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Energy Policy WA  
Level 1, 66 St Georges Terrace  
Perth WA 6000

Sent by email to: [EPWA-Submissions@dmirs.wa.gov.au](mailto:EPWA-Submissions@dmirs.wa.gov.au)

**Consultation draft of the Electricity Industry Amendment (Alternative Electricity Services) Bill 2023**

[Hero Property Management (**Hero**)] appreciates the opportunity to provide feedback on the consultation draft of the Electricity Industry Amendment (Alternative Electricity Services) Bill 2023 (**Draft Bill**).

Hero is an industrial developer in Perth and owns and operates embedded networks across our portfolio, including embedded networks connected to solar PV generation.

**Executive summary**

Hero welcomes and supports the reforms and thanks Energy Policy WA for the opportunity to comment. In the following submission:

1. Hero supports the extension of regulation to “large use customers” (i.e., customers who are not small use customers) but:
  - a. at present the differentiation set out in section 59U (3) does not apply to regulations made under section 59C, such that the Draft Bill presently, inappropriately, provides for unlimited regulation in respect of supply to large use customers – Hero proposes some possible ways to remedy this;
  - b. Hero considers that the matters described in section 59U(3)(m) (complaints and disputes) and (o) (disconnection etc) should be limited to small use customers;
  - c. the regulations which define alternative electricity services (**AES**) should be subject to formal consultation on the detailed drafting, to prevent unintended consequences.
2. Hero supports the use of fast-track applications.
3. Hero considers that pricing controls under both the AES code of practice (**AES Code**) or the regulations should be limited to small use customers.

4. Hero supports a 15-year registration limit, but suggests that for providers with generation, storage or network infrastructure, there should be a 15-year renewal as of right, to match current licence terms for such infrastructure.
5. Hero supports the proposal to force embedded network operators to provide third party access to their networks for consumers seeking access to alternative suppliers or renewable energy sources and agrees that Part 8 of the Act would not be an appropriate pathway to this access. However, Hero considers that in authorising this intrusion into private property rights, the Draft Bill should set at least some minimum pricing guidance, entitling the network operator to recover its efficient capital, operating and maintenance costs including a fair return and depreciation.
6. Hero supports the enforceable undertaking mechanism included in the Draft Bill.
7. On other matters:
  - a. Hero proposes that section 59ZC require the ERA to adopt audits of a reasonable scale, proportionate to the size of the audited business and the size of any harm likely to be disclosed. Also, audit costs should only be recoverable if the audit discloses a material non-compliance.
  - b. Hero is concerned that the ERA's disclosure powers in section 59ZD are much broader than in any other Part of the Act and contain no checks and balances at all.

## Submissions

### 1. Inclusion of large use customers

Hero supports the registration framework for providers of AES to both small and large use customers as this removes the current uncertainty associated with the categories of exemption from the licensing regime available under the *Electricity Industry Exemption Order 2005*. Whether an exemption is available under this exemption order is dependent on the individual facts of a particular network, supply or arrangement which sometimes produces illogical or arbitrary outcomes. The introduction of the registration framework will bring clarity to the regulatory landscape and introduce a level playing field for all providers of AES.

Hero also supports a differential regulatory approach in respect of small and large use customers, and subject to the comments below, considers that the degree of differentiation set out in section 59U(3)<sup>1</sup> is broadly appropriate.

However, Hero raises the following concerns with the Draft Bill as currently contemplated in relation to the above:

- **Regulation-making power does not differentiate between small and large customers:** Hero is particularly concerned by the broad scope of section 59C(2) and

<sup>1</sup> In section 59U (3):

- paragraphs (b)-(e), (h), (i) and (n) apply for small use customers.
- paragraphs (a), (f), (g), (j)-(m) and (o) apply for all customers.

(3) in the Draft Bill. This section gives a broad power for the regulations to “regulate” AES for all customers including large use customers. This power to regulate large use.

customers are not subject to the same limitations as are set out for the AES Code in section 59U.

Whilst Hero supports the overall registration framework also applying to large use customers, Hero submits that consumer level protections should only apply to small use customers as is currently the case in respect of licensed retailers. Hero notes the survey feedback mentioned in Energy Policy WA’s consultation guide that many large use customers are effectively in a monopoly supply arrangement. Whilst this may be true once those customers have entered into a commercial arrangement in respect of the relevant premises, large use customers do have more negotiating power before entry into of those commercial arrangements (for example, when negotiating the terms of their lease). In many cases, these potential tenants can have more negotiating leverage than the AES provider. It appears from the survey feedback that one of the key complaints is a lack of information at the time of entry into the commercial arrangements. This can be addressed by enhanced information provision, but Hero submits it is unnecessary and potentially harmful to interfere in the commercial bargain between a large use customer and an AES provider where the provision of AES is more likely to be part of a bigger commercial transaction with an overall risk-reward allocation meaning the regulation of just the energy aspects, and especially price, is unjustified and risky.

