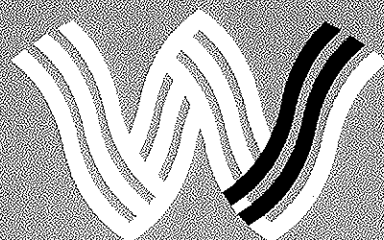


***PUBLIC CONSULTATION GUIDELINES FOR –
ELECTRICITY, GAS AND WATER LICENCES;
STANDARD FORM CONTRACTS
AND CUSTOMER SERVICE CHARTERS.***



wacoss

Western Australian
Council of Social Service Inc

*Ways to make
a difference*

Response by the
Western Australian Council of Social Service
to the Economic Regulation Authority on the
proposed Public Consultation Guidelines.

March 2006

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CONTENTS

| | PAGE |
|--|-------|
| Executive Summary | 1-2 |
| List of recommendations | |
| Background to WACOSS | 3 |
| Introduction | 4 |
| Why Consultation is Important | 4 |
| The Importance of Consultation on Essential Service Related Issues | 5-6 |
| Comments on Consultation Guidelines Paper | 7-11 |
| Part One - Background | |
| Scope and Purpose | 7 |
| Regulation of the WA Electricity, Gas and Water Industries | 7 |
| The Concept of Public Interest | 7-88 |
| Part Two - Public Interest | |
| Determining the Public Interest | 8-9 |
| When the ERA will consult | 9 |
| Determining the Scope of the Public Interest | 9 |
| Expectations of applicants | 10 |
| Summary | 10 |
| Part Three – How do Public Consultation Procedures Work | |
| Consultation Process Steps | 11-12 |
| Further Information | 13 |

EXECUTIVE SUMMARY

The Economic Regulation Authority (ERA) released their Public Consultation Guidelines for Electricity, Gas and Water Licences; Standard Form Contracts and Customer Service Charters, in January 2006 for consultation.

Each of the mechanisms (licences, contracts, charters) include important consumer protection elements. Any approvals and amendments of such mechanisms can alter the level of protection available to utility consumers. As such, it is vital that consumers and their representatives are offered a real opportunity to frame and agree to any amendments to the mechanisms. Ensuring clearly articulated consultation guidelines exist, if adequate, will give consumers and their representatives a greater ability to have their say on such important mechanisms.

The Western Australian Council of Social Service (WACOSS) offers both some general comments and specific recommendations regarding the guidelines contained in the ERA document. The recommendations are listed below:

Recommendation One

WACOSS recommends that the language in the guidelines is made more clear and simple to understand and that the ERA communicates in a way that engages participation from diverse members of the community.

Recommendation Two

WACOSS recommends that the Guidelines provide a more clear background on the regulation of the electricity, gas and water industries, including of self-regulation in these industries.

Recommendation Three

WACOSS recommends that the ERA provide greater clarity in the Background section of the guidelines about what will guide the ERA's concept of Public Interest.

Recommendation Four

WACOSS recommends that bullet point six referred to above be amended to:
"the importance and impact of competition, for example whether the licensee will provide new or vigorous competition in an area, and whether or not that competition will be beneficial or detrimental."

Recommendation Five

WACOSS recommends that further discussion occur (perhaps via the ERA Consumer Consultative Committee) regarding the definition and criteria for determining the 'public interest' as such a definition has broader application within the work of the ERA, and not just for licence, contract, and charter approvals.

**WACOSS Submission to the ERA
Public Consultation Guidelines March 2006**

Recommendation Six:

WACOSS recommends that the guidelines indicate the minimum factors that the ERA *will* consider and differentiate those from others which they *may* consider.

Recommendation Seven:

WACOSS recommends that the ERA respond to individual submissions, in addition to putting out a public issues paper that responds to and addresses a summary of all the concerns raised in submissions.

Recommendation Eight:

WACOSS recommends that the ERA provide more information about how it will determine whether or not a comment is considered significant, and therefore provided with a response or included in an issues paper, and whether a public interest test would be used at this stage.

Recommendation Nine:

WACOSS recommends that the ERA always issues draft decisions, regardless of the number of respondents to the first round of consultation.

