



3 May 2007

By email: [MCEMarketReform@industry.gov.au](mailto:MCEMarketReform@industry.gov.au)

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

Dear MCE Secretariat

### **Retail Policy Working Group Supplementary Working Paper Enforcement mechanisms and objectives**

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Supplementary Working Paper by Allens Arthur Robinson (**AAR**) released by the Ministerial Council on Energy's (**MCE**) Retail Policy Working Group (**RPWG**) on 19 April 2007. Consultation on the national energy regulatory system's enforcement mechanisms and objectives is essential to ensure that the system's institutional structures are capable of ensuring an effective, fair and efficient energy market.

## **1 Enforcement mechanisms**

We support the functions of the Australian Energy Regulator (**AER**) as set out in section 15 of the National Electricity Law (**NEL**) and the equivalent provisions to be included in the new National Gas Law (**NGL**). It is essential for the AER to adequately monitor compliance with the NEL, the NGL, the National Electricity Rules (**NER**) and the proposed National Gas Rules (**NGR**),<sup>1</sup> to investigate breaches of these instruments<sup>2</sup> and to institute enforcement action.<sup>3</sup> To do this, the AER must have access to a wide range of enforcement and compliance monitoring mechanisms. Such a wide range of measures, including informal discussion and consultations, can contribute to a dialogue about compliance between the regulator and regulated entities.

We are concerned that there is limited guidance provided to the AER about how it undertakes its enforcement and compliance monitoring powers. While the objective of the NEL and the NGL (discussed further below) provide some guidance, we believe that the AER should be able to ensure different classes of consumers, including low-income and vulnerable consumers, benefit from competition and the

---

<sup>1</sup> Section 15(a).

<sup>2</sup> Section 15(b).

<sup>3</sup> Section 15(c).

regulatory framework. In particular, we believe the AER should prioritise enforcement actions for breaches that disproportionately affect low-income and vulnerable consumers. As such, we believe there is scope for section 15 of the NEL and the equivalent provision of the NGL (as well section 29 of the NEL relating to the Australian Energy Market Commission (the **AEMC**)) to be amended to ensure that equity and distributional impacts of enforcement and compliance activities can be considered by the regulators.

## 1.1 Compliance monitoring

We are strongly supportive of a robust compliance monitoring system to support other enforcement activities. The AAR paper states that the AER's compliance and monitoring functions should be as follows:

- a requirement for regulated entities to establish systems and procedures to monitor regulatory compliance;
- a requirement for regulated entities to notify the AER of any breach of regulatory obligations; and
- an obligation on regulated entities to undertake periodic compliance audits using an independent regulator and provide the results of the audit to the AER.

Such requirements are essential to allow the regulator to monitor regulatory compliance and we support the approach set out in the paper. Robust compliance monitoring ensures that a regulator undertakes its responsibilities in a proactive, rather than merely reactive, fashion and does not have to wait until breaches become explicitly apparent or complained of before taking action to prevent them, thus allowing damage to be done in the meantime.

It is also important, however, that the results of such compliance monitoring activities are made public, so that consumers and other stakeholders are aware of regulatory non-compliance, and can take steps to promote enforcement and seek redress. Public reporting of compliance monitoring also provides important information to the market and promotes 'competition by comparison'. We believe that the AER should have an obligation to report publicly on compliance audits as well as any notification of breaches of regulatory obligations. The Victorian Essential Services Commission's (**ESC**) recent report of compliance audits for Victorian energy retail businesses, which focused on second-tier retailers, is a good example of public reporting of compliance audits which informs stakeholders about regulatory non-compliance.<sup>4</sup> That report highlighted a number of areas of non-compliance, particularly around the reliability and accuracy of performance indicator information reported to the ESC.

In addition to reporting on compliance audits, we believe that the AER should have specific powers to undertake comprehensive performance reporting about the level of services provided by regulated entities. Reporting of regulatory audits does not allow for a direct comparison between businesses in terms of their overall levels of service or compliance. Performance reporting can allow for such a comparison. We note that the recent exposure draft of the NGL and amendments to the NEL provide that the AER is to prepare and publish reports on the financial and operational

---

<sup>4</sup> Essential Services Commission Victoria, *Regulatory Audits Summary Report 2006-06*, April 2007, available at: <http://www.esc.vic.gov.au/NR/exeres/AF1521B3-75BD-4075-9C7D-0C77E8E3484A.htm>.

performance of network service providers.<sup>5</sup> While such reports are not strictly an enforcement or compliance monitoring function, they do inform customers about the price-service mix they receive, to enable monitoring of trends in performance and, again, facilitate 'competition by comparison'. We believe that such a function should not be limited to network service providers and should be applicable to retailers as well.