Under the Draft Bill as it currently stands, the Minister could choose not to make an AES Code and instead could have the Governor make a comprehensive suite of regulations binding all AES providers, including prescribing price controls for large customers. Hero also observes that there is a formal consultation process for the AES Code in section 59W but there is no formal equivalent for the regulations.

Hero acknowledges that this may not be Energy Policy WA’s intention but considers that the legislation should clearly signal the intended policy differentiation, rather than permitting future governments the choice between an appropriately differentiated structure under the AES Code, or an undifferentiated and potentially heavy-handed approach under the unfettered regulations.

Hero makes the following suggestions to assist with clarifying the scope of sections 59C(2) and (3).

- Option 1: If the intent is that the AES Code will be the main subordinate instrument, much like the Electricity Networks Access Code is the main subordinate instrument under Part 8, then the Draft Bill could reproduce the structure of Part 8 and the access aspects of Part 8A so that the AES Code is established as the main subordinate instrument with the regulations clearly used only to support it (for example dealing only with the definition of AES, enforcement, and the like). This would involve scaling back the scope of section 59C (2) and (3) substantially.

- Option 2: If Energy Policy WA wants to preserve flexibility to include matters in either the AES Code or the regulations, then Hero suggests the list of matters and the implied limitations from section 59U(3) is replicated in respect of the regulation making powers in sections 59C(2) and (3).
- Option 3: Move the concept of differentiation from where it appears implicitly in the paragraphs of section 59U(3), to an overarching policy statement in section 59A, listing the relevant concepts which are to be regulated only for small use customers, and those which are to be regulated for all customers.
- Option 4: Include in regulation 59C a list of matters the regulations may not deal with, for non-small use customers. As an absolute minimum, this should include pricing and price-related matters.
- **Additional matters which should be regulated for small use customers only:** Although many of the matters listed in section 59U (3) of the Draft Bill are limited to small use customers, Hero is concerned that the following items are not:
  - Section 59U(3)(m) – consistent with the approach for licence holders, Hero submits that the regulation of complaints handling, and dispute resolution should be restricted to small use customers.
  - Section 59U(3)(o) – Hero submits that the regulation of disconnection, suspension, interruption and restoration of an AES should be limited to small use customers.

In both these instances, given that large use customers are better able to negotiate their own commercial bargain at the time of entry into the AES arrangement it seems unnecessary and unjustified to intervene and impose consumer level protections which are generally reserved to protect those who are either unsophisticated or who lack resources and bargaining power. Intervening in this way with large use customers could have serious commercial ramifications or unintended consequences where either party could be the 'wrong doer'.

- **Consultation on definition of AESs:** Under section 59C (1), the activities that will comprise AES will be prescribed by regulation. Hero considers that the Act should require a formal consultation process before these critical regulations are made or amended. It is important that stakeholders be able to provide feedback on the detailed drafting of these definitions, to ensure there are no unintended consequences or excessive compliance costs in an area where new and innovative business models are required in order to be competitive. Without this feedback, there is a risk that the new regime might inadvertently recreate the present unsatisfactory situation, in which the regulatory outcome and cost for both supplier and customer may change materially based on differences in individual circumstances which should not be relevant.

## 2. 'Fast track' applications

Hero supports the option of a 'fast track' process for registration applications as contemplated in the consultation guide.

(08) 6498 9470  
 reception@heropm.com.au  
 Unit 3, 915 Cockburn Road,  
 Henderson WA 6166  
 ABN 91 530 482 069

**heropm.com.au**

### 3. Pricing controls

Hero submits that pricing controls should only be applicable to, at most, small use customers as is currently contemplated by section 59U(3)(d).

As noted above, for large use customers the provision of AES is more likely to be part of a bigger commercial transaction with an overall risk-reward allocation meaning the regulation of price in just the energy aspects is unjustified. Provided large use customers are provided with adequate information on pricing at the time of commercial negotiations, which large use customers are generally sophisticated enough to require, they can compare offers from different AES providers within different potential premises and embedded networks at the time of entry into a lease or renewal of a lease in respect of the relevant premises and can negotiate a commercial deal in the same way as they negotiate their lease terms and conditions. AES providers need the certainty that they can recover their capital and operating costs over time and imposing price controls has the potential to jeopardise the ability to do this.

The measures discussed below regarding access to market should help remedy the imbalance of bargaining power which can arise with some (not all) large use tenants.

