

Amendment of the Energy Industry Ombudsman Scheme WA

Approval

Economic Regulation Authority



WESTERN AUSTRALIA

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Contents

Amendment of the Energy Industry Ombudsman Scheme WA	1
Approval	1
DECISION	1
INTRODUCTION AND OVERVIEW	2
REASONS	3

DECISION

1. The Economic Regulation Authority (Authority) has approved the following amendments to the Energy Industry Ombudsman Scheme WA constitution:

(a) inserting the following new definition into clause 2.1:

"Nomination Committee" means a committee:

- (a) established under and subject to clauses 14.10 and 14.11;
- (b) for the purpose of nominating, in accordance with clause 12.3(a)(iii), proposed Directors to represent the interests of gas and electricity customers; and
- (c) the composition, meetings and procedures of which will be determined by the Board from time to time subject to:
 - (i) the committee being chaired by the Chairperson; and
 - (ii) the members including representatives from the Office of Energy";

(b) by inserting the following new definition into clause 2.1:

"Office of Energy" means the department, established under the *Public Sector Management Act 1994* (WA), that reports to the Minister for Energy and supports the performance of the statutory functions of the Coordinator of Energy.";

(c) by deleting all of clause 12.3(a)(iii) and replacing it with the following:

"two Directors whom must represent the interests of gas and electricity customers and whom are nominated by the Nomination Committee, after consulting with customer representative groups";

(d) by deleting all of clause 12.3(b) and replacing it with the following:

"Subject to this Constitution (including, in particular, clauses 12.3(h) and 12.3(k)), section 201E of the *Corporations Act 2001* and to the number of Directors for the time being fixed under clause 12.1 not being exceeded, the Board may appoint a person to be a Director at any time except during a general meeting. Any Director so appointed automatically retires at the next annual general meeting and is eligible for re-election by that general meeting.

The Board cannot validly appoint a person under this clause as a Director unless the person has been nominated by the persons eligible to nominate such a Director under clause 12.3(a) and the Company receives a consent to act as a Director signed by the person.";

(e) by inserting in clause 12.3(b), between the words "Constitution" and ", section 201E", the following:

"(including, in particular, clauses 12.3(h) and 12.3(k))";

(f) by deleting all of clause 12.3(g) and replacing it with the following:

"Subject to clauses 12.3(b), 12.3(h) and 12.3(k):

- (i) a Director must retire at the third annual general meeting after the Director was elected or last re-elected; and

- (ii) a Director who retires under this clause is eligible for re-election.";
- (g) by deleting all of clause 12.3(h) and replacing it with the following:
 "A Director who was appointed to represent the interests of gas and electricity customers in accordance with clause 12.3(a)(iii) may only be eligible for and seek re-election once.";
- (h) by inserting the following new clause 12.3(i):
 "Notwithstanding the operation of clause 12.3(h), any Director appointed to represent the interests of gas and electricity customers who has remained in office continuously since the incorporation of the Company (excepting their retirement and re-election at annual general meetings) and who:
 (i) holds office in September 2008; and
 (ii) has been re-elected once but not twice,
 is eligible to retire and offer himself or herself for re-election at the 2009 annual general meeting.";
- (i) by inserting the following new clause 12.3(k):
 "If, at any annual general meeting, as a result of the operation of clause 12.3(b) and/or clause 12.3(g), the two Directors who are appointed to represent the interests of gas and electricity customers in accordance with clause 12.3(a)(iii) are both required to retire, then:
 (i) subject to clause 12.3(k)(ii), they may agree which one of them must retire at the annual general meeting and, if eligible, seek re-election. If they do not agree they must draw lots to determine which one of them must retire. The Director who does not retire will have his term of office extended and may remain until the next following annual general meeting at which he must retire and may, if eligible, seek re-election; and
 (ii) if one of those Directors has had his term of office previously extended in accordance with clause 12.3(k)(i), that Director must retire at the annual general meeting and may, if eligible, seek re-election."; and
- (j) by deleting the last sentence of clause 20.4 and replacing it with the following:
 "The amounts shown in the tables in clauses 20.5(a) and 20.5(b) are to be amended to reflect a change in the Annual Levy (if any) following a redetermination by the Board under this clause 20.4."

