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Submission on the *Draft Charter of Consultation and Regulatory Practice*

Dear Ms Bryne,

The Australian Energy Council (AEC) welcomes the opportunity to comment on the Essential Services Commission's (the Commission's) *Draft Charter of Consultation and Regulatory Practice* (the Draft Charter).

The AEC is the industry body representing 21 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

We note that the Draft Charter is a much shorter document than the Charter currently in effect. At 54 pages in total, the current Charter provides significant information about the Commission and its role and responsibilities across sectors and in consultation processes. In contrast, the Draft Charter is eight pages.

Given that the current Charter has not been amended since 2012/13 it is reasonable that the document is assessed and modified as required. However, the modifications as proposed are unwarranted. While we support the content of the Draft Charter in principle, some important material is now missing.

Overall, the combined effect of the issues raised in this submission indicate that the Commission is recalibrating its own objectives and regulatory process. This is consistent with what we have observed over the past two years in energy regulatory processes and is a matter of some concern.

Consultation about the Draft Charter

It is unfortunate that the Commission's *Draft Charter of Consultation and Regulatory Practice* was itself released without the usual communications to stakeholders (or at least energy retailers). It was only by chance that an AEC member came across the current consultation late last month, located in the 'Completed Consultations' part of the Commission's website. We note that the Commission's website has no record of this consultation on the 'Current Projects' page, including under 'Papers inviting public submission'. We understand there was something posted on LinkedIn, but the nature of this social media platform is that even subscribers to the Commission's feed do not see everything posted.

A charter on consultation that is meant to promote engagement and transparency should be advertised to stakeholders; otherwise, it suggests that the document does not carry much practical weight in how the Commission will conduct itself. This is particularly concerning given the recent history of the Commission's consultation with its stakeholders. As we have discussed in our 2016/17 submissions to the Payment Difficulties Framework, the Commission's consultative approach in the past two years or so has been deeply problematic. As a result, there is a need to rebuild relationships with the energy sector.

The Commission's legislative objective

We note that the Draft Charter states the following:

Our primary legislative objective is to promote efficiency and competition in essential services to achieve the best outcomes for Victorian consumers in the long-term. (p. 1)

This is not technically correct. The relevant clauses of the *Essential Services Commission Act 2001* are as below:

8 Objective of the Commission

(1) In performing its functions and exercising its powers, the objective of the Commission is to promote the long term interests of Victorian consumers.

(2) Without derogating from subsection (1), in performing its functions and exercising its powers in relation to essential services, the Commission must in seeking to achieve the objective specified in subsection (1) have regard to the price, quality and reliability of essential services.

8A Matters which the Commission must have regard to

(1) In seeking to achieve the objective specified in section 8, the Commission must have regard to the following matters to the extent that they are relevant in any particular case—

(a) efficiency in the industry and incentives for long term investment;

(b) the financial viability of the industry;

(c) the degree of, and scope for, competition within the industry, including countervailing market power and information asymmetries;

(d) the relevant health, safety, environmental and social legislation applying to the industry;

(e) the benefits and costs of regulation (including externalities and the gains from competition and efficiency) for—

(i) consumers and users of products or services (including low income and vulnerable consumers);

(ii) regulated entities;

(f) consistency in regulation between States and on a national basis;

(g) any matters specified in the empowering instrument.

(2) Without derogating from section 8 or subsection (1), the Commission must also when performing its functions and exercising its powers in relation to a regulated industry do so in a manner that the Commission considers best achieves any objectives specified in the empowering instrument.

First, on the matter of the Commission's objective, we should note that beyond the basic misstating of its objective, there is a substantive difference between the stated objective in the Draft Charter and in the Act that is worth drawing out. This is the matter of *achieving the best outcomes for Victorian consumers in the long term* versus *promoting the long term interests of Victorian consumers*.

While in principle the two versions of the objective express a similar sentiment, in legal practice they are quite different. The act of 'achieving the best outcomes' suggests that there is such a thing as one set of best outcomes that the Commission can identify and work toward. This is a fundamental move away from means to ends (process to outcomes) and the Commission's actual objective under clauses 8 and 8A which accounts for many complex and sometimes conflicting policy requirements. We completely support the Commission aspiring to meeting its objectives in such a way so that observers (including consumers) consider consumer outcomes to be optimal. However, we know from experience that not all consumers are the same; we know that policy decisions taken to meet the needs of one consumer group can be disadvantageous to others. Subsidies are a key example, such as debt waivers and feed-in tariffs, which re-allocate costs from one customer group to another. What is 'best' is a matter of perspective.