BACKGROUND TO WACOSS

The Western Australian Council of Social Service Incorporated (WACOSS) is the peak body of the community service sector across Western Australia. Since 1956, WACOSS has been developing and strengthening the non-government community services sector's capacity to assist all Western Australians. With over 350 members, WACOSS has strong relationships with the social services sector and seeks to represent their interests, and those of the disadvantaged individuals and families they assist at a service level. Given this relationship, WACOSS is in a unique position to comment on issues in our society that socially impact upon disadvantaged members of the community.

WACOSS is well respected within both government and non-government arenas as being an authoritative voice for consumers with regard to Utility reform in WA. WACOSS has developed a strong network with Utility Policy Workers across Australia, which provides us with information and expert opinion on these issues.

In March 2005, WACOSS commenced the Consumer Utilities Project, funded through the Department of Consumer and Employment Protection. This project will build upon the utility policy work WACOSS has undertaken over the past 4 years. The Consumer Utilities Project has been established to work with consumers and representative organisations to achieve better outcomes in the provision of essential services.

WACOSS has direct access to the issues of low-income and disadvantaged consumers through our Consumer Reference Group, which includes representatives from the Emergency Relief sector, Unions, Financial Counsellors and Community Legal Centres. These agencies provide us with policy information and direction in relation to our work and look to us to represent the interests of their clients with regard to water issues. We have taken on this role due to the level and severity of the Utility issues being raised by community agencies and the fact that there is no other resourced body in Western Australia representing these issues.

INTRODUCTION

WACOSS welcomes the ERA's development of Public Consultation Guidelines. We believe the use of guidelines to streamline consistent, well planned consultation processes will be helpful for the community, industry and regulator.

It is important that the guidelines pursue best practice community consultation, which is not hindered by short time-frames, a lack of resources, or inadequate community engagement.

*"It is neither effective nor appropriate to consult if a final decision has already been made, or if the commissioning body cannot influence a final decision, or when there is insufficient time and/or resources available. Ineffective or inappropriate consultation is counterproductive and increases apathy and cynicism - not only towards future consultations, but also political processes, public institutions and our systems of governance."*¹

As outlined below, not only are rigorous consultation practices beneficial to achieving better outcomes, they are also required under the ERA Act;

Section 26 of the Economic Regulation Authority Act (2003) states;

- (1) In performing its functions, other than the functions described in section 25(c) and (d), the Authority must have regard to-
- (g) The need to promote transparent decision-making processes that involve public consultation

WHY CONSULTATION IS IMPORTANT

The benefits of public involvement in decision making include:

- Reinforced legitimacy in the decision-making process
- Actual or potential problems revealed
- Demonstrate a commitment to accountability, democracy and transparency
- Help in planning and prioritising various options
- Improve the level, profile and efficiency of services
- Offer and/or create new perspectives and solutions on issues
- Provide an opportunity for community input on issues at times other than elections

The Department of Premier and Cabinet, Citizens and Civics unit have explored public consultation processes. Their report, Consulting Citizens: A Resource Guide makes a number of comments about effective consultation processes, including;

- Ample time should be provided for consultees to participate throughout the consultation process, to become informed of the issues, reflect upon the information and make considered responses.
- Consideration should be given to the meeting cycles of different organisations, and the time it takes for groups and individuals to be involved in formal discussions, debate and awareness raising.
- Using language that is clearly written and free from unnecessary jargon.

¹ Consulting Citizens, a resource guide. Department of Premier and Cabinet (WA) 2002. Page 6.

**WACOSS Submission to the ERA
Public Consultation Guidelines March 2006**

- Incorporating mechanisms to address differing levels of literacy in the community.

For the purpose of encouraging participation in consultation processes, it is vital that the information made available by the ERA is as clear, simple and understandable as possible.

It is important that the ERA consider the varied backgrounds, experience and level of interest of participants in the consultation process. This will result in consultation processes which are more inclusive for a diverse range of groups.

The Department of Premier and Cabinet Consulting Citizens Guide identified the types of people likely to be involved in consultation processes;

Highly involved: those who want to know what you are doing in detail. They will be willing to be engaged in one-on-one interviews, they will want to be involved in a Community Advisory Panel and directly negotiate with senior managers, ministerial advisers or Ministers. They are likely to be known to the organisation already – look through complaint files, letters to the Department or the Minister, in media articles or letters or in activist organisations.