The ESC, for example, undertakes comprehensive reporting on the performance of retail energy businesses in Victoria.<sup>6</sup> The ESC's most recent report included:

- analysis of competitive market offers, incorporating price and non-price information on retailers' competitive energy offers;
- improved analysis of performance indicators, cross-referencing disconnection data with concession cardholder status, customers previously on budget instalment plans and multiple disconnections; and
- information on the number of bills based on estimated accounts.

This level of information is not easily obtainable without the regulator's reporting of it, and is very beneficial to support not only industry and consumer stakeholders but also policy makers in understanding and developing the market.

## 1.2 Court-based mechanisms

We agree with AAR's position that the court-based enforcement mechanisms provided for in sections 61, 63 and 68 of the NEL (and the equivalent provisions to be included in the NGL) should apply to the non-economic distribution and retail regulatory obligations to be included in the national framework. Although it is not entirely clear, we read the paper as stating that all obligations should be designated as civil penalty provisions. We would agree with that position – we see no reason why some obligations within the retail and distribution framework should not be designated as such. If breach of some obligations is not to attract civil penalties, then we seek further consultation on which specific obligations, outlining the reasons for them not being civil penalty provisions.

However, the orders available to a Court under the NEL or *Trade Practices Act 1974* (Cth), as listed in the paper, are relatively narrow. In particular, they do not enable the Court to order an entity to disgorge any profits made as a result of the breach successfully proven, nor can the Court order an entity to compensate another regulated entity or consumers who have suffered loss or damage as a result of the breach. These are obvious failings that need to be rectified by an amendment to the NEL (and NGL), especially now that the Courts will be adjudicating on breaches that relate to conduct that directly affects consumers, particularly small end consumers.

We recommend that, in addition to the specific orders listed above, the Courts be given the power to make any other orders considered appropriate. This sort of provision is now a common power given to Courts that adjudicate matters under regulatory regimes. It provides the Court with the flexibility to make different orders

---

<sup>5</sup> National Gas Law, s 26(f) and National Electricity Law, s 15(ea).

<sup>6</sup> See, eg, Essential Services Commission, *Energy Retail Businesses Comparative Performance Report 2005-06*, December 2006, available at: <http://www.esc.vic.gov.au/public/Energy/Regulation+and+Compliance/Performance+Reports/Energy+Retail+Businesses+-+Comparative+Performance+Report+for+2005-06/Energy+Retail+Businesses+-+Comparative+Performance+Report+for+2005-06.htm>.

in different cases, subject always to the requirement that the Court must consider the orders appropriate. Inserting such a power also obviates the need to try to determine in advance all the different sorts of orders that may be required, while risking an overly prescriptive regime.

AAR recommends in the paper that exactly these three powers to make orders (to disgorge profits; to compensate for loss; and any other order considered appropriate) be available to the Courts in dealing with an entity that has breached an enforceable undertaking. We strongly support these recommendations, and point out that if these orders are open to the Courts in dealing with breaches the subject of an enforceable undertaking, they should also be open to Courts dealing with the same breaches where an enforceable undertaking was not signed. Otherwise, there is a distorting incentive for the AER to obtain an enforceable undertaking prior to court action in every case, regardless of whether proceeding directly to court action may be more efficient in certain cases.

### 1.3 Infringement notices

We also support the provisions currently contained in the NEL (and to be included in the NGL) giving the AER the power to issue infringement notices where the AER believes that there has been a breach of a civil penalty provision. AAR, in its discussion of compliance notices (such as the enforcement orders that can be made by the ESC in Victoria), notes a concern about the regulator itself assessing regulatory compliance and imposing binding requirements on regulated entities based on that assessment. We agree that there should be court oversight of the determination that a breach has occurred, and note that an infringement notice regime more suitably fits within this requirement, with a regulated entity who has received an infringement notice entitled to disregard the notice and defend any proceedings in respect of the civil penalty provision. The issuing of an infringement notice is not an adjudicative role, and is required for the regulator to effectively enforce the law. However, while we agree with AAR that compliance notices are not necessary for the national framework, we note that the compliance notices discussed in the paper are also all subject to some level of judicial oversight.

