

**Submission to the  
Economic Regulation Authority**

# **Electricity Licence Review 2010 Discussion Paper**

**16 September 2010**

**DMS# 3363076**

The logo for Synergy, featuring the word "synergy" in a lowercase, sans-serif font. A stylized starburst or spark symbol is positioned above the letter 'y'. The entire logo is set against a black background that forms a curved shape at the bottom of the page.

**synergy**

# Executive Summary

**Matter** Economic Regulation Authority's (ERA) electricity licence review 2010 – Discussion Paper (**electricity licence review**)

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**Context** The ERA has undertaken an electricity licence review with respect to:

- licence format;
- licence terms and conditions;
- whether current deviations from the template licences should continue to exist; and
- whether further deviations should be created.

Synergy provides this submission in response to the ERA's request for stakeholder feedback on the electricity licence review.

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**Scope** ERA electricity licence review

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**Key issues**

1. **Licence scope.** The ERA has significantly increased the scope of electricity retail licence (ERL) template obligations by extending the definition of “Code” and “Regulations” to include a list of all codes and regulations enacted pursuant to the *Electricity Industry Act 2004* (Act).
  2. **Right of review.** The ERA has proposed to amend the definition of “Code” and “Regulations” under the ERL template to include future codes and regulations made under the Act. In doing so, this restricts the right of a licensee from seeking a review of the ERA's decision than otherwise would be the case if the Authority amended the licence to explicitly refer to the new code or regulation at the time they were enacted.
  3. **Applicable fees.** The ERA has proposed amendments to clause 4 of the ERL template to require a retail licensee to pay any “applicable fee” under “applicable legislation”.
  4. **Reporting change in circumstances.** The ERA has proposed amendments to clause 15 of the ERL template relating to this matter.
  5. **Notices.** The ERL template specifies when a notice is deemed to be sent via email, but not “electronic means”.
  6. **Deviations.** Unique licence conditions imposed on Synergy via regulations are proposed to be included within ERL1.
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**Recommendations**

1. **Licence scope.** Subordinate legislation should only be applied to the holder of an electricity retail licence in circumstances where the legislation explicitly applies to the holder of that licence.
  2. **Licence scope.** Delete reference to any code or regulation which is independently regulated outside of the licensing framework including networks access, wholesale electricity market and tariff equalisation.
  3. **Right of review.** The ERA should amend a retail licence to explicitly refer to any new applicable code and regulation which is to be imposed on that licence at the time of enactment.
  4. **Applicable fees.** Amend the ERL template to limit the obligation to pay fees in accordance with the *Electricity Industry (Licence Conditions) Regulations 2005*.
  5. **Reporting change in circumstances.** The ERA to provide industry with guidance as to the circumstances in which the licence condition is expected to apply prior to making the amendment.
  6. **Notices.** Paragraph (e) of clause 18 be amended to refer to "electronic means".
  7. **Deviations.** ERA to reconsider the matter.
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# 1. Key issues

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## 1.1 Licence Scope

Clause 5.1 of the electricity retail licence template states:

“Subject to any modifications or exemptions granted pursuant to the Act, the licensee must comply with any applicable legislation.”

“Applicable legislation” is defined under the ERL template as including:

- “(a) the Act;
- (b) the Regulations; and
- (c) the Codes.”

The ERA has materially increased the scope of electricity retail licence obligations by extending the definition of “Code” and “Regulations” to include a list of all codes and regulations granted pursuant to the Act notwithstanding some legislation is not applicable to the sale of electricity by a retail licensee or is subject to existing regulatory regimes.

Synergy does not support the extent of the proposed amendments for the reasons set out in item 1 Attachment 1. Synergy recommends that the definition of “Codes” and “Regulations” be amended to:

1. Apply subordinate legislation only in circumstances where it explicitly applies to the holder of an electricity retail licence.
2. Delete reference to any code or regulation which is independently regulated under law including networks access, wholesale electricity market and tariff equalisation.

## 1.2 Review of a decision by the Authority

The ERA has proposed to amend the definition of “Code” and “Regulations” under the ERL template to include reference to future codes and regulations made under the Act.

Synergy does not support this approach for the reasons set out in item 2 Attachment 1.

Synergy recommends the ERA should amend a retail licence to explicitly refer to any new applicable code and regulation at the time of enactment so as to preserve the right of a retailer to seek an independent review of the Authority’s decision in accordance with section 130(2)(f) of the Act.

The electricity retail licence template specifies the ERA decisions which a retailer can request a review by the Authority.

Synergy recommends the definition of “reviewable decision” be amended to include reference to a request by the ERA for the provision of information for the reasons specified in item 2 Attachment 1.