This leads to the second point, which is the importance of undertaking a consultation so that the Commission is informed about relevant matters that it needs to balance when reaching a decision. Consultation is a two-way discussion between the regulator and its stakeholders; regulators' decisions are not predetermined as

'the best' and then tested, they are developed *with* stakeholders. This is particularly important in complex sectors and for essential services like energy. In energy, the Commission's regulatory policy has recently been designed without significant input, and then consultation has been about trying to redo policy drafts to address problems which the Commission had not realised it created. The AEC is concerned that the recasting of the Commission's objective and its overall approach (as discussed below) will further embed this way of doing things.

Third, we note that under section 14 of the *Essential Services Commission Act 2001*, the Commission 'must develop and publish a Charter of Consultation and Regulatory Practice including guidelines relating to processes for making determinations and other regulatory decisions and conducting inquiries', where it 'must include such matters as are prescribed'. These matters are then prescribed under section 6 of the *Essential Services Commission Regulations 2011*, which states the following:

6 Charter of Consultation and Regulatory Practice

For the purposes of section 14 of the Act, the following matters are prescribed to be set out in the Charter—

- (a) the form and manner in which future work programs will be published in relation to each regulated industry;*
- (b) how inquiries, decisions and determinations are to be notified;*
- (c) the processes for public consultation that are to precede determinations and inquiries;*
- (d) the requirements in relation to public hearings by the Commission;*
- (e) the processes for reviewing the Charter;*
- (f) what is to be done to ensure best practice by the Commission in performing its functions.*

The Draft Charter could be described as at best ticking the boxes on these matters. Pages 4 and 5 of the Draft Charter provide little more information in each case than the regulation itself. This is consistent with an approach that prioritises outcomes over processes, as is the silence of the Draft Charter on the matters to which it must have regard (to the extent that they are relevant) under clause 8A.

These matters are now discussed in more detail.

Process and accountability

Leading from the previous discussion, we do not think that a document about how the Commission will undertake its consultative work should itself be so light on actual process. The Draft Charter focusses more on how the Commission will hold others accountable than on its own accountability. Gone are the Commission's commitments under the current Charter to:

- be 'independent, balanced and fair' (current Charter, p. 24);
- be 'representative and fair' in the way it explains issues and reflects comments (current Charter, p. 25);
- be 'effective in identifying priority issues, providing well-targeted opportunities for consultation' (current Charter, p. 25);
- be 'efficient...[so] that the costs of regulation do not exceed the benefits' (current Charter, p. 25);
- maintain 'a rigorous project management approach' (current Charter, p. 49);
- meet and liaise with 'peak industry bodies, academic institutions and other regulators to inform [the Commission's] regulatory approach, with a view to improving regulatory consistency across the jurisdictions where appropriate' (current Charter, p. 49); and
- 'implement best practice regulatory approaches consistent with the *Victorian Guide to Regulation*' (current Charter, p. 49).

These commitments are not provided in any recognisable form in the Draft Charter. Instead the Draft Charter could be interpreted as allowing the Commission to act as it sees fit as long as it can argue it is acting in the long term interests of consumers and it advises what it is doing when consulting. For example, under 'we are transparent and accountable', the words only explain that the Commission will be 'clear about what, when and how we consult', as well as decision-making being 'visible and accessible' (p. 3).

Further, the Commission states that it will be 'innovative, original and willing to challenge the conventional ways of working' (p. 2). This is welcome in principle but lacks the context of stakeholder expectations for the Commission to make independent, balanced and evidence-based decisions that take into account costs and benefits, whilst promoting consumer confidence and a reasonable degree of stakeholder certainty. As we have discussed above, recent history with the Commission's energy regulatory decisions have given us cause for concern on this matter.

Even statements about improvements are not directed towards improving the Commission. The Commission states in principle that it will 'continue to improve' the way it engages with stakeholders, then explains that this is mainly about having others 'understand [its] roles, responsibilities and objectives as a regulator' (p. 2). Under 'we will listen and learn to improve our consultation and engagement' the Commission says 'we will involve stakeholders in developing our approaches to engagement and consultation' (p. 3), then talks about self-evaluation and performance reporting.

