SHOPPING CENTRE
COUNCIL OF AUSTRALIA

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Energy Policy WA
Department of Mines, Industry Regulation and Safety
Level 1, 66 St Georges Terrace
PERTH WA 6000

By email: EPWA-Submissions@dmirs.wa.gov.au

To Whom It May Concern

Consultation Draft
Electricity Industry (Alternative Electricity Services) Amendment Bill 2023

Thank you for the opportunity to comment on the Consultation Draft *Electricity Industry (Alternative Electricity Services) Amendment Bill 2023,* and related material. We have also reviewed the *Stakeholder Consultation Guide*. This submission is provided in good faith and as a basis for further discussion.

We note that the Government's website suggests that embedded networks will be an 'Alternative Electricity Service' (AES) as defined under the Amendment Bill, with an anticipated 'AES Code of Practice' to ultimately be developed and made under the Act (subject to the Bill's passage through the Parliament).

As outlined below, we recommend several amendments to the Bill. Urgent further consultation is also needed.

Our proposed amendments include the removal of section 59U (3) to ensure that the need, detail and basis of such provisions can be properly considered at the stage of any draft AES Code development.

Overall, we are incredibly concerned with the proposed regulatory burden under the Amendment Bill, and note that the proposed regulatory framework is way out of alignment with equivalent frameworks in other jurisdictions that have a 'customer protection' focus and have operated for some time.

Noting the above, we believe the Bill:

- Is overly and unjustifiably prescriptive, and is not a 'low-cost, light-touch, fit-for-purpose' approach;
- Lacks a clear and substantiated basis for key parts;
- Lacks differentiation and clarity in relation to retail and network issues (e.g. 'supply' is referred to in context of the 'sale' of electricity);
- Relies too much on 'future' decisions (e.g. by the Authority), mechanisms (e.g. future Regulations and AES Codes) and costs (e.g. under the Ombudsman Scheme) – which contrasts with the comment in the '*Tailoring Customer Protections*' report that (at page 11) '*the AES Code will be used as the sole repository for all code obligations related to prescribed AES to ensure a simple registration framework*';
- Is heavy-handed (particularly the proposed $100,000 fines – which go above and beyond the 'up to' $100,000 fines in the current Act - and much of Division 7);
- Does not wholly account for our experience in contracting and the function of the WA electricity market; and

- Highlights a potential limited understanding by the Government as to how the proposed regulatory risk and burden, and associated costs, will fall onto AES providers, noting that in the case of shopping centres that embedded networks are ancillary activities.

The level of prescription in the Bill goes well beyond any 'comparative' heads of power for similar regulatory frameworks in other jurisdictions, including the fairly 'tried and tested' regime administered by the Australian Energy Regulator (AER) under the National Energy Retail Law (NERL) and other mechanisms. The proposed approach also stands in contrast with how other regulatory regimes have progressed, including when registration obligations were imposed in Victoria.

Further, we challenge the claim in the Guide that the amendments 'are based on the recommendations' in the '*Tailoring Customer Protections*' report. The recommendations (1 through to 6) in that report are broad, and the highly prescriptive elements in the Bill such as section 59U go well beyond what could be considered a 'framework', or structure, and the recommendations in that report. Further, the proposed regulatory framework seeks to include large use customers, whereas the report's recommendations related to small use customers. The Guide also expressly notes (at page 6) what is described as 'minor amendments' (though, are actually substantive amendments) that go beyond the report – including issues relating to consultation requirements, meter connections and net zero emission energy sources. Anything relating to meter connections is certainly not a 'minor' issue.

Further, we challenge the claim in the Guide that 'the Act amendments provide the legislative framework *that is needed*…' (our emphasis). When comparing legislation in other jurisdictions, the overly prescriptive nature of the Bill is not 'needed' to ensure a fit-for-purpose approach.

In addition, we recommend that the Government adopts a more balanced and positive narrative in relation to embedded networks.

Overall, we fear that parts of Government have a desired 'gotcha' approach to embedded networks, relying too much on unsubstantiated claims; rather than adopting a balanced approach; appreciating that embedded networks are an ancillary activity; learning from experience under other regulatory frameworks and partnering with embedded network operators.

In this regard, an overarching and express policy principle that is missing from the Government is that shopping centre embedded networks are ancillary, and that the overarching AES regulatory framework needs to be a low-cost, light-touch and fit-for-purpose approach. Such a clear statement and policy principle needs to be clearly expressed, particularly given there are no demonstrated or substantiated structural issues or policy problems.