## 1.3 Applicable fees

The ERA has proposed amendments to clause 4 of the electricity retail licence template which provides in the event a retail licensee does not pay any applicable fee under the Act, regulations or codes this will result in a retail licence breach. For example, if Synergy did not pay fees associated with Wholesale Electricity Market participation then Synergy would be in breach of its retail licence.

Synergy does not support the extent of the proposed amendments to clause 4 for the reasons set out in item 3 Attachment 1.

Synergy recommends clause 4 of the ERL template be amended to specify fees payable under an electricity retail licence are those payable in accordance with the *Electricity Industry (Licence Conditions) Regulations 2005*.

#### **1.4 Reporting a change in circumstance**

The ERA has proposed amendments to clause 15 of the ERL template relating to a retailer reporting a change in circumstance.

Synergy recommends the ERA provides industry with guidance as to the circumstances the requirement is expected to apply prior to making the amendment for the reasons specified in item 4 Attachment 1.

#### **1.5 Notices**

The ERL template specifies when a notice is deemed to be sent via email. Synergy recommends paragraph (e) of clause 18 be amended to refer to "electronic means". Refer item 5 Attachment 1 for a suggested definition.

#### **1.6 Deviations**

The ERA proposes to include unique licence conditions within ERL 1 which are currently imposed on Synergy via regulations. Synergy is concerned that this proposal exposes it to regulatory risk for the reasons specified in item 6 Attachment 1.

Synergy recommends the ERA reconsiders the proposal.

Simon Thackray  
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## Summary of Synergy response to the proposed retail template licence amendments

Proposed amendment	Comment
<p><b>1. Licence scope</b></p> <p><b>Code means:</b></p> <p>(a) <del>the Code of Conduct for the Supply of Electricity to Small Use Customers;</del></p> <p>(b) <del>the Electricity Industry Customer Transfer Code 2004;</del></p> <p>(c) <del>the Electricity Networks Access Code 2004;</del></p> <p>(d) <del>the Electricity Industry Metering Code 2005;</del></p> <p>(e) <del>the Electricity Industry (Network Quality and Reliability of Supply) Code 2005; and</del></p> <p>(f) <del>a code prepared by the Authority or the Minister pursuant to section 39 of the Act the Code of Conduct for the Supply of Electricity to Small Use Customers 2004;</del></p> <p><del>the Electricity Industry Customer Transfer Code 2004;</del></p> <p><del>the Electricity Networks Access Code 2004;</del></p> <p><del>the Electricity Industry Metering Code 2005;</del></p> <p><del>the Reliability and Quality of Supply Code 2005; or</del></p> <p><del>a code prepared by the Authority or the Minister pursuant to section 30 of the Act</del></p>	<ul style="list-style-type: none"> <li>▪ The ERA has extended the definition of “code” to include all codes issued under the Act. In effect the ERA has made the holder of a retail licence subject to each and every code issued under the Act and any future Code issued under section 39 of the Act. This is inappropriate because:       <ol style="list-style-type: none"> <li>1. A retail licensee is not subject to all codes issued under the Act. For example, the <i>Electricity Industry (Network Quality and Reliability of Supply) Code 2005</i> regulates the behaviour of network operators and not retailers.</li> <li>2. Compliance with the <i>Electricity Networks Access Code 2005</i> should not be an be a electricity retail licence condition. Part 8 of the <i>Electricity Industry Act 2004</i> establishes an independent regulatory regime including Code enforcement which is administered by the ERA for that purpose.</li> <li>3. It is unclear whether the ERA has sought policy advice from the state government to administer electricity networks access and wholesale electricity market arrangements under the electricity licensing framework.</li> <li>4. Synergy considers the ERA has extended its licensing jurisdiction to include access without an appropriate head of power to do so i.e., the ERA has conferred a licensing function on a matter dealt with by superior legislation (Act) using subordinate legislation (licence).</li> <li>5. Extending the licence regime to matters which are not relevant to the holder of a retail licence (e.g. <i>Electricity Industry (Network Quality and Reliability of Supply) Code 2005</i>) or subject of a separate regulatory regime (e.g. <i>Electricity Networks Access Code 2005</i>) is inconsistent with the ERA’s objective in undertaking the ERL review to reduce the regulatory burden on business. If a matter is the subject of a retail licence condition, the licensee will be required to demonstrate compliance as part of the periodic external performance audits. Therefore, the ERA needs to be mindful as to the matters a licensee can comply with or existing regulatory frameworks which exist outside of electricity licensing.</li> </ol> </li> </ul>