### 1.4 Administrative remedies

We strongly agree with AAR that the AER must have scope to employ administrative remedies and sanctions where it is concerned about regulatory non-compliance. We note that almost all of the ESC's compliance activities fall into the category of administrative responses, which do not have a legislative basis. While we support such administrative responses and an approach that aims to work with regulated businesses to overcome instances of non-compliance, we do believe that there should be robust and public reporting on the nature of such activities.

We recommend the ESC's Compliance Policy Statement for Victorian Energy Businesses<sup>7</sup> as a model for the AER. The ESC's policy envisages annual reporting of its compliance and reporting role. The ESC states that this is done to inform:

- the public of the ESC's response to non-compliance with regulatory obligations by regulated energy businesses, and

---

<sup>7</sup> Essential Services Commission, *Compliance Policy Statement for Victorian Energy Businesses*, November 2006, available at: <http://www.esc.vic.gov.au/public/Energy/Consultations/Compliance+Strategy/Compliance+Strategy.htm>.

- industry of the compliance standards expected and the consequences of failing to meet these standards.<sup>8</sup>

We agree that public reporting will provide confidence to stakeholders that the regulator will do its job. The ESC states it will document the following:

- the number of instances and types of non-compliance by individual regulated energy business and summary details of agreements and compliance action taken;
- number of initial investigations, provisional and final enforcement orders served, penalties levied, administrators appointed and licences varied or revoked;
- administrative agreements and enforcement orders aggregated by industry and classification of the regulatory obligation; and
- timeliness of data received for regulatory accounts and in response to other information requests made by the Commission.<sup>9</sup>

The AER should similarly document all forms of compliance activities it undertakes, including informal action and agreements made after released through initial investigations, before it resorts to infringement notices or court-based actions.

One administrative remedy that we believe should have a legislative basis is enforceable undertakings. We strongly support AAR's recommendation that the NEL and NGL include a provision similar to section 87B of the *Trade Practices Act 1974* (Cth) to allow for enforceable undertakings to be used. Enforceable undertakings enable regulators to be more responsive to inappropriate or unlawful market conduct. In addition, they can facilitate agreement to a detailed compliance strategy where non-compliance is persistent or systemic, while monetary penalties may be more appropriate for one-off breaches.

The public nature of enforceable undertakings is also fundamental. For example, in 2005 Consumer Affairs Victoria obtained an enforceable undertaking against Energy Australia relating to its marketing behaviour.<sup>10</sup> The public nature of the undertaking contributed to promoting improved regulatory compliance, not only by Energy Australia but by other new entrants in the Victorian market.

As stated above under 1.3, we agree with AAR that a compliance notice system is not the best choice of approach to providing the AER with appropriate administrative remedies.

## 1.5 Revocation

Revocation of business authorisation is clearly a last-resort enforcement mechanism. However, we disagree with AAR's conclusion that licence revocation is not an effective enforcement mechanism *at all*. In our view, revocation is an important and effective ultimate deterrent against regulatory non-compliance. As stated by Consumer Affairs Victoria in its paper, *Using licensing to protect consumers' interests*, the potential for regulated entities to lose, or have conditions placed on,

---

<sup>8</sup> Ibid, p 19.

<sup>9</sup> Ibid, p 19.

<sup>10</sup> See

[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Enforceable\\_Undertakings\\_2005/\\$file/Energy%20Australia%20Undertaking%20%2019-02-2005.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Enforceable_Undertakings_2005/$file/Energy%20Australia%20Undertaking%20%2019-02-2005.pdf).

their licence is a significant deterrent against traders seriously or persistently breaching industry standards.<sup>11</sup> In the event of consistent and systematic breaches by a regulated entity, and where financial penalties have not provided a sufficient deterrent, revocation of authorisation would be an appropriate last-resort enforcement option.

We note that in the third RPWG working paper, AAR recommended several entry tests be required to be satisfied to obtain business authorisation. Further, regulated entities would be required to continue to satisfy the entry criteria for the period of registration and the AER would have the power to revoke authorisation where the entity ceased to satisfy these criteria. This is logical – if it is accepted that some form of market entry test is required, it would be farcical to only apply such standards at the time a market participant first enters the market and not subsequently, given that a market entry test questions whether the party seeking to *enter* the market will be an appropriate *participant* in the market.