Attentives: those who rate your organisation as one of their top 20 concerns. They will be prepared to engage in focus groups and other forms of shared control. They are likely to be academics, informed observers and leaders in the community.

Browsers: those who will read about the issue in the newspaper but don't or can't investigate themselves. The majority form their opinions based on what the highly involved and attentives think.

General Public: those who have not had the opportunity, support or skills to engage with the issue or with your organisation.

Recommendation One

WACOSS recommends that the language in the guidelines is made more clear and simple to understand and that the ERA communicates in a way that engages participation from diverse members of the community.

IMPORTANCE OF CONSULTATION ON ESSENTIAL SERVICE RELATED ISSUES

The Western Australian energy and water markets are undergoing significant change that will have wide ranging and significant impacts on consumers now and into the future. Since these utilities provide essential services, these impacts can have serious consequences on peoples' wellbeing.

The importance of essential service provision was recognised strongly in the Senate Poverty Inquiry, which reported that,

"Evidence indicated the importance of ensuring access for low income households to essential utilities such as electricity, gas, water and telephone

**WACOSS Submission to the ERA
Public Consultation Guidelines March 2006**

*services. These services provide the basic means by which any household is able to function in a modern society."*²

Furthermore, the Productivity Commission suggested

*"Reliable, affordable and sustainable energy services are critical to Australia's economic and social wellbeing. They are important inputs for most businesses and are essential for supporting basic quality of life."*³

Much of the market reform currently underway in Western Australia is accompanied by new legislation and regulatory arrangements to safeguard consumers, including a potential shift towards national regulation for electricity and gas markets. While the intention of regulation of essential service markets is to make the markets work effectively for everyone, research suggests that for many consumers, energy and water markets are at least somewhat dysfunctional, and for some consumers they are highly dysfunctional.

A report produced for the Ministerial Council on Energy⁴ suggested "there is a clear case for a strong and well-informed consumer voice in energy markets. The case is generally a function of key features of the market, including:

- the "essential" nature of the services provided;
- the "imbalance" created by having a few large and sophisticated sellers but many buyers, for whom energy typically represents a small proportion of their expenditure; and
- the highly technical nature of the industry and complex institutional arrangements that are necessary to facilitate competition in these markets, which limits the capacity for most consumers to participate actively in debate on key issues affecting energy supply."

The Allen Consulting Group report to the Ministerial Council on Energy described two key reasons for the strong need to utility consumer advocacy, namely due to the impacts of market reform on consumers, and the benefits of consumer input to the markets.

"Consumers' need for involvement in the development of the national energy market is clear:

- Consumers will be affected greatly by the nature of the national energy market and therefore have the right to have their views heard as the arrangements evolve.
- Consumer involvement can improve the quality of decision-making and the operation of the market, resulting in public benefits, as well as benefits to consumers themselves.

² Report from the Australian Senate Community Affairs References Committee Inquiry into Poverty and Financial Hardship (Senate Poverty Inquiry) Ch9, p191. 2004

³ Productivity Commission *Review of National Competition Policy* Section 8.2 'Energy' p180. April 2005

⁴ *Review of Consumer Advocacy Requirements* Report for User Participation Working Group, Prepared by KPMG for the Ministerial Council on Energy. March 2005

COMMENTS ON CONSULTATION GUIDELINES PAPER

PART ONE - BACKGROUND

Scope and Purpose

The ERA identifies objectives of transparency and accountability when making decisions in the public interest, and hence suggests that a standardised approach to consultation would be beneficial.

While WACOSS agrees with this suggestion, we would like to take it a step further. Consultation is not only relevant to the purposes of transparency and accountability. It goes to the heart of the effectiveness of the ERA and the quality of both the decisions that it makes and the outcomes that result.

WACOSS believes that public consultation actually improves the quality of decisions made, by increasing the diversity of information sources, exposing the ERA to different social contexts and interests than it may otherwise consider.

The value of contributions made by consumer representatives has been highlighted above.

