we reasonably assume to have more bargaining power and a greater ability to protect their own interests).<sup>12</sup>

We are required to balance all of the above when considering whether it is currently necessary to expand access to ombudsman services to all exempt customer groups. For example, we are aware that contracts between small commercial customers and exempt entities often include specific dispute resolution obligations which incentivise both parties to efficiently resolve any disputes. Accordingly, small commercial customers may have a lesser need to access ombudsman services. To allow us to assess the characteristics of exempt entities and exempt customers, we seek information in this issues paper on various factors influencing the need for external dispute resolution via an ombudsman service, including the scale of the problem, existing dispute resolution mechanisms and the nature of disputes.

We are interested in stakeholders' views on whether they agree with our approach as a starting point and whether there are other factors we should consider when forming a position on this issue. We are also interested in stakeholders' views on how such an approach can be achieved, given the different dispute resolution conditions in the Retail and Network Guidelines.

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<sup>10</sup> Retail Law, s115-116

<sup>11</sup> AER (Retail) Exempt Selling Guideline, Version 4, March 2016, page 55

<sup>12</sup> AER (Retail) Exempt Selling Guideline, Version 4, March 2016, page 56

## 3.2 What is the scale of the problem?

**Question 5:** How many energy disputes do exempt entities encounter per year?

**Question 6:** What measures can assist in quantifying the scale of energy disputes concerning exempt customers? What weight should we place on being able to quantify the scale of the issue?

We are aware from early discussions with stakeholders representing both exempt entities and exempt customers that reported energy-related complaints and escalated disputes are generally low. Accordingly, some stakeholders expressed the view that it was not necessary to expand access to ombudsman services to exempt customers given the lack of utility. However, we consider it is difficult to assess the evidence of need for access to ombudsman schemes based on current volumes of complaints/disputes. This is because the present situation (where exempt customers may not have external clear pathways to resolve energy disputes, and their willingness to pursue a dispute may be complicated by their relationship with the exempt entity) provides an imperfect estimate of the complaint numbers that may be experienced if exempt customers have access to, and are aware they can access, a free and independent energy dispute resolution service.

It may be appropriate to look at case numbers in NSW as a benchmark, where EWON is able to hear complaints about exempt sellers but exempt sellers are not bound by EWON's decisions. Throughout the period 2011-12 to 2015-16, cases involving exempt sellers have been slightly increasing but remain at under 90 cases per year on average.<sup>13</sup> In 2015-16, EWON handled an increasing number of cases indicating systemic issues concerning exempt retailers and embedded networks.<sup>14</sup>

As administrators of the retail and network exemptions frameworks, we also receive complaints from exempt customers that often reveal non-compliance with exemption conditions. This is, however, an imperfect market intelligence gathering tool because most complaints are not likely to reach us.

It may be that low complaint numbers are a less important factor than ombudsman schemes being available to exempt customers (even if the ombudsman's services are not utilised). We are therefore interested in stakeholders' views on quantifying the scale of the issue, and the weight we should place on this factor.

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<sup>13</sup> EWON, Annual Report 2015/16, page 59, <http://www.ewon.com.au/content/Document/Annual%20Reports/EWON-annual-report-web-2015-2016.pdf>

<sup>14</sup> EWON, Annual Report 2015/16, page 15, <http://www.ewon.com.au/content/Document/Annual%20Reports/EWON-annual-report-web-2015-2016.pdf>



### 3.3 What is the nature of energy disputes experienced by exempt customers?

**Question 7:** Do you agree with our characterisation of energy disputes experienced by exempt customers? Is bundling of complaints with other issues common?

**Question 8:** Is it possible to isolate and resolve energy-specific disputes where there are a number of issues raised by exempt customers?

Our discussions with exempt entities and exempt customers identified billing as the most common source of customer complaints in caravan parks, long term residential parks, retirement villages and shopping centres. Exempt entities often have more complex relationships with their customers than retailers do, as they can also be landlords and provide other services. Given the greater complexity, we are aware that energy complaints such as billing issues are often bundled with other issues such as rent and property maintenance and can be difficult to isolate.

