



18 July 2007

By email: MCEMarketReform@industry.gov.au

Manager, MCE Secretariat,
Department of Industry, Tourism and Resources,
GPO Box 9839
Canberra ACT 2601

Dear Sir/Madam

Retail Policy Working Group – Composite Consultation Paper National Framework for Distribution and Retail Regulation

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to respond to the *Composite Consultation Paper* (the **Composite Paper**) authored by Allens Arthur Robinson (**AAR**), and released by the Retail Policy Working Group (the **RPWG**) on 19 June 2007. In addition to the comments made below, we refer the RPWG to our comments in relation to previous working papers released as part of the RPWG's consultation on the national framework for non-economic distribution and retail regulation.

1 Attachments

Attached to this submission is a copy of the table attached to the Composite Paper (**Attachment 1**). We refer the RPWG to this table which includes our detailed responses to all the recommendations in the 'comments' column.

Also attached is an additional table prepared by Consumer Action entitled *Electricity Retail Consumer Protections Comparison Table for NEM Jurisdictions* (**Attachment 2** or the **Comparison Table**). The Comparison Table updates a previous document prepared in 2004, and compares all electricity retail consumer protections across jurisdictions, as well as providing a view as to best practice for each category of regulation. We hope that the Comparison Table is useful to the RPWG.

2 Process

Consumer Action strongly supports an extension to the timeframe for the finalisation of the legislative package to implement the national framework for non-economic distribution and retail regulation. It is our view that an extension until 31 December 2008 would ensure that

Consumer Action Law Centre
Level 7, 459 Little Collins Street
Melbourne Victoria 3000

Telephone 03 9670 5088
Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

the process is not rushed, and that there is sufficient opportunity for consultation so that the final package is based on sound policy principles.

Consumer Action also notes that the Composite Paper is authored by AAR and that it has not been endorsed by the RPWG, the Ministerial Council on Energy (**MCE**), or the MCE's Standing Committee of Officials (**SCO**). We believe that it is incumbent upon the RPWG to ensure that additional consultation be undertaken on positions that are endorsed by the RPWG, the SCO and/or the MCE.

3 Division between Law and Rules

We broadly support AAR's recommendations relating to the division between the National Electricity Law and National Gas Law (the **Law**) on one hand, and the National Electricity Rules and National Gas Rules (the **Rules**) on the other, that general requirements should be placed in the Law and detailed obligations in the Rules. We submit, however, that the Law should contain high-level principles which outline and limit the scope of the Rules.

We note that AAR in part endorses this approach where it states that 'if, as a policy matter, anything is considered sufficiently important and enduring to warrant legislative protection it would be preferable to include the requirements themselves in the Law'. It is our view that the following three principles are sufficiently important to warrant legislative protection:

1. That small consumers should have, as far as is reasonably practicable, uninterrupted access to energy supplies on regulated terms and conditions.
2. That disconnection due to non-payment should be a last resort option, and that consumers should not be disconnected due to incapacity to pay alone.
3. That transfer in the competitive energy market should only occur where a consumer has provided explicit informed consent.

The first principle, relating to access, is now universally accepted. As energy is an essential service, access must be assured, particularly for consumers who may be less attractive to retailers due to their location, level of consumption or income. We note that the obligation to supply on regulated terms and conditions implements the first principle.

The second principle, relating to disconnection, reflects a well-founded tenet that has developed over the course of the competitive energy market. Most recently, the Victorian Government released a policy statement stating that it 'aims to ensure that no Victorian who is unable to pay their energy bill due to financial hardship is disconnected from supply'.¹ We note that, after deregulation of Victoria's energy market, disconnections became a problem, and from 1999 to 2004, the rates of electricity disconnections doubled.² Since that time, concerted efforts by governments, regulators, consumers and the community sector have

¹ Victorian Government, *Energy Consumer Hardship Policy Statement*, June 2006, available at: <http://www.dpi.vic.gov.au/dpi/dpinenergy.nsf/LinkView/1AC2510A81322843CA2572B10014F827844E6406280EB3D5CA25729D00101732>.

