



Department of **Energy, Mines,
Industry Regulation and Safety**
Energy Policy WA



SHARING THE POWER

Alternative electricity services framework – developing supporting regulations

Consultation paper –
proposed general regulations
and a consequential amendment
to the Ombudsman regulations

FEBRUARY 2024





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Glossary

Term	Definition
Act	<i>Electricity Industry Act 2004</i>
Amended Act	<i>Electricity Industry Act 2004 (as amended by the AES Bill)</i>
AES	Alternative electricity service, which is an electricity service that has been prescribed by regulations to be an AES.
AES Bill	Electricity Industry (Alternative Electricity Services) Amendment Bill 2023
AES Code	Alternative Electricity Service Code of Practice
Coordinator	Coordinator of Energy as defined by <i>Energy Coordination Act 1994</i>
Department	Department of Energy, Mines, Industry Regulation and Safety
EPWA	Energy Policy WA, Department of Mines, Industry Regulation and Safety
ERA or Authority	Economic Regulation Authority (referred to as the Authority in the AES Bill but the ERA in this paper)
MWh	megawatt hours
Ombudsman Regulations	Electricity Industry (Ombudsman Scheme) Regulations 2005
OSPA	On-site Power Supply Arrangements
registration holder	This is a person who holds a registration to provide an AES
Small Use Code	Code of Conduct for the Supply of Electricity to Small Use Customers
SWIS	South West Interconnected System

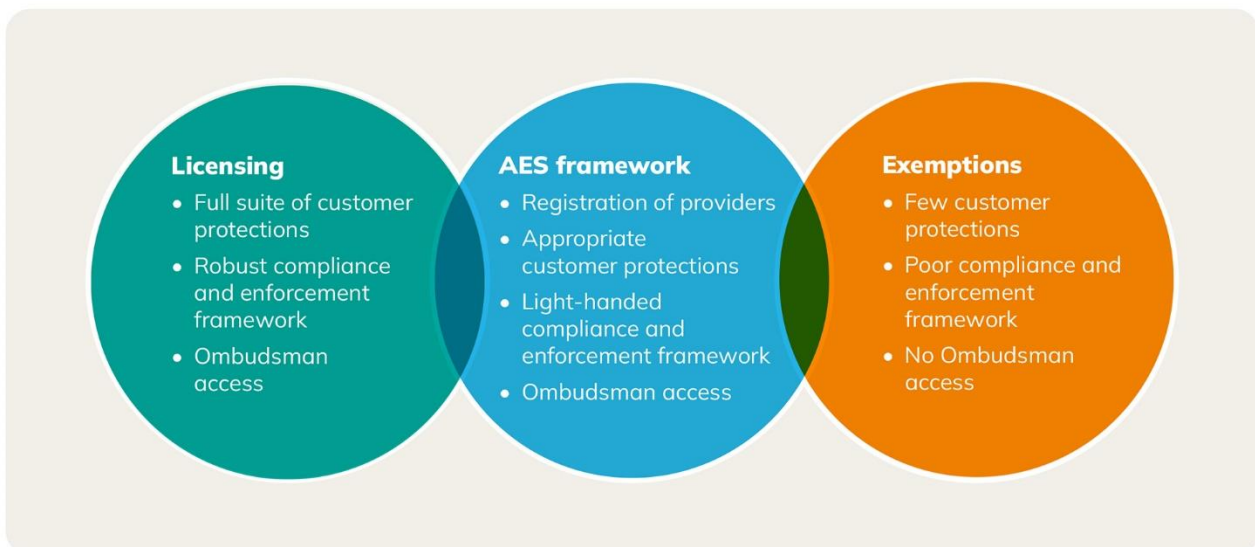


Overview

What is the AES registration framework?

The AES registration framework will deliver enforceable protections for electricity customers of new and emerging business models relevant to the type of service being provided.

- The AES framework will operate alongside the existing electricity licensing and exemption frameworks established under Part 2 of the *Electricity industry Act 2004*.
- The framework is designed to provide a fit for purpose regulatory regime to extend enforceable protections to customers of innovative and emerging electricity services.
- To allow flexibility for the framework to be applied to new and innovative services, the activities regulated under the framework will be prescribed in regulations. The requirements that need to be adhered to by providers of each prescribed service will be tailored to the characteristics of each prescribed service.
- The framework requires providers of a prescribed service to register, to become a member of the Energy Ombudsman scheme, and to comply with obligations contained in a single code of practice, the Alternative Electricity Services code of practice (AES Code).
- The Economic Regulation Authority (ERA) will be responsible for monitoring compliance with, and enforcement of, the registration framework, as well as for maintaining the register of persons who provide an AES.
- The framework is designed to be flexible enough to be able to cover a broad range of electricity-related activities into the future, if and when a need for regulation of those activities arises.



The Electricity Industry (Alternative Electricity Services) Bill 2023 proposes changes to the *Electricity Industry Act 2004* (Act) to enable the alternative electricity services (AES) registration framework. These changes include the power to make regulations to support the implementation of the framework.