### 4. Maximum 15-year registration

Hero supports a 15-year term for a registration, being consistent with the current term for a retail licence. However, Hero notes that generation, transmission and distribution licences can have a 30-year term. Hero submits that an AES provider should have a right to a second 15-year period, as of right, after the initial 15-year term where the AES provider applies for renewal in the final year of the initial term and the AES provider either owns or operates generation or storage equipment or network infrastructure. This would then align with the maximum term of a generation, transmission or distribution licence.

### 5. Master meter connections and/or access to renewable energy sources

Section 59U(3)(f) of the Draft Bill provides that the AES Code may include requirements “facilitating access to electricity or electricity services by other providers”. The principles of cost recovery arrangements referred to in the consultation guide do not appear in the Draft Bill.

Hero supports this in principle but considers that the Bill must provide more protection for asset owners.

A private embedded network will be a non-covered network under Part 8 of the Act (unless subject to a coverage decision which is unlikely) and therefore requiring the embedded network service provider to grant access to its network by a customer or another provider bypasses all of the protections built into Part 8 of the Act and the *Electricity Networks Access Code* made under Part 8 (or the *Pilbara Networks Access Code* under Part 8A where applicable). Hero accepts that requiring a coverage decision to enable access to be granted is likely impracticable and inconsistent with the intent of the reforms.

However, forcing an asset owner to provide third party access remains a significant intrusion into private property rights, with potentially serious commercial consequences, and it requires a sensible balancing between the rights of the access seeker and the rights of the asset owner (who invested the capital). The policy position has long been established in Australia that a person providing third party access should be able to recover the efficient cost of doing so, including a risk-reflective return on its investment. Although the scale is smaller, there is no reason in policy or economics why the outcome should be different for an embedded network operator.

The challenge for the government is to create a suitably quick and simple mechanism to discover this price, which works at an embedded network scale. Hero acknowledges that this is not straightforward, and the detail will need to appear in the AES Code, but Hero considers that as a minimum the Draft Bill should enshrine the fundamental principles relating to efficient cost recovery. Thus the Draft Bill should provide that anyone obtaining access under sections 59U(3)(f) or (g) must pay, in addition to the cost of energy or generation, a fair tariff to reflect the efficient capital, operating and maintenance costs of the embedded network including depreciation and a reasonable rate of return.

Section 59U(3)(g) of the Draft Bill provides that the AES Code may include requirements “facilitating access to electricity sources with low greenhouse gas emissions”. Hero supports this and notes that this reflects the business model of many AES providers but again the Draft Bill does not reflect the intent included in the consultation guide which is that this must be practicable and at the customer’s reasonable cost. Hero submits that these fundamental principles should be in the Draft Bill with the detail to be developed in the AES Code.

## 6. Enforceable undertakings

Hero supports the enforceable undertaking mechanism included in the Draft Bill.

## 7. Other comments

### Compliance audits

Under section 59ZC, the Economic Regulation Authority (**ERA**) may appoint a person to carry out a compliance audit in accordance with a process determined by the ERA and at the cost of the registration holder. There are no limits on the grounds or extent of this audit or how frequently it can be carried out. Although there is a requirement for the costs to be reasonable there is no requirement for the process to be reasonable. This could lead to a situation where the registration holder is required to pay the reasonable costs of an extensive (and arguably unreasonable) process. In simple terms, under section 59ZC as drafted, if the ERA establishes a Rolls Royce audit process, the registration holder will be required to pay a reasonable Rolls Royce price, when in fact a Toyota audit would have sufficed.

Hero submits that the Draft Bill should include obligations on the ERA to ensure compliance audits are efficient and proportionate, in terms of scale and scope, to the business being audited and to likely harm which would be associated with any noncompliance the audit may find. Hero also submits that the Draft Bill should limit these audits to no more than once every 24 months which is consistent with the timeframe for audits of licence holders under Part 2 of the Act.

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Hero also suggests that the costs of the audit should only be recoverable from the registration holder if the audit finds a material noncompliance. This reflects the practice often found in commercial agreements when providing for third party audits.

### **Confidential information**

Under section 59ZD of the Draft Bill, there is no provision for protection of confidential information. No other part of the Act contains such a broad ability for the ERA to disclose information, including in respect of licence holder information under Part 2 and Part 3. Other parts of the Act leave the management of confidential information to regulations and other subsidiary instruments, for example section 104B(n) in Part 8 and section 120C(q) in Part 8A, which enables suitable checks and balances to be included. As a minimum, the Draft Bill should provide that the regulations must specify suitable checks and balances.

Hero observes that the protections set out in section 55 of the ERA's own Act would not apply to disclosure under section 59ZD.

Hero submits also that Part 3A functions should be added to the Board review matters under section 130(2)(l) and the regulations should be required to create a process before disclosure of confidential information can occur.

If Energy Policy WA would like to discuss any aspects of the above further, please contact me at [REDACTED]

Yours sincerely

[REDACTED]

**Julie Drago**

Chief Executive Officer