In the current paper, AAR recommends that this revocation power is sufficient and is more appropriate as it is connected to the operation of authorisation as solely an entry requirement. However, as is clear from AAR's own recommendations in the third working paper, authorisation is proposed to be an ongoing requirement, not merely an entry requirement. Thus it is not inappropriate to be able to revoke authorisation due to ongoing conduct in the market, albeit as a last-resort.

However, although we disagree with AAR's conclusion in this regard, if its recommendations are followed, we suggest that at the very least the NEL and NGL be amended to clarify that the enforcement record of a regulated entity may be taken into account in assessing ongoing compliance with the market entry tests. For example, one of the entry requirements recommended by AAR is organisational and regulatory compliance capacity. In our view, continuing satisfaction of this requirement directly relates to enforcement. We do note that just because a regulated entity has organisational and regulatory compliance capacity, it does not mean that they will comply with their obligations in practice. Systematic breaches of regulatory obligations, however, should be evidence that a regulated entity does not have capacity to comply. When this occurs, the regulator should be able to revoke registration. Similarly, a record of systematic breaches might indicate that the entity is not a suitable person to continue to hold authorisation.

## 1.6 Other enforcement issues

### **(a) Private enforcement action**

We welcome the extension of private rights of action to third parties in the retail and distribution regulatory framework. We note that as far as the regulatory framework implies contractual terms and conditions between consumers and regulated entities, consumers will be able to have access to dispute resolution mechanisms, including the energy ombudsman and other courts and tribunals, to seek damages for breach of contract. However, we believe that extending regulatory enforcement rights to parties other than the regulator will improve the effectiveness of the regulatory system.

---

<sup>11</sup> Consumer Affairs Victoria, *Using licensing to protect consumers' interests*, November 2006, p 14, available at: [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Reports\\_and\\_Guidelines/\\$file/licensing\\_protect\\_consumer\\_interests.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/licensing_protect_consumer_interests.pdf).

In particular, we believe that such rights will assist enforcement by accessing private resources when the regulator may be disinclined or unwilling to act. We do not believe that such rights will impinge or affect the regulator's enforcement strategies, but can complement them. If such a proposal proceeds, we believe that standing should not only be provided to individuals who are seeking damage, but to consumer and other public interest organisations who may seek injunctions or declarations. We note that consumer organisations have been granted standing with respect to reviews of regulatory pricing decisions in the recent exposure drafts of the NEL and NGL. We believe that similar standing rules would be appropriate for the retail and distribution regulatory framework.

AAR raises a concern that allowing any person to bring proceedings may result in a proliferation of litigation. We do not believe that this would occur; the expense, time and commitment required for initiating litigation in this area would act as a significant deterrent to unwarranted litigation.

Another model which would support third party involvement in the enforcement and compliance process is the "super complaint" mechanism that exists in the UK. The *Enterprise Act 2002* (UK) provides that super-complaints can be submitted by designated consumer bodies about "any feature, or combination of features, of a market in the UK for goods or services is, or appears to be, significantly harming the interests of consumers". The regulator with the duty to respond to the super-complaint is required to publish a reasoned response within 90 calendar days from the date the complaint is received. With respect to the energy industry, Energywatch, a consumer advocacy organisation, can submit complaints to the regulator Ofgem.

We recommend this procedure to the RPWG as an effective addition to the enforcement and compliance regime in the national framework.

### **(b) Systemic issues**

AAR has not identified the obligation of the regulator to identify and address systemic issues as part of its enforcement and compliance activities. A systemic issue is an issue, a problem or a change in the policy or practice of a service provider which affects, or has the potential to affect, a number of customers. It is particularly in relation to systemic issues that guidance should be provided to the regulator to address distributional issues, such as the impact of regulatory non-compliance on different customer classes.

In our view, the energy regulator must work in tandem with energy ombudsman schemes to identify and address systemic issues early, so that their impact on customers can be lessened. The regulator's obligation in relation to addressing systemic issues should be made clear in the Law and/or Rules, and should be developed in consultation with energy ombudsman schemes.

### **(c) Wrongful disconnection payment**

AAR has also not considered the Wrongful Disconnection Payment (**WDP**) which was legislated for in Victoria in 2004. Section 40B of the *Electricity Industry Act 2000* (Vic) and section 48A of the *Gas Industry Act 2001* (Vic) makes a payment obligatory if the retailer "wrongly" disconnects the supply of electricity or gas to the premises of a "relevant customer" after failing to comply with the terms and conditions of a

customer's contract. The amount payable is currently \$250 for each whole day that supply is disconnected. This suggests that payments are intended not only to compensate customers who have been wrongfully disconnected but to encourage retailer compliance with their obligations.