INTRODUCTION AND OVERVIEW

2. The Energy Industry Ombudsman Scheme (EIO (WA)) is established under section 11ZPZ of the *Energy Coordination Act 1994* (EC Act) and section 92 of the *Electricity Industry Act 2004* (EI Act).
3. The EIO WA is an industry-based dispute resolution scheme which has been established to investigate and deal with:
 - disputes and complaints under customer contracts;
 - disputes between customers and licensees or customers and gas marketing agents;
 - complaints by customers about licensees or gas marketing agents; and

- any other kind of dispute or complaint (whether or not under a customer contract) that is prescribed by the regulations.
4. The Gas Industry Ombudsman Scheme was established by the Minister for Energy in May 2004. On 14 July 2005, the Authority approved the addition of the electricity scheme. Combining these two functions, the scheme is known as the EIO WA.
 5. The EIO WA Board is comprised of:
 - one Director representing the gas retail and distribution industry and nominated by Members;
 - one Director representing the electricity retail and distribution industry and nominated by Members;
 - two Directors representing the interests of gas and electricity customers and nominated by the Directors after consulting with customer representative groups; and
 - one independent chairperson nominated by Directors.
 6. The Board has responsibility for policy matters and oversight of the Scheme's operation, including the formal administration of the EIO (WA) Limited, and exercises final authority in relation to the financial affairs of the company. The Board's responsibilities include determining the dispute costs to be paid by members and approving the Ombudsman's annual budget.
 7. The Ombudsman has responsibility for the day-to-day operation of the Scheme and the resolution of individual complaints. The Board does not handle complaints. The Energy Ombudsman's governance arrangements through the structure and composition of the Board provide the framework to ensure that the independence of the Ombudsman is protected.
 8. On 17 September 2008, the EIO WA Board submitted the proposed constitutional amendments to the Authority with a request for approval.

REASONS

9. Section 92(4) of the EI Act and section 11ZPZ(4) of the EC Act provide that the Authority may, by instrument in writing, approve an amendment to a scheme.
10. Section 93 of the EI Act and section 11ZQ of the EC Act provides:

The Authority may approve a scheme, or an amendment to an approved scheme, only if it is satisfied that the scheme, or the scheme as amended, meets —

 - (a) the objectives set out in Schedule [2 of the EI Act or 2B of the EC Act]; and
 - (b) any other prescribed objective.
11. The prescribed objectives of the scheme are as follows:
 - (a) all licensees who are required to be members of the scheme —
 - (i) are members of the scheme;
 - (ii) have agreed to be bound by decisions and directions of the electricity ombudsman under the scheme; and

- (iii) as members, are so bound;
- (b) the scheme will be appropriately funded by the licensees who are required to be members;
- (c) the scheme has satisfactory arrangements in place to deal with all disputes and complaints referred to in (section 92(1) (EI Act) or section 11ZPZ(1) (EC Act));
- (d) the electricity ombudsman will be able to operate independently of all licensees in performing his or her functions under the scheme;
- (e) the scheme will be accessible to customers;
- (f) membership of the scheme will —
 - (i) be accessible to all potential members; and
 - (ii) provide appropriate representation for all members on the governing body of the scheme;
- (g) without limiting any other application of the scheme, the scheme will apply to all disputes and complaints referred to in (section 92(1) (EI Act) and section 11ZPZ(1) (EC Act));
- (h) the scheme will operate expeditiously and without cost to customers;
- (i) the scheme will satisfy best practice benchmarks for schemes of a similar kind, both in terms of its constitution and procedure and in terms of its day to day operations;
- (j) the scheme will provide for a monetary limit on claims covered by the scheme of an amount or amounts approved by the Authority;
- (k) the scheme will maintain the capacity of the electricity ombudsman, where appropriate, to refer disputes or complaints to other forums; and
- (l) the scheme will require the electricity ombudsman to inform the Authority substantial breaches of —
 - (i) any licence condition; or
 - (ii) the code of conduct under (Part 6 (EI Act) or under Part 2C (EC Act)), of which the ombudsman becomes aware.

12. The proposed amendments will allow for the following:

- Establishment of a nominations committee which will nominate prospective directors who will represent gas and electricity customers. The nominations committee will be chaired by the Chairman and include members nominated by the Office of Energy. Presently such directors are nominated by the entire board. The requirement for consultation with customer representative groups remains.
- A director appointed to represent gas and electricity customers may only seek re-election once (with a transitional arrangement for existing directors).
- Procedures for ensuring that if two directors appointed to represent gas and electricity customers must retire, then one continues on.

- The removal of the requirement for 1/3 of the Board to automatically retire (and face re-election if they choose) at each annual general meeting and instead replacing it with fixed 3 year terms (who are then eligible for re-election).
 - A housekeeping amendment to clarify that the Annual Levy may be amended for electricity licensees who are members of the scheme (it appears this was always intended as the Board has the power to amend the Annual Levy for gas licensees).
13. The Authority has reviewed the proposed amendments and confirms that these are consistent with the objectives set out in Schedule 2 of the EI Act and Schedule 2B of the EC Act. In particular, the proposal is consistent with objective (i) as it ensures that the best practice benchmark of independence is maintained and strengthened through the inclusion of an external representative, the Office of Energy, on a nominations committee to nominate prospective consumer representatives.