Three themes for these supporting regulations have been identified:

- regulations applying generally to the AES registration framework (general regulations);
- regulations prescribing a service as an AES (prescribed services regulations); and



- regulations defining fees (prescribed services registration fee regulations).

The purpose of this paper is to seek stakeholder feedback on Energy Policy WA's proposals for the development of general regulations. Section 1 identifies the heads of powers under the Amended Act that allow the making of regulations. Section 2 and Section 3 respectively consider consultation and confidential information requirements used in various regulatory schemes in Western Australia and present proposals to regulate consultation and confidential information requirements in support of the new AES registration framework.

Additional to the discussion on general regulations, Section 4 discusses a proposed consequential amendment to the Electricity Industry (Ombudsman Scheme) Regulations 2005 (Ombudsman Regulations) that will support the investigation of AES related complaints by the Ombudsman.

Subject to the Regulatory Impact Assessment process to consider regulating services under the framework, separate consultation will be carried out on the drafting of regulations to prescribe services and service registration fees. The first two services being considered for regulation under the AES framework are:

- the sale and supply of electricity in embedded network; and
- On-site Power Supply Arrangements (OPSA), previously referred to as behind-the-meter generation and storage services.

How to provide your feedback

You may choose to address some or all the questions in this consultation paper, noting that they are included as a guide to support structured feedback.

To share your views, submit your feedback via email to EPWA-AES@dmirs.wa.gov.au by 5pm (AWST), Friday 19 April 2024.

Please contact Anne Braithwaite via EPWA-AES@dmirs.wa.gov.au if you have any queries on the matters raised in this paper.

All submissions received will be published on the Energy Policy WA website, unless a specific request for confidentiality is made.

A copy of the [Electricity Industry Act 2004, as amended by the AES Bill](#) is available on the Parliament of Western Australia website.

Consultation questions

For ease of reference, below is a list of the questions asked in this consultation paper.

1. Do you support the proposed approach on the consultation requirements of registration applications as described? If not, please explain why.
2. Do you support the proposed approach to the regulation of public consultation processes as described? If not, please explain why.
3. Are there any additional matters related to regulating consultation approaches for AES applications and the AES Code that should be considered by Energy Policy WA?
4. Do you support the proposed approach to the regulation of confidential information as described? If not, please explain why.
5. Are there any additional matters related to regulating the use and disclosure of confidential information that should be considered by Energy Policy WA?

Next steps

Energy Policy WA will consider stakeholder feedback in the preparation of instructions for the drafting of the general regulations before submitting them to the Minister for Energy for consideration.



It is anticipated that a consultation draft of the general regulations will be released for further stakeholder feedback.

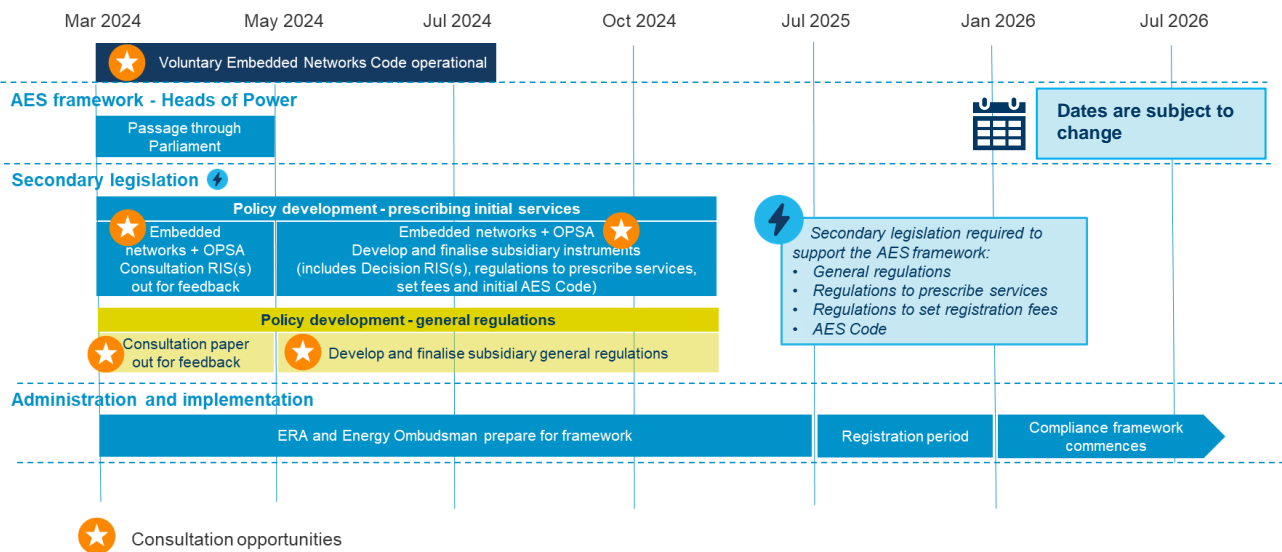
The anticipated timetable to finalise the general regulations is provided in Table 1.