In addition, we understand bundling of services often occurs in exempt selling arrangements for services unrelated to energy. For example within embedded networks, many bodies corporate, particularly in Queensland, use specialist body corporate management services that take responsibility for the day-to-day operation of multiple services, such as water, energy, air-conditioning, bulk hot water, internet and pay TV. This can lead to problems such as circumstances where a debt owed in relation to one service can impact on the provision of another service. A relevant question is the usefulness of energy ombudsman services to resolve complaints relating to issues of this nature, compared to existing dispute resolution mechanisms.

From the complaints we receive, we are aware that disputes between the exempt entity and exempt customer can be egregious and involve vulnerable customers who do not know what to do when they have a problem. In such cases, it appears there is a need for alternative dispute resolution mechanisms for these customers as current channels are ineffective in dealing with energy complaints and can be difficult for customers to engage with.

Another issue is the potential for increasing numbers of complaints relating to issues on the fringe or outside of the ombudsmen's jurisdiction, such as complex purchase arrangements involving battery storage and solar photovoltaics, peer-to-peer trading and increasingly sophisticated home energy management technologies. This 'jurisdictional black hole' is discussed in a report to EWOV, EWON and EWOSA on consumer access to external dispute resolution in a changing energy market.<sup>15</sup> We understand that some ombudsman schemes consider that consumer protections should apply equally to all customers, including those utilising new products and supply options. We are aware that policy makers are

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<sup>15</sup> Report to EWOV, EWON and EWOSA, Consumer access to external dispute resolution in a changing energy market, 24 June 2016, <https://www.ewov.com.au/files/160624-consumer-access-to-external-dispute-resolution-in-a-changing-energy-market.pdf>

considering what consumer protections should apply to these customers, including dispute resolution considerations.<sup>16</sup>

We are interested in stakeholder views on the nature and type of disputes experienced by exempt customers and the extent to which disputes involving issues other than energy can be decoupled from other issues.

### 3.4 Can existing external dispute resolution mechanisms effectively deal with energy disputes?

**Question 9:** What other external dispute resolution mechanisms exist to resolve energy disputes? Do they effectively deal with energy disputes?

**Question 10:** How many energy disputes encountered by exempt entities are escalated beyond internal dispute resolution processes?

**Question 11:** Do exempt customers have a clear understanding of the external avenues to resolve energy disputes? What are exempt customers' experiences of using these avenues?

From our early discussions with exempt entities, we understand that low numbers of disputes are escalated beyond internal dispute resolution processes. Most complaints are resolved through provision of information to exempt customers by the exempt entity or its agent.

Although external dispute resolution services are available for exempt customers, our preliminary observation is that customers often do not know what external avenues are available to them when they have a complaint. These external mechanisms for dispute resolution include:

- escalating a dispute to a tenancy tribunal or jurisdictional civil and administrative tribunal
- seeking assistance from advocacy groups
- referrals to consumer affairs regulators, and
- mediation and dispute resolution services provided by industry groups or peak bodies.

We understand that unresolved energy matters are usually taken by the exempt customer to jurisdictional civil and administrative tribunals, however the number of disputes taken to tribunals is low. While tribunals are able to hear complaints from exempt customers, there may be limitations in their effectiveness in providing exempt customers with low-cost (both in money and time), accessible dispute resolution on energy-specific matters. Conversely, given the matters brought by exempt customers may include a number of issues other than energy, tribunals could be considered an effective one-stop-shop in resolving a variety of disputes.

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<sup>16</sup> The COAG Energy Council's Energy Market Transformation project team is progressing a work program to address these issues. See <http://www.coagenergycouncil.gov.au/council-priorities/energy-market-transformation> for more information.

We also understand that in some instances there are limitations to consumer access to existing dispute resolution services—for example, exempt entities and exempt customers are often required to be a member of a peak body to gain access to that organisation's dispute resolution services.