While the introduction of the WDP has been a challenge to the regulator, the ombudsman and market participants, it has achieved its goal of reducing the amount of disconnections that were occurring in the market. The ombudsman reports that it has seen a reduction of 72% in disconnection cases since the WDP was introduced.<sup>12</sup> At the same time, there has not been a significant increase in customers' arrears. In this light, and given the fact that the ESC makes the final decision as to when the WDP is payable (subject to court oversight), the WDP has operated as a significant compliance tool available to the regulator. In our view, this compliance tool should be available to the national regulator.

#### **(d) Use of lower courts**

We support the proposal to enable the regulator, in seeking court based remedies under the NEL and NGL, to apply to lower courts. We believe that flexible procedures for enforcement of obligations, including the accessibility of different courts, can only enhance the effectiveness of enforcement activities. Lower courts are generally quicker and cheaper than courts of unlimited jurisdiction. It may be more appropriate, for example, for regulated entities that wish to challenge infringement notices to access lower courts, where that court has monetary jurisdiction over the relevant civil penalty.

## **2 Objectives**

### **2.1 Introduction**

We strongly disagree with the AAR's conclusion that the objective in the exposure drafts of the NGL and amendments to the NEL is adequate and appropriate for the purpose of guiding the AEMC and the AER in carrying out the non-economic and retail regulatory functions. As stated above, we 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.

As outlined below, the current Victorian regulatory framework allows the regulator to consider such issues. As we understand it, the main purpose of the RPWG is to develop a harmonised framework for distribution and retail energy functions of the national energy market and that it has received no particular guidance to alter the policy positions underlying the regulatory frameworks as they exist in jurisdictions.<sup>13</sup> 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).

---

<sup>12</sup> Energy and Water Ombudsman (Victoria), *Resolution 22*, 1 January 2006 – 30 June 2006, p 12.

<sup>13</sup> 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.

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.

## 2.2 The current objective

The second reading speech to the bill introducing the national electricity market (**NEM**) objective, the precursor to the objectives in the draft NEL and the NGL, made it clear that the objective is an economic concept and should be interpreted as such. The Minister introducing the bill stated:

[I]nvestment in and use of electricity services will be efficient when services are supplied in the long run at least cost, resources including infrastructure are used to deliver the greatest possible benefit and there is innovation and investment in response to changes in consumer needs and productive opportunities.

The long term interest of consumers of electricity requires the economic welfare of consumers, over the long term, to be maximised. If the National Electricity Market is efficient in an economic sense the long term economic interests of consumers in respect of price, quality, reliability, safety and security of electricity services will be maximised.<sup>14</sup>

It should be noted that this 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.<sup>15</sup> It recommended minimal change to the objective, and the MCE Standing 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.<sup>16</sup> 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.<sup>17</sup>

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

---

<sup>14</sup> John Hill MP for Minister Patrick Conlon, *Second reading speech – National Electricity (South Australia) (New National Electricity Law) Amendment Bill 2005*, 9 February 2005.

<sup>15</sup> Expert Panel on Energy Access Pricing, *Report to the Ministerial Council on Energy*, April 2006.

<sup>16</sup> 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.

<sup>17</sup> *Ibid*, p 39-40.

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.

### 1.3 Consumer interests and regulatory costs

AAR confirms that the approach it recommends constrains the AEMC and the AER in giving effect independently to equity and distributional factors. It also states that these issues 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 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.<sup>18</sup> 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'.<sup>19</sup> The ESC itself has praised the 'clarity' of this objective.<sup>20</sup> 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.<sup>21</sup>

The ESC points to the following examples of work undertaken by it in recent years relating to the energy sector that have involved consideration of social and environmental objectives and outcomes.<sup>22</sup> The ESC's facilitating objectives contributed to the ability and capacity of the ESC to undertake this work:

- a special report to Government examining the number of electricity or gas disconnections and the link to customer capacity to pay, and identifying opportunities to establish improved disconnection indicators;

---

<sup>18</sup> Ministerial Council on Energy, *Criteria for Effective Competition Assessments in Retail Energy Markets*, 27 October 2006.

<sup>19</sup> *Essential Services Commission Act 2001* (Vic), section 8(1).

<sup>20</sup> Essential Services Commission, *Submission to the review of the Essential Services Commission Act 2001*, September 2006, p 5.