Table 1: Timetable for gazettal of general regulations

Activity	Indicative timing
Release general regulations consultation paper	22 February 2024
Submissions on general regulations consultation paper close	19 April 2024
The timing of the next activities is subject to the passing of the AES Bill through Parliament	
<ul style="list-style-type: none"> Release consultation draft of general regulations for feedback 	September 2024
<ul style="list-style-type: none"> Amend consultation draft general regulations as appropriate 	October 2024
<ul style="list-style-type: none"> Ministerial approval of draft general regulations 	November 2024
<ul style="list-style-type: none"> Submission of draft amendments to Executive Council for approval 	December 2024

An indicative timeframe for the implementation of the AES framework is provided in Figure 1.

Figure 1: Indicative AES framework timeframe implementation



Information requests

Requests for information relating to this process will be treated in accordance with the *Freedom of Information Act 1992 (WA)* and Department of Mines Industry Regulation and Safety processes.



1. AES framework regulations

The AES Bill identifies specific matters to support the AES framework that can be addressed by regulation. These subsidiary regulations will fall into one of three themes identified below.

- General regulations.
 - These regulations will outline any requirements related to consultation and the use and disclosure of confidential information.
- Prescribed services regulations.
 - Primarily, these regulations will prescribe the services under the registration framework and the regulatory settings that apply to each prescribed service. They will also set out whether applications (i.e. for registration, renewal, amendment or transfer) for each service will go through the standard process or the fast-track process.
- Registration fee regulations.
 - These regulations will identify application fees and annual fees for different AES, or different classes of AES. This may be in the form of a set amount or a formula for allocating the ERA's actual costs.

Table 2 identifies matters that will be addressed in general regulations and the corresponding head of power in the Amended Act. Appendix A summarises all remaining matters that are to be determined by regulations.

Table 2: Matters to be addressed in general regulations.

Section	Summary of Amended Act head of powers establishing regulation
Public consultation on grant, renewal, amendment or transfer of registration	
59L(1)	Requires the ERA to undertake public consultation in accordance with regulations before it makes a decision on any application for the grant, renewal, amendment, or transfer of a registration
Public consultation on issue, amendment or replacement of AES Code	
59Z(1)	Requires the Minister for Energy to carry out public consultation in accordance with regulations before issuing, amending, or repealing and replacing the AES Code
Public consultation on review	
59ZC	Requires the Minister for Energy to ensure that when the AES Code is reviewed, public consultation is carried out in accordance with regulations
Use and disclosure of information	
59ZH(3)	Regulations may provide for how confidential information may be used and disclosed



2. Consultation

This section considers consultation requirements of various regulatory schemes operating in Western Australia and presents regulatory proposals in support of the consultation requirements of the new AES Bill for stakeholder feedback.

Three principles guided the development of the regulatory proposals:

- Stakeholders are identified and advised of consultation by the most practical means accessible.
- Timeframes for consultation are realistic to allow stakeholders enough time to provide a considered response.
- Stakeholder feedback is considered.

The regulatory proposals also aim to strike a balance between prescription, practicality, and flexibility in the way the Minister for Energy and the ERA are required to carry out consultation.

What are the legislated AES framework consultation requirements?

Consistent with the need for open and transparent processes and to ensure affected stakeholders can readily contribute to the implementation of the AES framework, the AES Bill requires consultation to be carried out when:

- granting, renewing, amending or transferring a registration, unless exempt from the consultation requirement (see 2.1); and
- issuing, amending, repealing and replacing, or reviewing the AES Code (see 2.2).

2.1 Consulting on granting, renewing, amending, or transferring registration applications

The requirement for the ERA to publicly consult on applications will not apply to applications that:



- are minor or administrative in nature, or
- have been exempted from consultation requirements – such as applications for services that are subject to the fast-track application process.

Under section 59L(1) of the Amended Act, the ERA must ensure that public consultation is carried out in accordance with regulations before it makes a decision on any application to grant, renew, amend, or transfer a registration.

When administering the application process, the ERA must also:

- take all reasonable steps to decide an application within 90 days of the application being made;¹ and
- have regard to the need to promote transparent decision-making processes that involves public consultation.²

Registration applications for an AES, or class of AES, can however be exempted from this consultation requirement to allow for a fast-track application process.³ It is intended that application of this provision will be considered during the process to prescribe a service. Section 59L(3) of the

¹ Section 59M(1), Amended Act

² Section 26(g), *Economic Regulation Authority Act 2003*

³ Section 59L(2), Amended Act



Amended Act also makes it clear that amendments to registrations which are of a minor or administrative nature are not subject to the public consultation process.

2.1.1 Consultation requirements of other regulatory schemes

Both the Act and *Water Services Act 2012* contain provisions where regulations may require the ERA to undertake public consultation in accordance with the regulations before it makes a decision on any application to grant, renew, transfer or amend a licence.^{4, 5} However, regulations to this effect have not yet been made under either of these provisions.