Regulation of the WA Electricity, Gas and Water Industries

The guidelines provide a brief explanation of the background of the WA Electricity, Gas and Water Industries. WACOSS recommends that this information is expressed more clearly and simply.

For example, this section could point out that anyone who sells water, gas or electricity in WA is required to have a licence, that licences have certain conditions imposed upon the licence holders and explain what the ERA's job is in relation to ensuring that the licence holders meet those obligations.

It would also be appropriate to provide a quick summary of how industry self-regulation differs from regulation by the ERA in each industry and what the relationship is between the two.

Recommendation Two:

WACOSS recommends that the Guidelines provide a more clear background on the regulation of the electricity, gas and water industries, including of self-regulation in these industries.

The concept of public interest

WACOSS considers the explanation of how the ERA will consider the public interest could be greatly improved.

WACOSS Submission to the ERA Public Consultation Guidelines March 2006

While the ERA refers to three different models for considering public interest that it may take into account, it does not provide enough information about any of them as to provide a reader of this document with a good understanding of the ERA's perspective.

Additionally, there are other common tools in the WA government for considering public interest, particularly in relation to public consultation, that the ERA have not referred to. This may suggest that the ERA does not support, for example, the information in the WA Government's own Citizens and Civics Unit.

While the guidelines do go on into more detail about Public Interest, it is worth bearing in mind that some readers may not read on beyond the background if they are not confident of the integrity of the consultation process.

Recommendation Three:

WACOSS recommends that the ERA provide greater clarity in the Background section of the guidelines about what will guide the ERA's concept of Public Interest.

PART TWO – PUBLIC INTEREST

Determining the Public Interest

The ERA summarises a list of matters, drawn from Western Australian legislation, which may be taken into account in determining the public interest.

One of these is:

“the importance of competition, for example whether the licensee will provide new or vigorous competition in an area.”

WACOSS believes that this criterion should be expanded to include consideration of whether or not new, or any competition is beneficial or detrimental in a particular area or for a particular class of customers.

Recommendation Four:

WACOSS recommends that bullet point six referred to above be amended to:

“the importance and impact of competition, for example whether the licensee will provide new or vigorous competition in an area, and whether or not that competition will be beneficial or detrimental.”

When the Economic Regulation Authority Bill was introduced into Parliament, WACOSS made a submission to the Government regarding some concerns including, *inter alia*, the protection of the public interest. Those comments relate to the definition and application of the term “public interest”;

“Furthermore, it is essential that the concept of public interest, particularly with regard to triple bottom line accountability be specifically defined. There are serious concerns

**WACOSS Submission to the ERA
Public Consultation Guidelines March 2006**

regarding the differing interpretations of the public interest. The fact that the Regulator will be independent of Government removes significant elements of the accountability to the public that is achieved through Ministerial responsibility of elected persons. For this reason it is essential that the concept of public interest, as understood by those whose interests are to be protected, is well defined and provides clear guidance to the Regulator."

Recommendation Five:

WACOSS recommends that further discussion occur (perhaps via the ERA Consumer Consultative Committee) regarding the definition and criteria for determining the 'public interest' as such a definition has broader application within the work of the ERA, and not just for licence, contract, and charter approvals.

When the ERA will consult

The guidelines indicate when the ERA will undertake a public consultation process, "Where, in the opinion of the Authority, there is a significant public interest impact on any or a combination of the above factors."

WACOSS believes the guidelines should provide a more clear explanation of when the ERA are and are not likely to consult on an application. Since the guidelines suggest this is directly related to the ERA's determination of the public interest, it may require further consideration, as discussed in Recommendation Five.

This discussion may include reference to examples of the types of applications that the ERA would and would not consult on, according to their consideration of the public interest.

Determining the Scope of the Public Interest

WACOSS considers that all of the factors listed in the guidelines for consideration ought to be taken into account in determining the scope of the Public Interest.

However, the ERA guidelines only suggest that the list of factors may be considered. WACOSS suggests that the ERA guidelines must at least indicate the minimum factors that it *will* consider and differentiate those from others which they *may* consider.

If the guidelines do not demonstrate a commitment from the ERA to consider the interests of consumers, for example, as a minimum, then they do not create enough confidence for readers in the integrity of the process, and are therefore unlikely to encourage greater participation of respondents.