Of course the Commission is expected to hold regulated businesses accountable – this is its job and we strongly support this. However, we would expect that a Charter of consultation and regulatory practice would be more explicit about the Commission's own procedural accountability and how it improves its decisions and practices in light of stakeholder feedback. The principles approach in the Draft Charter, combined with the deletion of the dot points outlined above from the current Charter, result in a document that lacks a reference point for assessing the *quality* and the *reasonableness* of the Commission's performance, particularly in light of how it exercises its powers under its legislative objective.

The value of consultation

We are concerned that the removal of key elements of the current Charter – particularly references to cost-benefit analysis and the *Victorian Guide to Regulation* – might suggest that the Commission places less emphasis on some of the usual (and key) objectives of consultation. The Draft Charter appears to downplay the role of consultation in improving regulatory outcomes.

Imperfect knowledge of the sectors they regulate is an inherent limitation of all regulatory agencies. Consultation mitigates this issue, allowing impacted parties to advise the manner in which regulation influences market outcomes.

It is vital that regulators consult with external stakeholders to not just explain their decisions but also better understand the likely impact of different regulatory options on the development of markets in the short to long term. Only then can regulators identify the most efficient and effective regulatory option to address existing and emerging problems or to achieve outcomes that are in consumers' long term interests. Consultation provides an opportunity to test how different regulatory options might influence issues such as business planning decisions, product development, innovation, cost of capital and competitive behaviour. At the same time, consultation following the implementation of new regulatory obligations is an important mechanism for testing whether they are achieving desired outcomes; regulators should not adopt a 'set and forget' approach.

It is well understood that misguided regulation can produce harmful unintended consequences or fail to achieve its policy objectives. Effective consultation can reduce the potential for this to occur.

Engagement compared with consultation

Consistent with the above, the new language of engagement raises some questions. The Commission states the following:

*We use **engagement** as a broad term to describe a planned process which has a specific purpose of working across organisations, stakeholders and communities to shape our decisions or actions. We use **consultation** to refer to a process of obtaining feedback on analysis, alternatives or decisions. (p. 1)*

The term 'engagement' is itself reasonable, but its use in the Draft Charter starts to muddy the waters between consultation as a formal two-way process – and as a public process – and a less public, one-way process of the Commission merely 'working across' stakeholders to 'shape' its views. For example, the Commission goes on to make the following statements:

Our engagement is considered, planned and genuine.

*Our projects, reviews and inquiries provide adequate **time for meaningful engagement** with people affected by our decisions. There is **clear purpose** to our engagement and it is considered at relevant stages of a project including establishing the best methods of engagement. Our **consultation is tailored** to the complexity and potential impact of the issue being considered.*

Our engagement is inclusive.

*We seek perspectives that represent the interests and views of **diverse communities**. Our decisions are well-informed by seeking input from those affected by our actions, including stakeholder groups and individuals with an interest in our work. (p. 3)*

The use of the term 'engagement' in these statements rather than 'consultation' (or even 'consultation and engagement' as used later on the same page) could be interpreted as reducing the Commission's responsibility to consult publicly and according to expected standards of consultation. The above statements are open enough to allow for private meetings, limited publication of documents and limited consultation as being the *only* means of engaging with stakeholders. They appear to provide for one-way rather than two-way discussions with stakeholders, on terms to be decided by the Commission on a case-by-case basis. We note the example public consultation timeframes on pages 6-7 of the Draft Charter give some basis for assuming that consultation (as we know it) will continue to have a role. However, the recent history of the Commission's consultation on energy issues (and this consultation itself) gives us cause for concern. At the least, the Draft Charter should flesh out some of its terms and provide context.

In summary, we believe that the Commission's Draft Charter should be amended to clarify and reinforce the Commission's accountability for its decision-making. The principles as provided do not allow for objective measurement of the Commission's performance. They do not connect clearly to the Commission's legislative obligations or a clear sense of due process. Given that the Commission is a publicly funded statutory body, this needs to change. In particular, we seek confirmation that the Commission remains committed to public consultation as a two-way process that allows time for stakeholders to reflect and respond through public submissions, and that it will also add back in to the Draft Charter its commitment to the *Victorian Guide to Regulation*.

Any questions about our submission should be addressed to me at fiona.simon@energycouncil.com.au or on (03) 9205 3111.

Yours sincerely,

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