² Essential Services Commission, *Disconnections and Capacity to Pay – Report on Energy Retailer's Performance*, October 2004.

contributed to reducing disconnection rates significantly in Victoria.³ These efforts have been in recognition that disconnection from an essential service can cause extreme physical and emotional distress.⁴ We provide further comments below about energy hardship and disconnection below.

The third principle, relating to the competitive market, recognises that, to be effective, competition requires informed demand side participation. Without effective demand side participation, retailers will not be able to provide products and services that accord with consumer preferences. We provide further comments below about what is meant by explicit informed consent – a term that is not adequately considered in the Composite Paper.

4 Objectives of the Law

Consumer Action strongly disagrees with AAR's recommendation 85 that there is no need to amend the statutory objectives to be included in the Law to accommodate the transfer of non-economic distribution and retail regulatory functions to the national framework. We do, however, support recommendation 86. We continue to believe that the AER and the AEMC should be able to actively consider distributional and equity issues, and should be able to ensure different classes of consumers, including low-income and vulnerable consumers, benefit from competition and the regulatory framework. We are concerned that the current objective gives the regulators limited scope to deal with these issues.

The current Victorian regulatory framework allows the regulator to consider such issues. The RPWG's primary purpose is to develop a harmonised framework for distribution and retail energy functions of the national energy market and we note that it has not received guidance to alter the policy positions underlying the regulatory frameworks as they exist in jurisdictions.⁵ In our view, what is being proposed is a change to those policy positions so that the regulator cannot explicitly consider distributional and equity issues (i.e., for retail and distribution functions, the Victorian regulator can consider these issues currently). We strongly oppose such a change and believe it is contrary to the expressed position of Governments as set out in the Australian Energy Market Agreement.

We also note that the current objective was instituted at a time when the national energy market did not include retail and non-economic distribution regulatory functions, but was instead made up of the wholesale exchange that is operated and administered by NEMMCO, as well as the interconnected electricity transmission system and connected generating systems, facilities and loads. There was no position that this objective should apply to the retail and non-economic distribution regulatory framework.

In 2006, the Expert Panel on Energy Access Pricing considered the adequacy of the objective.⁶ It recommended minimal change to the objective, and the MCE Standing

³ Essential Services Commission, *Comparative Performance Report 2005/06 – Energy Retail Businesses*, November 2006.

⁴ See, eg, Consumer Law Centre Victoria and Consumer Utilities Advocacy Centre, *Access to Energy and Water in Victoria – a research report*, November 2004.

⁵ Clause 14.5 of the Australian Energy Market Agreement sets out the policy principles to guide the development of the initial legislative and Rules package. The first principle is for harmonisation, and there is no principle relating to changing the role of the regulator.

⁶ Expert Panel on Energy Access Pricing, *Report to the Ministerial Council on Energy*, April 2006.

Committee of Officials agreed with its recommendations to make the objective that of the Law, and to have a common objective in respect to gas.⁷ However, these decisions were made in the context of network and revenue pricing and again did not consider retail and non-economic distribution functions to be included in the national regulatory framework. The Expert Panel noted:

The inclusion in future of additional regulatory requirements, particularly with respect to regulation of the retail market, may have implications for the objects clauses. These are best addressed at the time the additional provisions are introduced, either by modification to the objects clauses or (perhaps preferably) by the inclusion of additional factors to be considered by the regulator which are specific to the new regulatory requirements.⁸

We agree with the Expert Panel that the inclusion of the additional regulatory requirements currently being considered by the RPWG warrant amendment or clarification of the objective. In the retail and non-economic distribution sectors, it is our view that the long term interests of consumers are advanced by ensuring continuous access to the affordable, reliable and safe supply of energy, in recognition that energy is an essential service to the community. We are concerned that the economic interpretation of the objective limits the ability of the AER and the AEMC to consider equity or distributional issues, or to consider consumer protection as an objective, or even a broad notion of regulatory costs and benefits that includes benefits that flow to consumers from regulation.

We note concerns that giving effect to equity and distributional factors can sometimes reflect political rather than administrative/regulatory judgments. We understand and agree that elected governments should play the primary role in shaping social and environmental policy, not economic regulators. However, we believe there is also a defined role for economic regulators to consider the implications of economic regulation across classes of consumers, and particularly to consider social and regional equity matters.