Further, the *Embedded Network Survey* has a limited sample size, and given its structure and tone we are concerned that it would be overly relied upon as a justification to drive any policy change. To cite one example, the references in the Guide at page 5 make unsubstantiated claims in relation to pricing controls including certain user 'having a lack of negotiating power' (N.B. would they have more negotiating power with Synergy?) and 10 customers believing they were 'worse off'. There is little evidence to rely on such claims.

As part of the proposed regulatory approach, it may be that shopping centre embedded networks are being 'lumped-in' with other proposed AES's or scenarios that have arisen in residential networks. However, given the uncertainty, regulatory risk and material impact of the proposed Amendment Bill, there needs to be a clearer articulation of what actual problems exist and the best way to resolve them. Again, we respectfully submit that feedback from 10 customers in a Survey does not demonstrate there is a problem or market failure.

We appreciate the opportunity to discuss the Amendment Bill with the Government.

We are however disappointed as we believe we have been forthcoming in our engagement on this issue; yet this experience isn't reflected in any of the consultation material (e.g. the Survey is referenced, along with generic claims against embedded networks; versus a balanced perspective from an embedded network operator perspective including how such issues could be achieved). This submission formalises some of the key issues discussed with the Government. We look forward to continued discussions with the Government on this issue.

In short, we have **three overarching concerns**:

1. We are concerned with the inflammatory commentary in relation to embedded networks, including comments in the Consultation Guide that embedded networks are 'effectively a monopoly', including a basis of such a claim being on an *Embedded Network Survey* that had unrepresentative sample size, along with what we believe to be unsubstantiated claims

   This kind of simplistic commentary inflames issues that do not need to be, particularly where there are no documented or substantiated market failures along with limited real-harms being caused. In some cases, we believe the Government may be looking at solutions in search of a problem. We 'get' the political rhetoric around such issues, however it doesn't inform positive public policy. In addition, there is an irony whereby the WA energy market is in effect a monopoly due to the Government's ownership and market structure.

2. We are concerned the Amendment Bill (particularly the new Part 3A) is overly and unjustifiably detailed and over-specified, and goes beyond what we recommend should be a more-principled based 'heads of power' in the legislation for any future AES Code.

   When compared with 'equivalent' legislative structures and heads of power in other jurisdictions, the Amendment Bill is overly prescriptive and detailed. This approach contrasts with our experience with the National Energy Retail Law, National Energy Retail Rules and the AER's approach.

   We have been involved in every version of the AER's retail and network embedded network framework since its establishment.

   Further, when registration was considered under Victorian legislation there was a lengthy consultation process on detailed issues along with there being an existing regulatory framework in place before registration obligations were imposed. In effect, the proposed WA approach stands in contrast whereby regulatory obligations (and fines) are being imposed first, ahead of any understanding of what the AES framework looks like.

   In addition to legislation in other jurisdictions, the new Part 3A is also more prescriptive that parts of the existing Act, including current section 39 which already enables the Authority to issue Codes (and is based on more general and broad principles).

Why does section 39 remain general and principles based, yet the proposed section 59U is incredibly prescriptive and inflexible?

At no point does the Amendment Bill provide a foundation principle to clarify or contextualise that embedded networks are generally an ancillary activity (versus being core business), and the regulatory framework should be low-cost, light-handed and fit-for-purpose including to ensure that customer protections should be provided in a practicable manner.

Aside from detailed provisions, we are concerned about – for instance – the prevalent use of the term 'must' in terms of what an AES provider 'must' do (prescribed over ten times). Ahead of the actual development of any AES Code, this is overly prescriptive.

We are also alarmed at the proposed fines which in our view are not commensurate with any risk or harm that may be caused (e.g. section 59D, a fine of $100,000 for not being a registered AES), and in the absence in some cases of an appropriate remedy noting that, for instance, the Bill enables the Government to 'take reasonable steps' on certain issues but such a principal isn't extended to an AES applicant or provider.

We believe this detail – including (for example) section 59U (2) which states that a code 'must' set out customers protection requirements' without any qualification - could give rise to expectations of certain stakeholders about what 'must' be included in any future Code and could also limit any flexibility needed in a Code due to future circumstances.

3. We are concerned that further issues are deferred to future Regulations (which in some cases, are incredibly limited to the detail in the Bill – e.g. the Regulation 'must'…), future forms / processes / applications fees determined by the Government, costs (e.g. audit costs, the provisions of 'any information the 'Authority considers reasonable') for the Authority, and ultimately the provisions of a Draft AES Code.