The Act does however describe public consultation procedures that the ERA must follow when conducting a review of the:

- Pilbara electricity objective;⁶ and
- market objectives for the wholesale supply of electricity in the South West Interconnected System (SWIS)⁷.

The procedures for consulting on both matters are similar and are summarised below:

- the ERA must provide notice of the matter being consulted on in a daily newspaper (available state-wide) and on a publicly available website maintained by the ERA;
- the notice is to include advice that any person can make written submissions to the ERA on the matter within a specified timeframe and the address where submissions can be sent;
- the specified timeframe for submissions cannot be less than 30 days after the notice is published; and
- the ERA is to have regard to submissions made in accordance with the notice.

2.1.2 Preliminary position

Energy Policy WA is proposing to adopt similar procedures that required for consulting on the Pilbara electricity objective and the SWIS market objectives for AES applications with some modification.

When reaching out for comment, Energy Policy WA considers it will be more effective for the ERA to seek submissions from interested stakeholders and parties they consider may have an interest in providing comment on applications rather than requiring the placement of a notice in a daily newspaper. Persons with an interest would include, but not be limited to:

- persons registered to provide a prescribed service;
- persons who have registered with the ERA to receive information about the AES framework; and
- consumer representatives.

This approach to consulting is similar to that required when:

- reviewing or amending the Small Use Code (see 2.2.1)
- preparing draft codes of practice under the *Water Services Regulations 2013* (see [2.2.1](#)).

⁴ Section 25, *Electricity Industry Act 2004*

⁵ Section 49 *Water Services Act 2012*

⁶ Section 120ZH, *Electricity Industry Act 2004*

⁷ Section 129, *Electricity Industry Act 2004*, noting however that the ERA will no longer have the function of reviewing market objectives following the passage of the *Electricity Industry Amendment (Distributed Energy Resources) Bill 2023*.



Energy Policy WA is also of the view that a requirement to place a notice of applications received in a daily newspaper may not be practical if a substantial number of applications is submitted and considers that providing notice of applications received on the ERA's website is likely to be more effective in reaching interested audiences and reflects the growing public uptake of digital technology.

2.1.3 Regulatory proposal

Regulations are to be drafted to require that, prior to making a decision on registration applications, the ERA:

- must provide notice of an application being received on a publicly available website maintained by the ERA. The notice may refer to one or more applications received and is to include:
 - advice that any person can make written submissions to the ERA on the application(s);
 - submissions must be received within a specified timeframe; and
 - where to send submissions.
- must use reasonable endeavour to notify persons who may have a material interest in the application(s) being made of the application(s), to the extent it is practicable to do so; and
- must have regard to submissions, made in accordance with the notice, when making a decision on an application.

Questions:

1. Do you support the proposed approach on the consultation requirements of registration applications as described? If not, please explain why.

2.2 Consulting on the AES Code



Consultation before the issue of the initial AES Code will be determined by the Minister for Energy⁸

Under the Amended Act, the Minister for Energy will be responsible for preparing and issuing the AES Code.⁹ The Minister will be required to ensure that public consultation is carried out in accordance with regulations:

- before issuing, amending or repealing and replacing the Code; and
- when the Code is reviewed (Table 3).

The AES Code will be used as the main repository for obligations placed on registration holders providing prescribed services. The AES Code will be subsidiary legislation and will therefore be subject to Parliamentary scrutiny as will be any regulations made under Part 3A of the Amended Act.



The Act (as amended by the AES Bill) also makes it clear that if the Minister for Energy is satisfied that AES Code amendments are of a minor nature the requirement to consult does not apply

⁸ Section 59Z(3), Amended Act

⁹ Section 59X(1), Amended Act



The Amended Act will allow for the Minister for Energy to delegate the responsibilities for reviewing the AES code to the ERA.¹⁰ This allows flexibility for these functions to be potentially conferred by the Minister on the ERA once the AES Code is reasonably mature.

The ERA is already responsible for reviews of, and amendments to, the *Code of Conduct for Supply of Electricity to Small Use Customers* (Small Use Code), which imposes customer protection obligations on electricity retail and distribution licensees when supplying electricity to customers who consume less than 160 MWh per annum.

Table 3: AES Code consultation

AES Code event	Section*	Public consultation	Detail
Initial release	59Z(3)	In manner to be determined by Minister	This allows consultation on the initial code to commence before the general regulations are finalised. Further information on developing the initial AES Code is provided below (Figure 2)
Amendment (and issue, repeal, or replacement)	59Z(1)	In accordance with regulations	Each time a new service is prescribed, the AES Code will be amended following consultation with stakeholders to include customer protection obligations deemed necessary for the new service. It may also be amended following a review, or between reviews to address an identified issue.
Minor amendments	59Z(2)	Not required	The Minister for Energy will need to be satisfied that the amendments are of a minor nature
Review	59ZC	In accordance with regulations	The first review of the AES Code is to be carried out as soon as practicable five years after it commences, and then at five yearly intervals. (Section 59ZB*) The Minister can cause a review to be carried out earlier if the Minister considers it necessary.