We note that the MCE has acknowledged a need to consider the implications of the competitive retail energy market across classes of consumers, by having a framework that can consider social and regional equity considerations as part of the AEMC reviews into the effectiveness of competition.⁹ Similarly, we believe that the AEMC and the AER should be mandated to consider the implications of regulation, competition and efficiency for different classes of consumers in relation to its functions that directly impact on consumers.

The ESC is a good example of an economic regulator that is able to consider broader social and environmental objectives in an economic regulatory framework. The ESC's objectives, as set out in the *Essential Services Commission Act 2001* (Vic) (the **ESC Act**), are in our view more appropriate for an economic regulator of essential services. The ESC's primary objective is 'to protect the long term interests of Victorian consumers with regard to the price, quality and reliability of essential services'.¹⁰ The ESC itself has praised the 'clarity' of this

⁷ Standing Committee of Officials to the Ministerial Council on Energy, *2006 Comprehensive Legislative Package: Overview and Response to Expert Panel on Energy Access Pricing*, November 2006, p 9-10.

⁸ Ibid, p 39-40.

⁹ Ministerial Council on Energy, *Criteria for Effective Competition Assessments in Retail Energy Markets*, 27 October 2006.

¹⁰ *Essential Services Commission Act 2001* (Vic), section 8(1).

objective.¹¹ It has also recognised the important role of its facilitating objectives which are aimed at requiring the Commission to ensure that:

- regulatory decision making has regard to the environmental, health, safety and social legislation applying to the regulated industry; and
- users and consumers, including low-income and vulnerable consumers, benefit from the gains from competition and efficiency.¹²

The ESC has undertaken a range of work in recent years relating to the energy sector that has involved consideration of social and environmental objectives and outcomes.¹³ The ESC's facilitating objectives contributed to the ability and capacity of the ESC to undertake this work.

While we recognise the value of the objective to be included in the NGL and NEL, we continue to be concerned that it limits regulatory decision making to narrow notions of economic efficiency, and does not allow consideration of issues relating to distribution of benefits from efficiency gains. As the well-known economics scholar Professor Michael Trebilcock has stated:

For economists to claim that they are only concerned with maximising the total value of social resources, without being concerned about how gains in the value of social resources are to be distributed and whether these gains are in fact making the lives of individuals better ... reflects a highly impoverished view of the world.¹⁴

5 Hardship policies and measures to address affordability

One glaring omission from the Composite Paper is any consideration of the mandating of financial hardship policies, as has occurred in Victoria. In 2005, recognising that energy hardship was increasingly a problem, the Victorian Government established an Independent Committee of Inquiry into Energy Financial Hardship (the **Committee of Inquiry**). The Committee for Inquiry produced a detailed report which included a recommendation to Government to require energy retailers to have financial hardship policies. The Government implemented this recommendation through the *Energy Legislation (Hardship, Metering and Other Matters) Act 2006* (Vic).

Consumer Action believes that this legislation, together with the Government's policy statement that followed the Committee of Inquiry's report,¹⁵ represents a significant advance in the regulation of retail energy businesses. The Government's policy statement provides for a collaborative framework to address the problem of energy hardship, requiring retailers to work with Government, consumers and the community welfare sector. These requirements support the principles that disconnection should be only used as a last resort and should not be allowed due to a consumer's incapacity to pay alone. The legislation

¹¹ Essential Services Commission, *Submission to the review of the Essential Services Commission Act 2001*, September 2006, p 5.

¹² *Essential Services Commission Act 2001* (Vic), sections 8(2)(e) and (f).

¹³ Essential Services Commission, above n 8, p 6-7.

¹⁴ Michael Trebilcock "An Introduction to Law and Economics" (1997) 23 *Monash University Law Review* 124.

¹⁵ Victorian Government, *Energy Consumer Hardship Policy Statement*, June 2006, available at:

<http://www.dpi.vic.gov.au/dpi/dpinenergy.nsf/LinkView/1AC2510A81322843CA2572B10014F827844E6406280EB3D5CA25729D00101732>.

makes it clear that a retailer cannot disconnect where a consumer is participating in a retailers' financial hardship policy.¹⁶

This regulation recognises that energy hardship is a complex issue, and one that can cause significant detriment, not only to individual consumers but to society as a whole. Energy hardship primarily falls into three main categories – temporary hardship, chronic hardship and energy inefficient households. Temporary hardship results from a range of causes (due to loss of job, family emergency etc) and presents problems as customers may not know of, or have experience dealing with, assistance schemes. Retailers will need to make themselves available and approachable to such customers. Chronic hardship presents different issues for retailers, and the need for strong links between retailer and government assistance is required. Finally, there is a strong relationship between energy efficiency and energy affordability – this is not so much a separate customer group as it is a way of addressing energy affordability and assisting customers in chronic hardship.