   While we note that there will be further opportunities for comment on draft Regulations and the AES Code, noting the ancillary nature of embedded networks in shopping centres, this gives rise to great concerns of regulatory and consultation fatigue, and that the new framework may impose additional risks, costs and compliance requirements that are not reasonable, fit-for-purpose or balance the overall operation of embedded networks.

Noting the above, we respectfully seek the following changes:

- Firstly, that amendments are made to the Bill (see detailed comments below), and
- Secondly, in the event that a Bill is tabled, the Minister provides balanced and positive commentary on embedded networks particularly in relation to shopping centre embedded networks, including in the Government's Explanatory Note, second reading speech, and any briefings to cross-bench MPs.

A key message should be that that embedded networks are a legitimate part of the electricity network, and in the case of shopping centres operate under reasonable arrangements. They exist for historical reasons including due to Government owned-entities (including 'monopolies' – see comment above) not wanting the cost or operational risk of building or operating embedded networks.

A further key message is that the Government will ensure that the new framework is low-cost, light-handed and fit-for-purpose and will not impose unnecessary costs or compliance risks onto AES providers, and that these costs can be passed onto users.

Only regulated parties can provide a properly informed view as to the regulatory and cost burden, and at this stage the consideration of such views seems to be lacking.

- Thirdly, subject to the passage of the Bill, there needs to be clarity as to what embedded networks will be covered including for existing networks.

  There should be at least a 12-month transition period from the date of the Bill's commencement to enable a provider to apply for registration, and set up arrangements in order to ensure compliance. This should be accompanied with a proactive engagement and regulatory compliance program by the Government versus the Government trying to 'catch-out' providers or make them public policy scape-goats, along with ensuring the AES Code and its application is clear and well-understood by all relevant parties.

Specifically, we have the following comments for the Government's consideration:

- **Embedded network survey**

  We note the survey results published on the Department's website, including that the response was incredibly low to be considered in any way representative particularly where certain 'findings' are relied upon to justify certain commentary and/or change. We are also mindful that, in our experience, certain embedded network tenants use regulatory processes to argue for more favourable commercial outcomes under the guise of a public policy failure or with the intent to shift more risk to embedded network operators. Such claims need to be treated with a grain of salt.

  An unjustified imbalance is also highlighted in the Consultation Guide whereby the views of embedded network operators are clearly not articulated or noted as a relevant factor in 'informing' any future Code.

- **Small / large customers**

  We note that neither small or large customers are defined.

  In any case, using the normal definition of small and large customers, we do not support the AES protections being provided to large use customers. Further, we believe that 'small customers' that are large companies should not be extended the protections. In this respect, we believe that section 59C (2) (b) and (c) should be amended to ensure that the regulatory framework can only apply in relation to small customers. Similarly, we believe that section 59F (2) (d) should be clarified to limit application to small customers.

- **Future Regulation versus an AES Code of Practice**

  From a clarity perspective, any relevant requirements should be set out in a single mechanism that is easy to access, understand and apply. We are concerned that the Amendment Bill refers to the following:

  - *Terms and conditions* that 'may' be determined by the Authority,

- *Terms and conditions* (including 'other' terms and conditions) that can be prescribed in the Regulations, and

- *Requirements* within an AES Code.

The above means that requirements can be imposed on an embedded network operator under various mechanisms, giving rise to a potential lack of awareness or consistency between different mechanisms.

Having obligations under several mechanisms also contrasts with the comment in the '*Tailoring Customer Protections*' report that (at page 11) '*the AES Code will be used as the sole repository for all code obligations related to prescribed AES to ensure a simple registration framework*'.

The structure of the Bill suggests that an AES will not be the sole repository for obligations.

All relevant requirements that an operator should be required to abide by should be clear and in a single mechanism and should acknowledge that energy services are ancillary, not the core business of AES's (i.e. there are no large regulatory divisions running the AES as there will be within major energy companies).

- **Class of embedded network registrants**

We believe that clarity should be provided as to what embedded networks any future AES Code will apply to, which should reflect the cost / regulatory burden weighed against the customer risks and protections. For instance, the AER's framework applies (e.g. Registrable Exemption 1) to persons selling energy to 10+ small commercial customers within the limits of the site they own and operate. The WA Government may want to introduce a similar class threshold to ensure consistency and clarity.

- **Deemed or non-registered activities**

We are greatly concerned that there is no provision for activities that could be deemed or non-registered. For instance, this could include the sale of energy to related entities which, in our case, could include the provision of electricity to a related entity undertaking on-site construction or related activity. The AER framework provides for such circumstances.