**Proposed amendment**

**Comment**

**Regulations means:**

- (a) Electricity Industry (Access Code Enforcement) Regulations 2005;
- (b) Electricity Industry (Arbitrator and Board Funding) Regulations 2009;
- (c) Electricity Industry (Code of Conduct) Regulations 2005;
- (d) Electricity Industry (Customer Contracts) Regulations 2005;
- (e) Electricity Industry (Independent Market Operator) Regulations 2004;
- (f) Electricity Industry (Licence Conditions) Regulations 2005;
- (g) Electricity Industry (Licensing Fees) Regulations 2005;
- (h) Electricity Industry (Obligation to Connect) Regulations 2005;
- (i) Electricity Industry (Ombudsman Scheme) Regulations 2005;
- (j) Electricity Industry (Tariff Equalisation) Regulations 2006;
- (k) Electricity Industry (Wholesale Electricity Market) Regulations 2004; and
- ~~(l) any regulations in force from time to time made pursuant to the Act, Electricity Industry (Code of Conduct) Regulations 2005;~~
- ~~(m) Electricity Industry (Licence Conditions) Regulations 2005;~~
- ~~(n) Electricity Industry (Licensing Fees) Regulations 2005;~~
- ~~(o) Electricity Industry (Obligation to Connect) Regulations 2005;~~
- ~~(p) Electricity Industry (Ombudsman) Regulations 2005; and~~
- ~~(q) any regulations in force from time to time made pursuant to the Act.~~

- The ERA has extended the definition of “Regulations” to include all regulations issued under the Act. Further the ERA has also proposed that any regulation issued from time to time under the Act also falls under the definition of “Regulations”. This is inappropriate because:
  1. Compliance with the *Electricity Networks Access Code Enforcement Regulations 2005*, *Electricity Industry (Wholesale Electricity Market) Regulations 2004* and *Electricity Industry (Independent Market Operator) Regulations 2005* should not be an electricity retail licence condition as these matters are subject to separate and independent regulatory regimes.
  2. Synergy considers the ERA has extended its licensing jurisdiction to include matters the subject of various regulations without an appropriate head of power to do so i.e., the Authority has conferred a licensing function on a matter dealt with by superior legislation (regulations) using subordinate legislation (licence).
  3. Extending the licence regime to matters which are not relevant to the sale of electricity (e.g. *Electricity Industry (Tariff Equalisation Regulations) 2006* or subject of a separate regulatory regime (e.g. *Electricity Industry (Independent Market Operator) Regulations 2005*) is inconsistent with the ERA’s objective in undertaking the ERL review to reduce the regulatory burden on business. If a matter is the subject of a retail licence condition a licensee will be required to demonstrate compliance as part of periodic external performance audits. Therefore, the ERA needs to be mindful as to the matters a licensee can comply with or recognise existing regulatory frameworks which exist outside of electricity licensing.

Proposed amendment	Comment
<p><b>2. Review of a decision by the Authority</b></p> <p><del>(f) a code prepared by the Authority or the Minister pursuant to section 39 of the Act the Code of Conduct for the Supply of Electricity to Small Use Customers 2004;</del></p> <p><del>(g) any regulations in force from time to time made pursuant to the Act Electricity Industry (Code of Conduct) Regulations 2005.</del></p>	<ul style="list-style-type: none"> <li>▪ The ERA has proposed that any code made pursuant to section 39 of the Act or regulation issued from time to time under the Act falls under the definition of “Code” and “Regulations” respectively. This is inappropriate because:             <ol style="list-style-type: none"> <li>1. The ERA should give consideration to each code and regulation as to whether it should legitimately apply to an electricity retail licence. Best practice regulation<sup>1</sup> requires the definition of “Code” and “Regulations” to be amended each and every time a new code or regulation is enacted to ensure clarity and application to an electricity retail licence.</li> <li>2. By including a licence condition to the effect that any future section 39 code or regulation made pursuant to the Act automatically applies as a retail licence condition will deny Synergy a right of independent review of the ERA’s decision in accordance with section 130(2)(f) of the Act.</li> </ol> </li> </ul>
<p><i>reviewable decision</i> means a decision by the Authority pursuant to:</p> <p>(a) <u>clause 13.2;</u></p> <p>(b) <u>clause 14.2;</u></p> <p>(c) <u>clause 14.4; or</u></p> <p>(d) <u>clause 17.1.</u></p>	<ul style="list-style-type: none"> <li>▪ The electricity retail licence template specifies the ERA decisions which a retailer can request a review by the Authority.</li> <li>▪ Synergy recommends the definition of “reviewable decision” be extended to enable a retailer to request a review in relation to a request by the ERA, under clause 16 of the ERL template, for information in recognition that:             <ol style="list-style-type: none"> <li>1. A request for information can have significant financial and operational impacts depending on the nature of the request and the associated timeframes for a response.</li> <li>2. Broad and open ended requests for information can be difficult to comply with.</li> <li>3. It is important that licensees have an ability to comment on the reasonableness of proposed information requests.</li> </ol> </li> <li>▪ Accordingly, Synergy recommends the definition of “reviewable decision” be amended to include clause 16 – provision of information.</li> </ul>

