

CONSUMER LAW CENTRE VICTORIA

e-bulletin no.25, February 2003

EDITORIAL

The recent decision of the High Court in the Boral case is disappointing (Boral Besser Masonry Limited and the Australian Competition and Consumer Commission). The Court, in considering whether Boral had breached the misuse of market power provisions of the *Trade Practices Act* (section 46), found that Boral did not have a substantial degree of market power at the relevant time. The Court had before it evidence that Boral had (at the relevant times) between 25-30 per cent market share and, as set out in the judgment of Kirby J in dissent, inferences that could be drawn from the evidence indicating substantial market power, including, among other things, barriers to entry for new entrants and financial power/vertical integration. In the words of Kirby J "With the number of rivals reduced and the appellant's market share correspondingly increased, its market power was further consolidated. Short-term pricing sacrifices were made for long-term economic rewards. Inevitably, these would come at a probable cost to consumers. This is precisely the type of market power that s 46 of the Act forbids. Despite that, the corporation is now absolved because, it is said, it did not possess, and take advantage of, the requisite degree of power in the relevant market. Respectfully, I regard that conclusion as contrary to the reasonable inferences arising from the evidence."

In finding as it has, the Court may well have placed an overly onerous test on the Australian Competition and Consumer Commission to pursue successfully legitimate cases of misuse of market power. Such an outcome will not be beneficial for consumers. Whilst perfectly lawful robust competition and unfair and illegal predatory pricing practices are finely balanced, the Court's decision may create conditions that prevent new entrants into markets, eliminate smaller incumbents in the market and discourage rigorous competition between large incumbents, ultimately leading to higher prices for consumers.

Hot on the heels of the Boral decision comes the widely anticipated report of the review conducted into Part IV of the *Trade Practices Act* (the Dawson review). We have commented on this Review previously (see *e-bulletin no. 24* August 2002). The Centre and other leading consumer organisations had submitted that a fairer effects test should be applied to the consideration of misuse of market power. It had been anticipated that the Dawson Review would recommend leaving s.46 of the Act largely untouched. The importance of addressing the regulation of lawful and desirable rigorous competition, contrasted with unlawful predatory practices and ultimately anti-competitive practices, has suddenly become much more critical for consumers following the High Court's decision.

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CONTENTS OF THIS EDITION

Editorial

1 What have we been doing?

1.1 Consumer protection in the electricity market

1.2 Telecommunications regulation and consumer protection

[1.3 Review of the gas and electricity Retail Codes by the Essential Services Commission](#)

[1.4 Consumer Law Centre Strategic Plan July 2002 - June 2005](#)

[2. Updated staff contact details](#)

[3. Representing the consumer interest in the development of product and service standards](#)

[4. Next Edition: April 2003](#)

1 What have we been doing?

1.1 Consumer protection in the electricity market

Household consumers have historically been inadequately represented in national electricity market processes. It is for this reason that we were pleased to report in this newsletter (*e-bulletin no. 20* October 2001) that the ACCC had made the authorisation of the National Electricity Code conditional upon the establishment of a funding mechanism for end-user advocacy. This followed more than three years of lobbying by the Centre and other consumer organisations to create a funding pool directed towards end-user advocacy in the national electricity market. We are pleased that this funding mechanism has now been developed. This new mechanism can be expected to demonstrably improve outcomes for household energy consumers including, importantly, low-income consumers. The funding will be administered by NECA through an Advocacy Panel. This Panel consists of an independent Chair, Adam Bisits, and equal numbers of industry and consumer representatives.

We are also pleased to report that the inaugural meeting of the Essential Services Commission's Marketing Code of Conduct Advisory Committee occurred on 18 December 2002. Following our extensive involvement in developing the code, the Centre has joined this Committee which will have a critical role in monitoring and reviewing the Code's operation.

The Code deals with product knowledge and training, information disclosure, informed consent, privacy protection, door to door sales and telemarketing. Importantly, it provides a framework for complaints handling, identification of systemic poor selling practices and sanctions for non-compliant Code members. The experience of overseas electricity markets, the experience of the selling of telecommunications products in the domestic market and early experiences of the contestable Victorian electricity market, all suggest that there are a number of serious risks faced by consumers. These inappropriate market practices are often targeted at vulnerable consumers. Accordingly, the Marketing Code of Conduct represents an important industry initiative to establish a framework to deal with these issues.

If you would like further information about work of the Centre in developing advocacy for low-income energy consumers or on co-regulatory Codes, please contact Chris Field on (03) 9629 6300 or chris@clcv.net.au.

1.2 Telecommunications regulation and consumer protection

In the August 2002 edition of the e-bulletin we reported on the release of the *Telecommunications Contracts Check List of Fair and Unfair Contract Terms*, jointly developed by the Australian Consumers' Association, the Communications Law Centre, the Consumers' Telecommunications network and the Centre (*e-bulletin no. 24* August 2002). The Checklist can be found at www.choice.com.au.

Following on from the Checklist, the Consumers' Federation of Australia (CFA) has developed a '5 Point' Policy Position in relation to the telecommunications industry.

1. 1. A single Consumer Telecommunications Code should be developed - the process for the creation of this Code must be capable of delivering the Code in a fair and expeditious manner.
2. 2. There should be a 'one-stop' shop for telecommunications alternative dispute resolution and complaint handling - the TIO is best placed to be that scheme.
3. 3. The telecommunications industry requires a substantially more robust consumer protection regulator - this could be achieved through a merged Australian Broadcasting Authority and Australian Communications' Authority (responsible for technical regulation) and enhanced consumer protection responsibilities in the telecommunications industry transferring to the ACCC.
4. 4. The internal complaints handling processes within the telecommunications industry must be significantly improved.
5. 5. Telecommunications contracts must be fair and clear and ought to reflect at a minimum the six principles set out in the Checklist.