- **$100,000 fine / $5,000 daily penalty**

The proposed fines are not appropriate to be applied to AES providers, and overlooks that fact that AES providers operate as an ancillary activity. No comparison can be drawn to a licensed electricity provider, their activities or their customer base whereby such fines could be recovered. Further, the existing Act provides in places that a fine is to 'be no more than' or 'not exceeding' $100,000. At the very least, the structure of such provisions should be reflected under the new Part 3A where relevant.

- **Section 59A – Purpose of part**

A new subsection (e) should be inserted to provide that the registration framework is '*to ensure a low-cost, light-handed and fit-for-purpose regulation framework for AES applicants and providers in line with the ancillary nature of such services'*. The regulation should include for AES providers to pass regulator costs onto end use customers, which will help ensure unnecessary regulatory burden is given due consideration.

A new subsection (f) should be inserted to provide that the registration framework will seek '*to ensure operational efficiency including alignment with other jurisdictions*'.

- **What definition of 'the public interest'?**

  The Amendment Bill makes reference to 'the public interest' in the Authority's consideration of exercising its powers, including in taking into account several relevant issues (e.g. under section 59F). The 'public interest' is not defined in the Amendment Bill, and there does not seem to be a common definition under WA policy legislation. We understand the principle of the public interest, however we seek clarity as to what definition will be used and how it will be applied in the context of the Amendment Bill.

- **Registration requirements and provisions (Divisions 2 and 3)**

  We have noted the registration requirements.

  We submit that the Authority will need to engage with our industry on the issue of registration. It has been our experience that registration of shopping centres can require a nuanced approach, including given the common ownership structures within our industry such as joint-ventures and trusts, along with operating structures whereby management can be undertaken by a related-entity. We are also keen to ensure section 59L and 59J operate in a sensible manner, such as registration not being required due to a change of unit-holders within an ASX-listed structure or trust, or a joint-venture partner.

  We support the registration being for a period of not more than 15-years. Our industry is generally based on holding and investing in assets over a long period of time.

- **Section 59Q – Registration and annual fees**

  Ahead of the Bill being tabled, there needs to be clarity on the nature of any proposed annual fees, and the basis and structure of such fees. We again highlight that shopping centre embedded networks are ancillary activities, and the registration fee could have a harmful impact on the efficient operation of an embedded network.

  We believe that the pricing principle should be introduced that (similar to section 59ZC (4) of the Act) a fee should be based on the Authority's 'reasonable costs and expenses'. A registration fee should not form part of a general revenue raising from the Authority.

- **Section 59T – Register**

  We believe that section 59T (4) (b) should be removed from the Amendment Bill. Having a person's name and contact details on the public register is not something that is common on other public registers; it has the potential to harm a person's privacy; and the only stakeholders that need to know such information are the embedded network customers (which could be covered in a Code; noting section 59U). We note that the 'contact details' of any other person are not provided for in the current Act – meaning that no other electricity provider or any personnel within the Authority are expected to have their personal contact details on a public register or website.

- **The risk of unreasonable requirements and non-registration**

  Noting the above comments the Government needs to be aware of the risk of imposing unreasonable requirements on AES providers and the risk of non-registration, including whereby non-registration could affect the ability of shopping centre tenants to open and trade.

- **Section 59U – AES Code of Practice**

  We have several concerns with this section, which is ultimately a 'Table of Contents' for any AES Code. As noted earlier in this submission, we believe that this section should be removed from the Amendment Bill to ensure that the need, detail and basis of such provisions can be properly considered at the stage of any draft Code development.

  There has not been extensive consultation or consideration on these issues to date, and without sufficient background or explanatory material being provided, the provisions can be, to an extent, difficult to comment on in detail.

  Our core concern lies with the lack of clearly policy principles upon how such 'customer protections' may be enshrined in a Code of Practice.

  It doesn't give us great comfort at this stage that the protections are designed to cover 'all scenarios' of AES providers.

  If such provisions are to remain in a revised Amendment Bill, urgent consultation is needed on these issues and the Government should provide express clarity in a written publication, and in any further consultation material, ahead of the Bill being tabled into the Parliament.