Our preliminary observation is that exempt customers will often experience varied levels of effective dispute resolution as compared to the level of service and expertise provided by an energy and water ombudsman scheme. We are aware that in certain jurisdictions, industry-based external dispute resolution processes are well established and efficient in achieving outcomes for both parties. However many exempt customers have to rely on raising a complaint with their seller, which is complicated by the multilayered relationship, or seek to resolve their complaint through a tribunal such as the residential tenancy tribunals or civil and administrative tribunals.

### 3.5 Additional considerations

**Question 12:** Do stakeholders have comments on these additional considerations?

**Question 13:** What other issues should be considered?

We are aware of the following additional issues in relation to expanding ombudsman access to exempt customers:

- *Ombudsman coverage for on-market market customers in embedded networks:* there are occasions when an exempt NSP has small customers within their embedded network but does not sell energy to them (i.e. when a customer within an embedded network has access to an on-market offer with an authorised retailer). In this situation, the small customer would not have access to an ombudsman dispute resolution service for matters concerning the embedded network unless exempt NSPs were also required to participate in an ombudsman scheme. The Australian Energy Market Commission's (AEMC) embedded networks rule change, effective 1 December 2017, is designed to enable more customers in embedded networks to access on-market offers to increase retail contestability.<sup>17</sup> Should the rule change have the desired effect, this situation would become much more common.
- *Use of related bodies corporate as exemption holders:* it is already a common practice for related bodies corporate of large companies to hold exemptions. This may have implications for membership of ombudsman schemes, if for example membership is limited to exempt entities which service greater than a certain number of customers.
- *Forum shopping:* we are aware of concerns that exempt customers may choose to 'forum shop' (i.e. pursue a complaint through a number of different external dispute resolution channels) if they are unsatisfied with the outcome from one forum. While any decision of the ombudsman is automatically binding on a provider, the customer may decide whether or not to accept the decision. We understand there are concerns that exempt

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<sup>17</sup> More information about the AEMC's embedded networks rule change can be found here: <http://aemc.gov.au/Rule-Changes/Embedded-Networks>

customers would not be bound (as providers are) by ombudsman decisions. This may be a low risk issue given ombudsman decisions do bind both parties where the customer accepts the decision. Where the customer chooses not to accept the ombudsman's decision, the provider is released from any obligations imposed by the decision and the customer may take other actions, including legal proceedings against the provider.

## 4 Next steps

Stakeholder submissions to this issues paper are due on **Friday 14 July 2017**. Once received, we will publish a summary of submissions and details of further work in the third quarter of 2017.

If changes to the Retail and Network Guidelines are subsequently required these will be consulted on separately, consistent with previous Retail and Network Guideline amendments.

### 4.1 Interaction with other relevant reviews and work programs

There are a number of external reviews and work programs related to this project. We are considering the policy and legal issues across these projects as they impact our work and intend to coordinate where possible.

#### **Victorian Department of Environment, Land, Water and Planning (DELWP) General Exemption Order (GEO) review<sup>18</sup>**

The Victorian Government is currently reviewing its licence exemptions framework arrangements via potential amendments to the GEO. As part of this work, they are considering similar issues regarding the potential expansion of EWOV's jurisdiction to enable it to hear complaints from exempt bodies.

#### **Queensland Department of Energy and Water Supply (DEWS) regulatory impact statement - on-supply customer access to EWOQ<sup>19</sup>**

Through its consultation regulatory impact statement, DEWS has sought feedback on options to improve small on-supply customer access to EWOQ.

#### **AEMC review of regulatory arrangements for embedded networks<sup>20</sup>**

The AEMC is currently reviewing the regulatory arrangements for embedded networks under the Retail Law and Retail Rules. As part of this review, the AEMC is considering the consumer protections appropriate for embedded network customers, including dispute resolution.