Recommendation Six:

WACOSS recommends that the guidelines indicate the minimum factors that the ERA *will* consider and differentiate those from others which they *may* consider.

**WACOSS Submission to the ERA
Public Consultation Guidelines March 2006**

Expectations of applicants

The guidelines suggest that applicants will be encouraged to provide comprehensive information about the Public Interest issues at stake with their application, including a Cost Benefit Analysis and an explanation of the positive benefits of licence approval.

WACOSS considers it is equally important that applicants identify any possible public detriment resulting, including proposed processes for overcoming them.

Summary

WACOSS is pleased that the ERA will not make a determination on a licence, contract or customer charter application unless it is sure that it will not be contrary to the public interest, but would like to see the guidelines for determining the public interest test and consultation trigger more clearly defined.

PART THREE – HOW DO PUBLIC CONSULTATION PROCEDURES WORK

Consultation process steps

Step One – Applicants present documentation to the Authority:

This step indicates that applicants present documentation to the ERA, who considers if that information is found to be complete. It should also indicate whether the ERA may request more information from an applicant, if it is found to be incomplete, before the application is released for public comment.

Step Two – The licence application is released for public comment:

WACOSS suggests the ERA release a background paper with information about the role, purpose and impact of the applications. This would give some background for the public and help people to determine whether or not it is important or in their interest to take the time and effort involved in making a response.

Step two indicates that all comments will be reviewed by the ERA. WACOSS suggests that all parties who provide a submission receive a written response acknowledging the issues they raised and the position of the Authority in relation to them, if any.

Recommendation Seven:

WACOSS recommends that the ERA respond to individual submissions, in addition to putting out a public issues paper that responds to and addresses a summary of all the concerns raised in submissions.

Step Three – An issues paper is released for public comment if the issues raised are considered by the Authority to be significant to the licence application:

It is necessary that Issues Papers released by the ERA include adequate detail and any relevant research as it relates to the topic for decision, particularly if it directly relates to why a particular path or determination is to be progressed. Ensuring that not only the views of the ERA, but the information that has led to those view being included in the issues paper will allow the public to provide more significant feedback- to not only the views, but how those views have been arrived at by the ERA.

In addition, any research commissioned by the ERA should be publicly available, to ensure all parties making submission have access to the most up to date information, and research upon which the ERA are basing their decisions on. If all parties have a greater shared understanding on issues, the consultation process would be greatly improved.

Recommendation Eight:

WACOSS recommends that the ERA provide more information about how it will determine whether or not a comment is considered significant, and therefore provided with a response or included in an issues paper, and whether a public interest test would be used at this stage.

**WACOSS Submission to the ERA
Public Consultation Guidelines March 2006**

Step Four – A draft decision is released for public comment:

WACOSS would not like to see Step Four skipped in the event of no submissions being received at Step Three. It is important that everyone is informed of the ERA's intention to make a particular decision, and be given a chance to respond to that draft decision, even though they may not have had an opportunity to participate in the original consultation process on the application.

Recommendation Nine:

WACOSS recommends that the ERA always issues draft decisions, regardless of the number of respondents to the first round of consultation.

Step Five – A final decision is made:

WACOSS would like to see the Authority inform all interested parties, as well as all respondents to the public consultation process who lodged a submission, who may or may not be registered on the interested persons list.

FURTHER INFORMATION

A number of resources may be useful for the Economic Regulation Authority to consider, these include;

- Consulting Citizens, A Resource Guide. Department of Premier and Cabinet (WA) 2002
- Consulting Citizens, Planning for Success. Department of Premier and Cabinet (WA) 2003
- Innovation in Community Engagement. Department of Planning and Infrastructure conference materials (WA) 2005
- Department of Trade and Industry (UK) Extending Competitive Markets: Empowered consumers, successful business. 2004.
- UNDP/World Bank Energy Sector Management Assistance Program. Stakeholder involvement in options assessment; promoting dialogue in meeting water and energy needs. 2003.
- Australian Communication Authority. Consumer Driven Communications: Strategies for Better Representation Issues Paper. 2005