  Our comments below related to sub-clause (3) and align with the relevant clauses:

  a) *Information to be contained in a customer contract* – this has the potential to be limitless, incredibly onerous and we interpret that this could be a form of to-be-developed standard form contract (possibly under section 51). We are also concerned this could be the Government prescribing issues that should be issues agreed on commercial terms.

  b) *Ongoing provision of information to small use customers* – clarity if needed as to what 'ongoing provision of information' is anticipated, particularly if this relates to issues not relevant under the contract.

  c) *Obtaining the consent of small use customers* – this should be amended to note that customers cannot unreasonably withhold their consent including whereby the embedded network operator has complied with relevant requirements under the Act / regulation / AES Code.

  d) *Regulating pricing and pricing controls for small use customers* – immediate clarity is needed on this issue, including that it should be based on not being any higher than the standing offer price / gazetted tariff that would be charged for the customer if under a direct supply. We are also concerned with this provision given that the WA electricity market is a monopoly, and we don't want to be in the position of being a price-taker from a WA Government owned business, and then regulated as to the pricing for the selling of electricity to our small business customers. There needs to be an arms-length process in how the pricing provisions work.

e) *Standards of conduct in the supply and marketing of services to small use customers* – we would welcome clarity, but support that operators should not undertake false, misleading or undesirable marketing.

f) *Facilitating access to service provided by other providers* – there needs to be clarity that there be no obligation that would incur a capital expense or ongoing substantial repair and maintenance costs to the owner or operator; that an owner has a right to ensure the integrity, safety and reliability of their overall network; and that a tenant cannot unreasonably disrupt the normal operations of the shopping centre or any other tenant. Any facilitation (e.g. to the main meter) should also be at a customer's reasonable costs.

g) *Facilitating access electricity sources with low greenhouse gas emissions* – similar to the above, there should be no obligation on an owner to incur any capital expense to facilitate such access. We note that this is a new issue not initially raised in the '*Tailoring Customer Protections'* report.

h) *The methods or principles to be applied in the preparation for accounts for small use customers* – we seek clarity as to the intent of this provision.

i) *Matters relating to bills for small use customers* – we broadly support the proposed provisions, however this provision should not be used to enable to customer to abrogate their responsibilities under a contract.

j) *Metering of the supply of electricity* – we are concerned that this will impose additional requirements beyond existing metering rules. We also seek clarity as to what is meant as to accessing metering data. Meter reading will be provided with billing; however this is very broad. There is a concern if meter data is required in a form that is not available within the meter (requiring a new meter, significant capital costs can be involved to modify switchboards / switch rooms to facilitate). Also it needs to be noted that payment for metering delivery services usually incur additional costs.

k) *Technical requirements, including quality and reliability standards* – we are deeply concerned that the AES Code would seek to be a technical Code in relation to issues that are covered under other rules.

l) *Asset management systems* – we are concerned that this provision would see the Government dictating what management systems and platform we use for the efficient and compliant operation of our assets and businesses. We are concerned that this provision simply reflects section 14 of the Act, which clearly applies to electricity assets held by licensed electricity companies.

m) *Internal and external complaints handling and dispute resolution processes* – we are unclear on the different between internal and external complaints.

n) *The continuity of supply of electricity to small use customers* – we are unclear as to the intent of this provision.

o) *The disconnection, suspension and interruption and restoration of an AES* – we generally support such provisions, but seek clarity on what is proposed.

- **Division 7**

We submit that much of Division 7 is incredibly heavy-handed, including the rights of the Authority, the manner in which such rights can be exercised, the issuing of fines to registration holders, and (at section 59ZG) the power to enter land to rectify a contravention. We request further discussion on this Division ahead of the tabling of the Amendment Bill.

- **Section 90 – (Electricity Ombudsman Scheme)**

We are greatly concerned with the proposal that AES customer contracts would be subject to the Ombudsman Scheme, under (yet another) further approval by the Authority and in absence of any substantive detail as to what this would entail. It is also concerning that evidence of being a member of the Ombudsman Scheme would be needed as a 'pre-condition' for registration (which seems at odds with the recommendation in the '*Tailoring Customer Protections'* report that membership would be a condition (not a pre-condition) of registration).

This approach of automatically requiring AES providers to be members of the Ombudsman Scheme stands in stark contrast to the approach undertaken in other jurisdictions whereby there was detailed consultation and engagement ahead of any detailed regulatory obligation.

We would welcome an opportunity to discuss this submission with Energy Policy WA. As noted above, we are greatly concerned about the regulatory burden proposed under the Amendment Bill. We are also concerned about the need for further detailed consultation, and the drivers for change, noting issues such as the express acknowledgement (in the *Tailoring Customer Protections* report) that no formal comments were made on the initial Directions Report, along with the limited sample size of the Embedded Network Survey. We would also urge Energy Policy WA to consider aspects of the AER's regulatory approach.

As always, please feel free to contact me on [redacted]

Yours sincerely,

Angus Nardi
Executive Director