#### **COAG Energy Council's Energy Market Transformation work program<sup>21</sup>**

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<sup>18</sup> See the DELWP draft position paper: [http://delwp.vic.gov.au/\\_data/assets/pdf\\_file/0006/357504/General-Exemption-Position-Paper.pdf](http://delwp.vic.gov.au/_data/assets/pdf_file/0006/357504/General-Exemption-Position-Paper.pdf)

<sup>19</sup> See the DEWS website: <https://www.dews.qld.gov.au/electricity/retailers/onsupply>

<sup>20</sup> See the AEMC project page: <http://aemc.gov.au/Markets-Reviews-Advice/Review-of-regulatory-arrangements-for-embedded-net>

<sup>21</sup> See the COAG Energy Council's project page: <http://www.coagenergycouncil.gov.au/council-priorities/energy-market-transformation>

The COAG Energy Council is progressing a work program to consider appropriate policy and regulatory responses to addressing key issues in the energy market relating to new technology, innovation and market change. As part of this work program, the COAG Energy Council is looking at the consumer protections that should apply to emerging new business models and technologies that enable energy to be supplied behind the electricity meter.

## Glossary/shortened forms

Shortened form	Extended form/definition
ACAT	ACT Civil and Administrative Tribunal
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ANZEWON	Australia and New Zealand Energy and Water Ombudsman Network
COAG	Council of Australian Governments
DELWP	Victorian Department of Environment, Land, Water and Planning
DEWS	Queensland Department of Energy and Water Supply
EWON	Energy and Water Ombudsman NSW
EWOQ	Energy and Water Ombudsman Queensland
EWOSA	Energy and Water Ombudsman SA
EWOV	Energy and Water Ombudsman Victoria
Exempt entity	An entity holding either or both the retail and network exemptions
Exempt NSP	A person who is subject to a network exemption for the supply of electricity to a third party through a network that they own, operate, or control
Exempt seller	An energy seller that is exempt from holding a retail authorisation under the National Energy Retail Law
GEO	General Exemption Order
NEL	National Electricity Law
NER	National Electricity Rules
Network Guideline	Electricity Network Service Provider Registration Exemption Guideline
NSP	Network service provider
Retail Guideline	Retail Exempt Selling Guideline
Retail Law	National Energy Retail Law
Retail Rules	National Energy Retail Rules
Retailer	A retailer authorised under the National Energy Retail Law

## Appendix 1: Consultation questions

We would like to hear your views on any of the issues in this document. We would especially welcome responses to the specific questions in **Chapter 3** at the beginning of each section set out below.

Please refer to **section 1.2** for details on how to respond.

### **Section 3.1: What should be our approach to considering exempt customer access to ombudsman schemes?**

**Question 1:** Do you agree with our approach to external dispute resolution? What are the barriers to pursuing this approach and how might these be overcome?

**Question 2:** Noting the different approaches to dispute resolution in the Retail and Network Guidelines, what considerations should we be aware of if we align the two Guidelines?

**Question 3:** Are there any issues specific to small scale operators to which we should have regard?

**Question 4:** Are there any other considerations we should balance when forming a position on this issue?

### **Section 3.2: What is the scale of the problem?**

**Question 5:** How many energy disputes do exempt entities encounter per year?

**Question 6:** What measures can assist in quantifying the scale of energy disputes concerning exempt customers? What weight should we place on being able to quantify the scale of the issue?

### **Section 3.3: What is the nature of energy disputes experienced by exempt customers?**

**Question 7:** Do you agree with our characterisation of energy disputes experienced by exempt customers? Is bundling of complaints with other issues common?

**Question 8:** Is it possible to isolate and resolve energy-specific disputes where there are a number of issues raised by exempt customers?



**Section 3.4: Can existing external dispute resolution mechanisms effectively deal with energy disputes?**

**Question 9:** What other external dispute resolution mechanisms exist to resolve energy disputes? Do they effectively deal with energy disputes?

**Question 10:** How many energy disputes encountered by exempt entities are escalated beyond internal dispute resolution processes?

**Question 11:** Do exempt customers have a clear understanding of the external avenues to resolve energy disputes? What are exempt customers' experiences of using these avenues?

**Section 3.5: Additional considerations**

**Question 12:** Do stakeholders have comments on these additional considerations?

**Question 13:** What other issues should be considered?