* Amended Act

¹⁰ Section 59ZB(4), Amended Act



Figure 2: Developing the initial AES Code

Developing the initial AES Code

The first services proposed to be considered for regulation under the registration framework are the sale and supply of electricity in embedded networks and the provision of OPSA services, and should these services be successfully prescribed, the initial AES Code will contain obligations for providers of those services.

As precursors to aid the development of the initial AES Code, Energy Policy WA has already worked closely with stakeholders to develop the:

- Voluntary Embedded Networks Code of Practice; and
- draft code of practice for behind the meter generation and storage services (subsequently refined into the draft code obligations for OPSA services).

Subject to regulation of the two initial proposed services, the above codes will be combined to form the initial AES Code.

Consultation with stakeholders on the development of these documents has been varied and included, but was not limited to, one on one meetings, establishing working groups, holding workshops, web updates, short videos, surveys, and formal written consultation processes. The number and type of stakeholders involved in the matter being considered informed what form of consultation was taken.

The Small Use Code was used as a key reference document when developing these draft codes of practice.

The resulting documents have now been published to inform consultation on the Consultation Regulatory Impact Statements regarding prescribing these first two services under the AES registration framework.

Further information on the development of these documents and related consultation is available on the Energy Policy WA website.

Additional consultation will be undertaken on the initial AES Code, informed by feedback on the Consultation Regulatory Impact Statements and the voluntary period for applying code obligations to embedded networks.

2.2.1 Consultation requirements of other regulatory schemes

Electricity and gas codes of conduct

Under the electricity licensing framework, the ERA is required to establish a committee to advise it on matters relating to the Small Use Code.¹¹ This includes:

- providing advice on proposed amendments or replacement of the Small Use Code; and
- undertaking a review of the Small Use Code every two years.

To fulfil this function, the ERA established the Electricity Code Consultative Committee (ECCC).¹²

The ECCC consists of four industry representatives, four consumer representative organisations, two government agency representatives and a non-voting chairperson and executive officer. The ERA provides all secretarial services for the ECCC. The number of industry representatives on the ECCC reflects the regulated market for small use customers in Western Australia.

When providing advice to the ERA on amending, replacing or reviewing the Small Use Code, the Act requires the ECCC to give any interested persons an opportunity to comment and take into consider any comments received.^{13, 14} The Act also defines interested person as being a person

¹¹ Section 81, *Electricity Industry Act 2004*

¹² [Electricity Consultative Committee Constitution](#), accessed September 2023

¹³ Section 87(2) and (3), *Electricity Industry Act 2004*

¹⁴ Section 88(3) and (4), *Electricity Industry Act 2004*



- (i) *who the committee considers has a particular interest in the amendment, replacement or review; or*
- (ii) *who is determined by the Authority [the ERA], by notice in writing to the committee, to have such an interest;*

The Act also allows the ERA, or the ECCC, to determine the period within which written comments can be received when seeking feedback on amending, replacing or reviewing the Small Use Code.¹⁵

Reviews of the Small Use Code are resource intensive and can take about 10-12 months or longer to complete.¹⁶ Figure 3 shows the process followed that repealed and replaced the 2018 Small Use Code with the 2022 Small Use Code.

Prior to the commencement of the review, the ECCC emailed interested persons and called for issues to help guide deliberations on the upcoming review. The ECCC sought feedback on this review by:

- placing notices on the ERA website;
- emailing persons registered with the ERA to receive communication about the work of the ECCC; and
- placing a notice in the West Australian newspaper.

Similar consultation requirements have been adopted under Part 2C of the *Energy Coordination Act 1994* for the amendment, repeal and review of the Gas Marketing Code of Conduct, including establishing a consultative committee.

¹⁵ Section 899b), *Electricity Industry Act 2004*

¹⁶ [Operation of the electricity licensing scheme and licensee compliance – Annual report 2019/20](#), page 17



Figure 3: Consultation process for the review (and replacement) of the Small Use Code (2019-2022)



Source: Energy Policy WA



Electricity access code

Prior to amending or repealing and replacing the Electricity Networks Access Code, the Act requires the Minister for Energy to seek public comment by placing a notice of the proposal being considered published in daily newspapers available state-wide and nationally and on an appropriate website. The notice is to include the following information:

- details of the website where a copy of the proposal may be obtained;
- that submissions may be made within a specified time frame, which cannot be less than 30 days after the notices have been published;
- the address where submissions may be sent; and
- that the Minister for Energy must have regard to submissions received.¹⁷

Water and environment codes of conduct and codes of practice

Similar to the Electricity and Gas Acts, the *Water Services Act 2012*, requires the ERA to establish a committee to advise it on matters relating to a code of conduct for water licensees in (the [Water Service Code of Conduct \(Customer Service Standards\) 2018](#)). The Code deals with matters related to conduct in relation to billing, marketing, connections, and complaint handling.¹⁸ The ERA established the Water Code Consultative Committee (WCCC) to fulfil this function.