If you would like further information about the work of the Centre in developing fairer telecommunications contracts, please contact Anna Stewart on (03) 9629 6300 or anna@clcv.net.au.

1.3 Review of the gas and electricity Retail Codes by the Essential Services Commission

On 2 December 2002, the Essential Services Commission (**ESC**) announced that it intended to review the Victorian gas and electricity Retail Codes (the **Codes**) to ensure consistency across both fuels and to ensure that the terms and conditions of the Codes have the capacity to accommodate "dual fuel" offers. As the term suggests, a "dual fuel" offer is one in which a retail energy supplier offers to supply both gas and electricity to a customer. Such an offer can encompass a variety of contractual arrangements with a retailer.

The ESC initially stated that it did not wish to undertake a broad review of the Codes, and would be concentrating solely on issues affecting or arising out of dual fuel offers. This was due to the fact that the ESC anticipates that it will undertake a broad review of the Codes in 2004 while examining the effectiveness of competition and customer protection in the Victorian energy market.

However, on 30 January this year the ESC announced that feedback indicated most stakeholders (primarily the retailers) were seeking to expand the scope of the review.

The Consumer Utilities Advocacy Centre (**CUAC**) made a submission to the ESC on behalf of CUAC, the Centre, the Financial and Consumer Rights Council and the Consumers' Federation of Australia regarding the review of the Codes. The submission was premised on the basis that a general review of the Codes is premature. The submission emphasised the fact that the Victorian electricity and gas retail markets have been operating for a relatively short period of time and competition remains underdeveloped. In addition, the submission focussed on a number of clauses in the Codes which have the potential to conflict with dual fuel offers, and also highlighted the potential for dual fuel offers to further disadvantage low-income and vulnerable consumers.

In accordance with the views expressed in the submission, the Centre strongly opposes any reduction in the current consumer protection standards guaranteed by the Codes. While the Centre is aware that retailers are asserting that they require increased "flexibility" under the Codes to enable them to offer new products, including dual fuel contracts, the Centre does not accept that there is evidence to support the removal of any consumer protections currently found in the Codes.

As was noted in the submission, dual fuel offers raise a number of issues for low-income and vulnerable consumers in particular. Proposed payment arrangements (for example, payment by direct debit only), smoothed tariffs, the potential for double disconnection from both gas and electricity, the current lack of clarity with respect to concessions and how actual billing and estimates will be conducted, are all matters which the Centre believes should be seriously considered by the ESC.

The Submission can be found on the ESC's website at www.esc.vic.gov.au/electricity586.html.

If you would like further information about the work of the Centre in relation to the review of the gas and electricity Retail Codes, please contact Anna Stewart on (03) 9629 6300 or anna@clcv.net.au.

1.4 Consumer Law Centre Strategic Plan July 2002 - June 2005

Our Strategic Plan for the three year period July 2002 to June 2005 was mailed to stakeholders in late December. The Plan sets out our organisational and policy goals for this period. The Plan also includes an assessment of our achievements measured against the objectives set out in the Strategic Plan July 1999 to June 2002. We are very grateful to the diverse range of organisations and individuals who commented on our draft plan and, in particular, to those who attended our planning roundtable last year. A copy of the Plan can be obtained from Jane Douglas on (03) 9629 6300 or jane@clcv.net.au.

2. Updated staff contact details

Following four very successful years with the Centre, Catriona Lowe resigned on 1 November 2002 to take up a position as the Director, Consumer Liaison, Australian Competition and Consumer Commission. The Centre is indebted to Catriona for her enthusiastic commitment to protecting the consumer interest in her time at the Centre. Among her many achievements, Catriona played a key role in advocating for an end to marketplace discrimination against women, a fairer telecommunications market and played a key role in establishing and supervising the Centre's legal practice for low-income consumers.

We are very pleased to report that Nicole Rich began at the Centre on 2 December last year. Immediately prior to beginning at the Centre, Nicole was a first year lawyer at a major commercial law firm in Melbourne. Among her previous achievements, Nicole was dux of Lauriston Girls School and finished with first class honours in law from Melbourne University. The phone number for all staff is 9629 6300.

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3. Representing the consumer interest in the development of product and service standards

It is pleasing to report that our budget for the support of consumer representatives on Standards Australia committees has received a substantial boost from Standards Australia. Until now, we have been restricted to nominating representatives to committees that fall within our top priority areas, namely:

1. Health, safety and welfare of vulnerable consumers, and overwhelming public interest; and
2. Health, safety and welfare of consumers generally.

However, we are now able to expand our representation on committees. We can now nominate representatives to committees in the areas of fair trading, information and environment, as well as our top priority areas.

The following committees require consumer representatives:

- • Children's nightclothes
- • First aid kits
- • Valves for use in warm and hot water systems
- • Locksets and associated hardware

The following draft standard has been put out for public comment:

- • National Plumbing and Drainage: Glossary of Terms (comments by 15 April 2003)

If you would like to make comment on any of the above draft standards, would like to join a committee, or simply require further information, please contact the Standards Co-ordinator, Fran Macdonald on (03) 9629 6300 or fran@clcv.net.au.

4. Next Edition: April 2003

The e-bulletin, produced once every two months, is designed to keep our stakeholders up to date on the work of the Centre. We welcome your comments on the e-bulletin. If you would like to be added to the Centre e-bulletin mailing list, please contact Jane Douglas on jane@clcv.net.au or (03) 9629 6300.