

Our ref: EWOQ/15/0100

1 October 2015



The Research Director
Utilities, Science and Innovation Committee
Parliament House
George Street
BRISBANE Q 4000

Dear Sir/Madam

Re: Call for submissions – Energy and Water Ombudsman Bill 2015

The purpose of this letter is to assist the Utilities, Science and Innovation Committee (Committee) in its consideration of the Energy and Water Ombudsman Bill 2015 (the Bill) which was introduced into Parliament on 15 September 2015 by the Honourable Mark Bailey MP, Minister for Main Roads, Road Safety, and Ports, and Minister for Energy and Water Supply.

About the Energy and Water Ombudsman Queensland

The Bill amends the *Energy and Water Ombudsman Act 2006* (the Act) which establishes my office, Energy and Water Ombudsman Queensland (EWOQ).

EWOQ is a free, fair and independent dispute resolution service for residential and small business energy customers across Queensland, and water customers in south-east Queensland, who are unable to resolve a complaint with their electricity, gas or water distributor/supplier.

The following classes of entities are members of the Ombudsman scheme (scheme participants):

- electricity distributors in Queensland
- electricity retailers and retailers of reticulated gas in Queensland, and
- water distributors/retailers in south-east Queensland.

There are currently 27 scheme participants.

My functions are prescribed under s.11 of the Act as follows:

11 Functions

- (1) The energy and water ombudsman's functions are—
- (a) to receive and investigate, and facilitate the resolution of, disputes referred under this Act to the energy and water ombudsman; and
 - (b) to resolve the disputes if they cannot be resolved by agreement, negotiation or mediation; and
 - (c) to promote the operation of this Act to eligible customers and relevant occupiers of land; and
 - (d) to identify systemic issues arising out of complaints anyone makes to the ombudsman; and
 - (e) the other functions conferred on the energy and water ombudsman under any Act.

The types of issues with which we routinely deal include: high and disputed bills; customers experiencing payment difficulties; connection, disconnection and restriction of supply; compensation for damages and loss; disputes about compliance with contractual obligations; energy marketers' conduct; customer service; and quality of supply.

I am not subject to direction by anyone about the way I perform my functions, make decisions on the dispute referrals, or the priority given to investigations or the resolution of dispute referrals.

I have the power to make or refuse to make a final order in favour of a consumer. Once accepted by the consumer the final order is conclusive and binds the parties for all matters the subject of the relevant dispute.

To assist in maintaining my independence, EWOQ is fully funded by scheme participants through a combination of participation fees and user-pays fees rather than through consolidated revenue.

Small business

The Bill amends the *Energy and Water Ombudsman Act 2006* (the Act) to extend access to EWOQ to business customers who consume up to 160 megawatt hours (MWh) of electricity per annum. Presently, the limit is 100 MWh.

I respectfully agree with the reasons for the amendment as stated by the Minister in the Parliament when introducing the Bill:¹

Many small businesses that are dependent on a high use of electricity for their daily operations often do not have the time, expertise or resources to deal with issues and disputes that may arise with their electricity accounts while still conducting their businesses. Current dispute resolution mechanisms available to these types of business customers may not be specialised enough to efficiently and effectively deal with energy-related disputes. The services currently offered may cost small businesses and can be time consuming. To address this, the bill expands EWOQ's dispute resolution services to cover small, high energy-using business customers, such as bakeries, small supermarkets, manufacturing businesses, amateur sporting clubs, community groups and not-for-profit organisations. This bill will allow these types of businesses and organisations to contact EWOQ for free assistance if they are unable to resolve a dispute with their electricity retailer.

I support the amendment as drafted. Despite there being the potential for more customers lodging a complaint with EWOQ I do not consider that my office will require any additional resources to undertake this function.