The *Water Services Act 2012* also provides for the establishment of codes of practice, for example the [Water Services Code of Practice \(Family Violence\) 2020](#).¹⁹ For the purposes of making a code, consultation requirements are provided for in the [Water Services Regulations 2013](#). Under these regulations, the Minister for Water is required to:

- consult with each person they consider may have a material interest in the application of the code; and
- allow a three-month period for comment to be received on the proposed code.²⁰

These requirements do not apply to the extent the Minister for Water is satisfied that it is not practical to do so.

Specific consultation requirements have also been legislated under the [Environmental Protection Act 1986](#) when developing codes of practice regarding an emission or environmental harm. Before making a code of practice, the Chief Executive Officer (CEO) of the Department of Environment is obligated under the *Environmental Protection Act 1986*, to, by written notice, seek submissions specifically from:

- the Environmental Protection Authority; and
- stakeholders that the CEO considers appropriate, such as State authorities, industry groups and environmental and other groups.²¹

Under this Act, the CEO can also seek submissions from the public when developing codes of practice.

2.2.2 Preliminary position

As shown above, although there is a mix of common requirements that have been used when regulating consultation there is no perfect one size fits all approach. A tailored approach is

¹⁷ Section 108, *Electricity Industry Act 2004*

¹⁸ Sub-section 28(1) *Water Services Act 2012*

¹⁹ Sections 26 and 12(1), *Water Services Act 2012*

²⁰ Regulation 8 of the *Water Regulations 2013*

²¹ Section 122A of the *Environmental Protection Act 1986*



therefore proposed by adopting some of the processes described above to regulate consultation requirements for the AES Code.

Responsibility

While the Minister will remain responsible for ensuring public consultations are carried out in accordance with the regulations, it will be a function of the Coordinator of Energy to carry out any required consultation processes in the first instance in order to provide advice to the Minister before the Minister decides on the review, amendment, or repeal and replacement of the AES Code.²²

The Amended Act allows for the responsibility for reviewing the AES Code, including for public consultation, to be delegated to the ERA.

Consultation process

Energy Policy WA considers that establishing a permanent committee, like the ECCC, to provide advice to the Minister on AES Code amendments and reviews will be limited in its effectiveness, primarily due to the number of industry members that would likely be required to fairly represent providers of each prescribed service, along with being highly resource intensive.

However, to balance this position as a minimum, Energy Policy WA is proposing that to the extent possible, reasonable endeavours should be required to be made to identify stakeholders who may have a material interest in the amendment or review of the AES Code. Persons with a material interest would include, but not be limited to:

- persons registered to provide a prescribed service;
- persons who have registered with the Department or ERA to receive information about the AES framework; and
- consumer representatives.

Energy Policy WA is also of the view that maintaining flexibility around the way consultation is carried out with stakeholders, e.g. establishing working groups, holding workshops, will allow consultation methods to be adopted that will best target the range of stakeholders who may have an interest in amending or reviewing the AES Code.



The AES Code will be subsidiary legislation and proposed changes to the Code will also be subject to regulatory development and approval processes under the [Better Regulation Program](#)²³

For consistency in approach with consultation on AES applications, it is not proposed to require a notice to be placed in the newspaper when amending or reviewing the AES Code.

2.2.3 Regulatory proposal

Regulations are to provide for public consultation on the AES Code that requires:

- notice of the proposed issue, amendment or repeal and replacement, of the AES Code (including changes as an outcome of a review) to be placed on a publicly available website. The notice is to include advice that:

²² It is a function of the Coordinator to advise the Minister for Energy on matters relating to the operation of legislation and to consult with interested groups and persons when advising the Minister on energy policy, sub-sections 4A(c) and (d)(ii) of the [Energy Coordination Act 1994](#).

²³ The Better Regulation Program requires agencies to carry out their own initial assessment of regulatory proposals, and only economically significant proposals will require formal consultation and assessment.



- any person can make a written submission on the proposed changes being made to the AES Code;
- submissions must be received within a specified timeframe; and
- where to send submissions.
- notice, prior to a review of the AES Code, to be made on a publicly available website, to call for submissions on issues to help guide deliberations on the review. The notice is to include advice that:
 - any person can make a submission raising issues and proposed amendments to Minister's delegate;
 - submissions should include a detailed explanation of issues and any proposed amendments; and
 - where to send submissions.
- reasonable endeavours to be made to identify and advise persons who may have a material interest in proposed changes being made to the AES Code, to the extent it is practicable to do so.
- regard to be had on submissions, made in accordance with the notice, when making recommendations to the Minister for Energy on changes to the AES Code.