The Committee of Inquiry noted the complexity of energy hardship and stated that 'rather than spending effort on fine-tuning definitions for a situation that is known to be complex and fluid, the more effective use of effort is to develop systems that will respond effectively to people identifying themselves as being in hardship'.¹⁷ In particular, they recommended a range of ways to assist with energy efficiency, and mandated hardship policies must now include provision for the auditing of a customer's energy usage, and flexible options for the purchase or supply of replacement energy equipment.¹⁸

We are pleased that AAR recommends general contractual protections requiring retailers to offer instalment plans as well as significant restrictions on a retailer's right to disconnect. We are, however, concerned that AAR's current formulations of these protections are weak, and have provided detailed comment in Attachment 1 as to how they should be strengthened. While regulation of terms and conditions of contracts (both standing and market) is obviously an integral part of developing systems to address energy affordability, we are concerned that AAR has not adequately considered the usefulness and importance of additional targeted measures to address energy hardship. Financial hardship policies are targeted at consumers with financial difficulties. Although based upon universal consumer protection measures that provide basic consumer protection for all consumers, mandated financial hardship policies require businesses to develop more targeted policies for those who require extra help. We note that some utilities providers have identified the 'business case' for having a successful financial hardship policy (in addition to the benefits of ensuring consumers have continued access to supply). For example, Yarra Valley Water has pointed to improved cash flow from consistent payment and more effective debtor management through better customer segmentation.¹⁹ Making such benefits more widely known and acknowledged among the industry is difficult, and targeted legislation can encourage industry to develop and improve financial hardship policies. We encourage the RPWG to revisit this issue, to ensure that the national framework for retail regulation deals with the issue of energy hardship in a robust and considered way.

¹⁶ *Electricity Industry Act 2000 (Vic)*, s 46A and *Gas Industry Act 2001 (Vic)*, s 48K.

¹⁷ Committee of Inquiry into the Financial Hardship of Energy Consumers, *Main Report*, September 2005, 19.

¹⁸ *Electricity Industry Act 2000 (Vic)*, s 43 and *Gas Industry Act 2001 (Vic)* s 48G.

¹⁹ Yarra Valley Water, *Customer Support Programs: Why they make good business and customer sense*, presentation at Credit & Collections for Power & Water, 31 August 2006.

6 Explicit informed consent

We are very pleased to see that the AAR recommends a robust framework for the regulation of marketing conduct, requiring not only pre-contractual disclosures, but also regulation of marketers in terms of conduct standards, training and record keeping. In a market that relies upon direct sales channels (door-to-door and telephone marketing) for customer churn, robust regulation of marketing is required to ensure that the demand side is able to effectively participate in the market. While fair trading legislation does regulate some aspects of marketing, it fails to require specific disclosures relevant to the energy market.

We note that AAR recommends that energy specific regulation of marketing conduct is justified where marketing conduct has the potential to influence energy contract formation and terms. We agree, but are concerned that AAR fails to adequately consider what is meant by explicit informed consent, which is required before a customer can enter into a new contract. This is a concept integral to the operation of an effective and competitive market, and there is value in having the concept explained clearly in the Law and/or Rules.

It is our view that informed consent consists of five principle components: information disclosure; capacity of the consumer to understand the information; genuine understanding by the consumer; that the transaction be completely voluntary; and that the decision to enter the arrangement/contract is made by the consumer. Explicit consent ensures that the consent is verifiable and auditable (in writing signed by the customer or recorded by electronic communication). We believe that the RPWG must reconsider this issue, and ensure a definition of explicit informed consent that reflects the above is made clear in the Law and/or Rules.

Should you have any questions about this submission, please contact me on 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody
Director – Policy & Campaigns