Early dispute resolution scheme – privacy

Part IIIA of the Commonwealth *Privacy Act 1988* (Privacy Act) regulates consumer credit reporting in Australia. According to the Office of the Information Commissioner:

One of the objects of the Privacy Act is to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected. In recognition of that objective, the laws about credit reporting are intended to balance individuals' interest in protecting their personal information with the

¹ Hansard 5 September 2015 at page 1734

need to ensure that credit providers have sufficient information available to assist them to decide whether to provide an individual with credit.²

Amendments to the Privacy Act permit entities called “credit providers” to participate in the credit reporting system, thereby enabling them to disclose credit information to the system and access a wide range of credit information held there.

Ombudsman scheme participants are considered credit providers because they provide services (electricity and water) and then issue an invoice for their services.

Credit providers must be part of a recognised external dispute resolution scheme (EDR scheme) before they can participate in the credit reporting system. Recognition as an EDR scheme is gained through a formal application by a proposed scheme to the Privacy Commissioner who then assesses the scheme against settled guidelines. This framework provides an alternative mechanism to all privacy complaints being dealt with by the Privacy Commissioner.

The Privacy Commissioner proposed that my office become recognised as an EDR scheme for energy retailers so that we can deal with privacy complaints against them under the Privacy Act. Other Energy and Water Ombudsman in Australia have been recognised for this purpose.

As a statutory entity, I am subject to the doctrine of *ultra vires* and may only exercise my powers in the performance of my functions under the Act. As there is no function of being an EDR scheme for privacy complaints I cannot exercise a privacy function without suitable amendments to the Act.

To achieve this, the Bill inserts a new function in s.11(e) of the Act to deal with complaints about practices of scheme participants that may be an interference with their privacy under the Privacy Act. The Bill also permits me to provide a report or make observations in certain circumstances to the Commonwealth Information Commissioner (who is responsible for both freedom of information and privacy).

I support these amendments. I do not consider that my office will require any additional resources to undertake this function.

Personal information used for billing purposes

As stated above, EWOQ is funded by fees imposed on scheme participants under the Act.

The obligation on scheme participants to pay fees is found in s.65 of the Act which provides:

- (1) Generally, performance of the energy and water ombudsman’s functions is funded by fees imposed on each scheme participant.
- (2) The fees are—
 - (a) a fee (the **participation fee**) for being a scheme participant during all or part of a financial year; and
 - (b) a fee (the **user-pays fee**) for the participant’s costs for the performance of the energy and water ombudsman’s functions.
- (3) The participation fee and the user-pays fee must be paid to the energy and water ombudsman office.

² Office of the Australian Information Commissioner website www.oaic.gov.au

User-pays fees are calculated in advance, using a forecast based on the scheme participant's likely use of the scheme and the forecast costs to operate the scheme for the next quarter. The 'likely use' component is based on the scheme participant's performance during the same period in the previous financial year.

A reconciliation is conducted twice a year to reflect actual year-to-date costs and each scheme participant's actual use of the scheme. This may result in either a refund or an invoice for additional fees being issued to the scheme participant depending on their performance and the cost of running the scheme.

The issue which arose was whether EWOQ could provide personal information which has been obtained when a complaint is made, to a scheme participant for billing purposes.

The relevant provisions of the Act are as follows (except for section headings highlighting is added).

79 Privacy

(1) This section applies to a person who—

(a) is, or has been, the energy and water ombudsman or an energy and water ombudsman officer; and
(b) **obtains in the course of, or because of, any of the following, personal or confidential information** that is not publicly available—

(i) a preliminary inquiry;

(ii) an investigation;

(iii) the performance of another function of the energy and water ombudsman.

(2) **The person must not—**

(a) make a record of the information; or

(b) **divulge or communicate the information to anyone else**, whether directly or indirectly; or (c) use the information to benefit any person.

Maximum penalty—100 penalty units.