<sup>1</sup> Council of Australian Governments “Best Practice Regulation – A Guide For Ministerial Councils and National Standard Setting Bodies” October 2007



Proposed amendment	Comment
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### 3. Licence fees

#### 4 Fees

4.1 The licensee must pay the applicable fees in accordance with the ~~any applicable-  
legislation, Regulations, legislation~~

- The ERA has proposed amendments to clause 4 of the electricity retail licence template which will result in a retail licensee breaching its retail licence if it does not pay any applicable fee under the Act, regulations or codes. For example, if a retail licensee did not pay fees associated with Wholesale Electricity Market participation then the licensee would be in breach of its retail licence.
- The provision is inconsistent with the ERA's stated objective of the electricity licence review to reduce the regulatory burden on business as it is imposing additional compliance costs on a retail licensee by having to demonstrate licence compliance to the ERA and independent auditors for matters beyond the sale of electricity to the end use customer and which is already subject to independent regulation.
- Best practice regulation requires regulation to be clear to remove uncertainty and enable regulatory compliance. Clause 4 does not meet this test.
- Synergy recommends clause 4 is amended as follows "The licensee must pay the fees applicable to the holder of a retail licence in accordance with the *Electricity Industry (Licensing Fees) Regulations 2005*.

### 4. Reporting a change in circumstance

#### 2315 Reporting a Change in Circumstances

2315.1 The licensee must report to the Authority:

(a) if the licensee is under external administration, as defined by the *Corporations Act 2001 (Cwth)*, within 2 business days of such external administration occurring;

(b) if the licensee:

- (i) experiences a significant change in the licensee's corporate, financial or technical circumstances upon which this licence was granted; and
- (ii) the change which may materially affect the licensee's ability to perform ~~meet~~ its obligations under this licence, within 10 business days of the change occurring; or

(c) if the details of the:

- (i) licensee's name;
- (ii) licensee's ABN; or
- (iii) licensee's address;

~~as set out in page 2 of this document are incorrect, within 2 business days of such details being incorrect.~~

- The ERA has proposed amendments to the existing clause 23 of the ERL template to "improve clarity and accuracy".
- Synergy suggests it appropriate for the ERA to provide guidance to industry as to the circumstances which would trigger the obligation in the proposed clause 15.1(b).

Proposed amendment	Comment
<p><b>5. Notices</b></p> <p><b>2618 Notices</b></p> <p><b>2618.1</b> Unless otherwise specified, all notices must be in writing.</p> <p><b>2618.2</b> A notice will be regarded as having been sent and received:</p> <ul style="list-style-type: none"> <li>(a) when delivered in person to the addressee; or</li> <li>(b) 3 business days after the date of posting if the notice is posted in Western Australia; or</li> <li>(c) 5 business days after the date of posting if the notice is posted outside Western Australia; or</li> <li>(d) if sent by facsimile when, according to the sender's transmission report, the notice has been successfully received by the addressee; or</li> <li>(e) if sent by email when, according to the sender's electronic record, the notice has been successfully sent to the addressee's electricity licensing email address.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Synergy recommends paragraph (e) be amended to refer to "electronic means". Refer Code of Conduct for the Supply of Electricity to Small Use Customers for a definition suggestion.</li> </ul>
<p><b>6. Deviations</b></p> <p>Synergy specific retail licence amendments</p>	<ul style="list-style-type: none"> <li>▪ Synergy notes the ERA is seeking to replicate Synergy's renewable energy buyback scheme obligations contained within the <i>Electricity Industry (Licence Conditions) Regulations 2005</i> and the obligation to offer to supply electricity to small use customers contained within the <i>Electricity Industry (Customer Contracts) Regulations 2005</i>.</li> <li>▪ Synergy recognises the ERA is seeking to consolidate Synergy specific retail licence obligations under the regulations within its retail licence however this proposal poses regulatory risk to Synergy.</li> <li>▪ In the event the regulations are changed and ERL 1 is not amended simultaneously, Synergy is exposed to being subject to two sets of differing regulatory requirements until the two instruments are amended to achieve consistency.</li> <li>▪ This situation has already occurred with respect to Synergy's gas trading licence whereby the <i>Energy Coordination (Customer Contracts) Regulations</i> were not amended at the time the ERA amended Synergy's gas trading licence to reflect the new gas customer service code (1 July 2010). Consequently, Synergy is still required to comply with the AGA gas customer service code with respect to its approved gas standard form contract as well as the new gas customer service code under its licence as the regulations have yet to be amended by government to delete reference to the AGA Code.</li> </ul>