<sup>21</sup> *Essential Services Commission Act 2001* (Vic), sections 8(2)(e) and (f).

<sup>22</sup> Essential Services Commission, above n 14, p 6-7.

- a special report to Government on the market for bottled liquefied petroleum gas (LPG) which identified options to mitigate price impacts caused by a substantial increase in the degree of supplier market power and to promote effective competitive and sustainable (triple bottom line) market outcomes;
- the mandated rollout of interval meters, which was partly aimed at promoting more sustainable use of energy resources and providing customers with information allowing them to better manage their energy consumption;
- a review of retailer compliance with Energy Retail Code requirements in relation to the setting of early termination fees;
- examining the financial hardship policies currently administered by energy and water businesses, which will develop an economic model to assess the costs and benefits of hardship policies, review the businesses' existing policies and practices and seek to identify best practice;
- improving customer education and information in retail energy markets, with a specific focus on implementing mechanisms to assist (particularly low-income and vulnerable) customers to make informed choices on price and non-price offers in the energy retail markets.

It is integral that the regulators at the national level have capacity and direction to undertake these sorts of tasks. While Governments should have ultimate control over social and environmental policies, both the AEMC and the AER will be well placed to undertake tasks such as those above, which have contributed to outcomes that address market failures existing in energy markets.

We note that the recent independent review of the ESC Act recommended a new objective, more focused on achieving efficiency in line with the objective in the draft NEL and NGL. The review found that there is

a need to ensure that regulation focus[es] on delivering not just allocative efficiency (accurate pricing to reflect real underlying costs to reduce the risk of excess profits being earned by the provider) which was seen as a major focus of the existing regulatory structure, but also productive efficiency (to encourage adoption of approaches that will reduce costs by lifting the productivity of existing and proposed assets) and dynamic efficiency (ensuring an adequate incentive to make new infrastructure investment).<sup>23</sup>

We agree that achieving efficient outcomes is beneficial to consumers. However, we believe that the public interest should underscore the implementation of efficiency objectives. Without such a focus, a narrowly defined notion of efficiency may neglect consumer benefits.

The ESC Act review also stated:

placing a primary emphasis on the interests of consumers increase(s) the risk of overemphasis on short run allocative efficiency and keeping prices low, at the expense of incentives to increase productivity and investment. In the long run, maintaining the incentives to improve productivity and to invest are as important to the interest of consumers as ensuring prices do not allow excessive profits.<sup>24</sup>

We strongly agree with the last sentence, but we fail to see how recognising the interests of consumers necessarily prevents consideration of productivity and

---

<sup>23</sup> Roger Beale, *Review of the Essential Services Commission Act 2001 (Vic)*, p 6.

<sup>24</sup> *Ibid*, p 7.

investment concerns. In our view, economic regulation will always involve a balancing of the competing interests of various stakeholders as well as short and long term benefits. The ESC Act's objectives, particularly the facilitating objective ensuring consumers, including low-income and vulnerable consumers, benefit from competition and efficiency, enable the ESC to more fairly balance costs and benefits of particular action.

We also note that the Victorian Government is concerned about the recommendation to amend the ESC's objectives, particularly the reference to low-income and vulnerable consumers.<sup>25</sup> In its response to the review, the Victorian Government states that the inclusion of this wording represented a significant advance in the economic regulation of essential services.<sup>26</sup> We agree and will be making representations to the Victorian Government not to accept the relevant recommendations of the review. This is because, 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.<sup>27</sup>

#### 1.4 Conclusion

The MCE is not limited in its options to merely amending or retaining the current objective of the NEL and draft NGL. As in the ESC Act, it is possible to have an overriding objective, with facilitating objectives to give further guidance to the regulator. We strongly recommend that this approach be adopted under the NEL and NGL, as there is significant scope for considerations such as the ones we discussed above in relation to considering distributional and equity effects to be incorporated into the principles guiding the regulator. Indeed, doing so would ensure that the regulatory regime the AER is left to enforce does not represent an impoverished view of how the national electricity and gas markets should operate.

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

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



Gerard Brody  
Senior Policy Officer

---

<sup>25</sup> Victorian Government, *Strategic Government Response to the Review of the Essential Services Commission Act 2001*, p 3.

<sup>26</sup> *Ibid.*

<sup>27</sup> Michael Trebilcock "An Introduction to Law and Economics" (1997) 23 *Monash University Law Review* 124.