(3) However, **subsection (2) does not apply** if the record is made, or the information is divulged, communicated or used—

(a) for, or as a part of—

(i) the **performance of the preliminary inquiry, investigation or other function** of the energy and water ombudsman; or

(ii) formulating a report about or arising from the preliminary inquiry, investigation or other function; or

(b) **with the consent of the person** to whom the information relates; or

(c) as required by law; or

(d) under section 80(1).

(4) Subsection (3)(a) does not limit section 78(2) and (3)

Personal information is not defined in the Act but s.12 of the *Information Privacy Act 2009* (Q) defines personal information as:

Information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

My view is that personal information cannot be provided for billing purposes as this is unrelated to the performance of an investigation or formulating a report about or arising from the preliminary inquiry, investigation or **other function**.

I do have power under s.15 of the Act which provides:

Without limiting the energy and water ombudsman's specific powers under this Act, the ombudsman may do anything necessary or convenient to be done for, or in connection with, the ombudsman's functions.

However, this power is again limited to the exercise of my functions.

Consequently, the billing information EWOQ presently provides to scheme participants is very limited and insufficient to allow them to reconcile their records with the invoices they receive from EWOQ. Through the Department of Energy and Water Supply we approached the Minister seeking an amendment to the Act to permit us to provide personal information for billing purposes.

Unfortunately the proposed amendments do not adequately address the issue.

As currently drafted clause 11 of the Bill provides that an eligible customer (an energy or water customer) is taken to have agreed to their identifying information being disclosed in two circumstances:

- in cases where the customer has not made a genuine attempt to resolve the matter with the entity (s.19A(1)(c)). Example: the customer has not approached the entity with their complaint, and
- in cases where the customer has not given the entity a reasonable opportunity to resolve the dispute (s.22(1)(d)). Example: the customer has made a complaint to the entity but only a day has passed since doing so.

In these examples EWOQ will refer the customer back to the entity and the customer will only be able to return to EWOQ if the complaint is not resolved to their satisfaction. Such cases are known as 'refer backs'.

Last financial year, refer backs represented only 35% of all closed cases. The majority of the balance of cases closed was investigations (14.5%) and cases referred to a higher level at the entity (26%).³ It follows that as the Bill is presently drafted I will still be unable to provide personal information for all billing purposes.

Furthermore, refer backs are generally simple cases and take little time to deal with when compared to investigations and RHLs. Consequently, the cost per case is much less than the other case types, and I expect that entities would be most interested in those.

In my submission, the current restriction on the use of personal information should be lifted in respect of refer backs, RHLs, and investigations. I do not expect that customers will have any concerns in this regard, as their personal information is already in possession of the entity that provides them with water or energy.

I recommend that the proposed new s.25A(2) to (5) be removed and a new s.25A(1)(d) be inserted as follows:

³ A customer can choose to have their complaint referred by EWOQ to a higher level at the entity to be dealt with rather than have EWOQ investigate. These are known as RHLs.

The eligible customer is taken to have agreed to the eligible customer's personal information being disclosed to the scheme participant to the extent reasonably necessary for the purpose of invoicing the utility entity for a user-pays fee.

The use of the words 'personal information' is preferable to 'customer identifying information' as it is consistent with s.25 of the Act and with the *Information Privacy Act 2009*.

If the proposed new paragraph is inserted there is no need for a new s.25A(6) containing a definition of 'user-pays purposes' and that can also be removed from the Bill. I should add that I had some concern with the second limb of the proposed definition of 'user-pays fees purposes' namely 'the utility entity's billing reconciliation purposes'. This clause exposes EWOQ to the risk of the considerable burden of providing personal information to meet the individual billing reconciliation requirements of each of the 27 scheme participants.

Summary

In summary, I generally support the proposed amendments subject to the suggested changes to the clauses concerning the provision of billing information to scheme participants.

If I can be of any further assistance please do not hesitate to contact me on [REDACTED] or [REDACTED]

Yours sincerely

[REDACTED]

Forbes Smith
Energy and Water Ombudsman