Questions:

2. Do you support the proposed approach to the regulation of public consultation processes as described? If not, please explain why.
3. Are there any additional matters related to regulating consultation approaches for AES applications and the AES Code that should be considered by Energy Policy WA?

3. Confidential information

This section presents regulatory proposals related to the handling of confidential information in the support of the new AES Bill for stakeholder feedback.

Section 59ZH of the Amended Act, provides for regulations to be made relating to the use and disclosure of confidential information. This section requires the ERA to comply with the regulations and also allows for the ERA to disclose information in response to a request from the Coordinator of Energy.

When dealing with confidential information the ERA is bound by obligations under the *Freedom of Information Act 1992* and the *Public Sector Management Act 1994*.

3.1 Handling of confidential information in other regulatory schemes

Economic Regulation Authority Act 2003

Section 55 of the *Economic Regulation Authority Act 2003* (ERA Act) places restrictions on the ERA when disclosing any information it receives, however these restrictions only apply when:

- the ERA undertakes an inquiry; or
- the ERA uses its specific powers to obtain information under the ERA Act,

and the person giving (or producing) the information (or document contents), identifies it as being confidential or commercially sensitive.



The restrictions prevent the ERA from disclosing information unless the ERA considers:

- the disclosure of the information would not cause detriment to the person giving it or another person; or
- the public benefit in disclosing information that would cause detriment to the person giving it or another person outweighs that detriment.

The restrictions do not prevent the ERA from disclosing information to a staff member; or using information for the purposes of civil or criminal proceedings.

Section 55 also specifies that the disclosure of anything that is already in the public domain at the time the ERA wishes to disclose it cannot cause detriment to a person.

Sections 36 and 42 of the ERA Act also requires the ERA to identify any information that it considers is of a confidential or commercially sensitive nature when submitting inquiry reports to the Minister for Energy. Additional requirements are provided for to exclude any confidential or commercially sensitive information from inquiry reports prior to being laid before Parliament.

[Electricity Networks Access Code 2004](#)

Chapter 14 of the Access Code outlines the requirements for the treatment of confidential information by the ERA and network operators (to whom the Code applies). These provisions largely reflect the intent of the requirements outlined in section 55 of the ERA Act, but they also place an additional responsibility on the person giving confidential information that they also detail the basis upon which the material is considered confidential.

[Pilbara Networks Access Code](#)

The Pilbara Networks Code provides detail on how confidential information is to be treated for the purposes of the Code. The Code:

- describes what is meant by information that is “confidential” and “not confidential” (clauses 157-158);
- sets out the requirement for the use of confidential information (clause 159) as well as it permitted disclosures (clauses 160 to 164);
- describes a “pre-disclosure process” that applies when called for by the Code (ringfencing and arbitration) (clause 165).

Specific to the Pilbara networks, the Act also provides for protection against liability when the disclosure or use of confidential information, the circumstances of which have been further expended upon in the Code (clause 167). No similar head of power was considered warranted for the AES framework.

3.2 Preliminary position

Regulations to provide for how confidential information is dealt with for the purposes of the AES framework are to largely reflect the restrictions placed upon the ERA under Section 55 of the ERA Act.

In addition to these restrictions, Energy Policy WA is proposing that:

- the person who gives information that they identify as being confidential also be required to provide, in detail:
 - the basis upon which the material is considered confidential, similar to that required by the Electricity Networks Access Code 2004, and
 - an indication of the harm the person would suffer if the confidential information was made public,
- to allow the ERA to make informed decisions quickly about how it deals with information.



- when the ERA submits its annual report to the Minister and publishes the annual report on its website²⁴ it is required to take measures to protect any confidential information contained in the report. Measures, similar to that contained in sections 36 (identification of confidential information when reporting to the Minister) and 42 of the ERA Act (removal of confidential information prior to publication) in relation to inquiry reports are proposed.
- when the ERA provides information to the Coordinator in response to a request made under section 59ZH of the Amended Act, the ERA is required to identify any information it considers to be of a confidential nature. The Coordinator is bound by obligations when dealing with information obtained in the course of their duty under the [Energy Coordination Act 1994](#).²⁵

3.3 Regulatory proposal

Regulations are to provide for:

- Restrictions to be placed on the ERA when disclosing confidential information identified by the person giving (or producing) the information (or document contents), as being confidential. The restrictions are to largely reflect section 55 of the ERA Act, being the ERA must not disclose confidential information unless the ERA is of the opinion that:
 - the disclosure of the information would not cause detriment to the person giving it or another person; or
 - although the disclosure of the information would cause detriment to the person giving it or another person, the public benefit in disclosing it outweighs that detriment.

The person providing information they identify as being confidential must also detail the basis upon which the material is considered confidential, and indicate what harm they would suffer if the confidential information was made public.

- When submitting an annual report to the Minister for Energy under section 59ZE of the Amended Act, the ERA is to identify in the report any information it considers is of a confidential nature.
- When publishing an annual report prepared for the Minister for Energy under section 59ZE of the Amended Act, the ERA must:
 - exclude any confidential information; and
 - contain a statement to that effect at the place in the report where the information excluded would have otherwise appeared.
- When providing information to the Coordinator under section 59ZH of the Amended Act the ERA must identify any information it considers to be of a confidential nature.

Questions:

4. Do you support the proposed approach to the regulation of confidential information as described? If not, please explain why.
5. Are there any additional matters related to regulating the use and disclosure of confidential information that should be considered by Energy Policy WA?

²⁴ Section 59ZE, Amended Act

²⁵ Section 24, *Energy Coordination Act 1994*



4. Consequential amendment

The AES Bill amends section 92 of the Act, to provide a head of power for the ERA to *approve a scheme* to allow the Ombudsman scheme to investigate and deal with:

- disputes and complaints under customer contracts and AES Code;
- disputes between AES registered providers and customers; and
- complaints from customers about registered providers of AESs.

Currently regulation 5(1)(b) of the [Electricity Industry \(Ombudsman Scheme\) Regulations 2005](#) (Ombudsman Regulations) refers to a licence held by a member when describing the functions of the Ombudsman under an approved scheme.

4.1 Regulatory proposal

That a consequential amendment is made to extend regulation 5(1) of the Ombudsman Regulations to include a registration held by a member.



Appendices

Appendix A. Additional regulation making powers

Prescribed services regulations will primarily prescribe the services under the registration framework and provide certainty to service providers and customers of those services what minimum standards are required to provide a prescribed service, while providing confidence to the customers that protections are clearly described and enforceable.

Registration fee regulations will identify different application fees and annual fees for different AES or different classes of AES, which may be a specified fee or a formula for calculating the fee.

Table A4: Summary of Amended Act head of powers establishing regulation and likely allocation to prescribed services or registration fee regulations

Section	Regulation description	Prescribed services regulations	Registration fee regulations
59C(1)	Regulations may prescribe an activity as an AES or a class of activities as a class of AES. Until regulations are made under this subsection, the AES framework does not apply to any activity and there is no requirement for any person to register under the framework.	✓	
59C(2)	Regulations may regulate the provision of an AES or a class of AES to all customers or only certain customers	✓	
59C(3)	Regulations may prescribe requirements that must be adhered to when providing an AES. This allows requirements to be tailored to each AES or class of AES as it is prescribed.	✓	
59C(4)	Regulations may detail the eligibility of a person, or class of person, to be granted a registration for an AES or class of AES, which may include the requirement to meet certain criteria. There may be cases where multiple entities are involved in provision of a particular AES, but it is desirable that only one of those entities is responsible for ensuring customer protection obligations are met.	✓	
59C(7)	Regulations may provide that a class of activity is not an AES. This provision is intended to provide flexibility so that if an activity falls within the definition of an AES, but it is determined there is no need for regulation of that activity, it can be designated as not being an AES for the purposes of the Act.	✓	
59D(2)	Regulations may exempt certain persons from the requirement to be registered to provide an alternative electricity service. This allows for regulations to 'switch on' the ability for licensees and/or existing registration holders to provide an AES without them being required to hold a separate AES registration. It is anticipated that this may be used in circumstances where the provision of that AES would otherwise fall within the ambit of their existing licence or existing registration. Whether exemptions will be applied, or not, will be determined when the particular AES is prescribed.	✓	



Section	Regulation description	Prescribed services regulations	Registration fee regulations
59F	<p>Regulations to prescribe circumstances where the ERA will not be required to apply the:</p> <ul style="list-style-type: none">• public interest test in subsection 59F(1); or• general public interest test that applies under the Economic Regulation Authority Act 2003 section 26(1)(a). <p>This provision has been made to allow for 'fast track' applications, acknowledging that applying the public interest test to individual registration applications is likely to be time-consuming and resource-intensive for the ERA. In particular, in situations where a large number of small entities offer the prescribed AES.</p> <p>Whether or not applications for a specific type of AES need to be assessed against the public interest test will be determined when the particular AES is prescribed.</p>	✓	
59L(2)	<p>Allows for regulations to exempt a class of AES from the public consultation requirements. For example, for fast track applications where the public interest test is not applied initially at the time of granting a registration. Where the outcomes of a consultation is not required to inform consideration of the public interest test, the costs and delays of conducting public consultation are likely to outweigh any benefits.</p>	✓	
59O(1)	<p>Provides that it is a condition of registration that the registration holder must comply with the relevant provisions of the AES Code that are specified in regulations to apply to the AES or class of AES.</p>	✓	
59O(5)	<p>Provides a power for regulations to set out terms and conditions of registration which may be applied to an AES or class of AES.</p>	✓	
59W	<p>Regulations to be made which prescribe different application fees and annual fees for different AES, or different classes of AES.</p> <p>Regulations may specify the amount of a fee or provide for a fee to be calculated in accordance with a specified method or formula.</p> <p>Circumstances specify circumstances in which the payment of some or all of a fee may be waived.</p>		✓

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