



29 June 2007

**By email:** [escactreview@infoshare.vic.gov.au](mailto:escactreview@infoshare.vic.gov.au)

Tim Holding MP  
Minister for Finance  
Level 5, 1 Macarthur Street  
MELBOURNE VIC 3002

Dear Minister

### **Review of the *Essential Services Commission Act 2001***

The Consumer Action Law Centre (**Consumer Action**) thanks you for your letter dated 30 April 2007 inviting comment on the Strategic Government Response to the Independent Review (the **Review**) of the *Essential Services Commission Act 2001* (Vic) (the **Act**), conducted by Mr Roger Beale AO last year. In this response, we have provided comment on the four issues about which your letter sought stakeholder feedback.

#### **1 About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign focused, casework and policy organisation. It was formed by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service in 2006, and builds on the significant strengths of these two centres.

Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and throughout the community directly.

Consumer Action has been a member of the Essential Services Commission's (the **Commission**) Customer Consultative Committee since its inception, and is particularly interested in the Commission's regulation of energy and water. Consumer Action regularly provides the Commission with submissions and comments about its work.

**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](mailto:info@consumeraction.org.au)  
[www.consumeraction.org.au](http://www.consumeraction.org.au)

## 2 New objective and pricing principles

### 2.1 New objective

Consumer Action strongly supports the current objectives of the Act and does not agree with the recommendation of the Review to amend the primary objective in section 8(1) of the Act and remove the facilitating objectives in section 8(2). We note that the review did find that the objectives of the Act are being achieved by the Commission, and that service, reliability and customer responsiveness of regulated industries has improved under the regulatory regime administered by the Commission.

In the second reading speech introducing the Act into the Victorian Parliament, Treasurer Brumby stated that the aim of the Act and associated reforms was ‘to protect the interests of all consumers in relation to reliable supplies of gas, water and electricity’.<sup>1</sup> Treasurer Brumby identified the following key features of the Commission:

- a focus on achieving triple-bottom line outcomes through more effective integration of economic regulation with broader environmental and social objectives;
- a regulatory approach that provides strong incentives for optimal long-term investment in infrastructure;
- more effective regulatory oversight over reliability of essential services as they affect Victoria; and
- enhanced accountability and transparency of regulatory decision-making.<sup>2</sup>

With respect, it appears to us that the Review’s analysis of the Act’s objectives focuses on the second dot point above, and the need to ensure that there are incentives to improve productivity and investment in infrastructure, without adequately considering the other key features identified in the second-reading speech. While we agree that regulatory decision-making should promote improved productivity and efficient outcomes, we are concerned that the Review’s recommended objective focuses on efficiency to the neglect of consumer outcomes.

The Review argues that social and environmental outcomes should be dealt with through independent regulatory or other mechanisms. While this may be possible in some circumstances, such an approach denies the significant impact that economic regulation can have on environmental and social outcomes. The fact is that economic, environmental and social aspects of essential service delivery are inter-related and the regulator’s decision-making role will always be a matter of balance, judging competing interests, and promoting outcomes that further the public interest. It is our view that the ‘laundry list’ of facilitating objectives provides important guidance to the regulator in achieving such outcomes.

The Review discusses the 2005 Productivity Commission (**PC**) Review on National Competition Policy, a policy which was an important precursor to the independent economic regulation of essential infrastructure. As discussed in the Review, the PC did outline a

---

<sup>1</sup> John Brumby MP, *Essential Services Commission Bill 2001 – Second reading speech* (Victorian Parliament, 23 August 2001).

<sup>2</sup> *Ibid.*

number of key benefits of Australia's micro-economic reform program for consumers, including improved productivity, sustained economic growth and increased consumer choice. The PC noted, however, that 'experience with NCP reinforces the importance of ensuring that the potential adjustment and distributional implications are considered at the outset'.<sup>3</sup> Additionally, the PC noted the 'mixed impacts' of reforms on regional communities and adverse impacts on the environment (such as increased greenhouse gas emission from the reform-related stimulus to demand for electricity). It is our view that the Review's recommended objective will entrench a failure to consider adjustment, distributional and equity impacts of regulatory decision-making. This is because it will focus the regulator on supply-side efficiency and investment matters only.

Consumer Action believes that economic growth exists to serve not just the majority of Australians, but all of them. Public policy programs should not place such an emphasis on wealth creation that we pay insufficient attention to how we distribute wealth. Considering this, it is our view that the facilitating objective of the Act that ensures users and consumers, including low-income and vulnerable consumers, benefit from the gains from competition and efficiency, is an important and progressive inclusion that should be maintained.

## 2.2 Pricing principles

Consumer Action broadly supports the Review's recommendation relating to pricing principles to guide the Commission's determinations relating to price determinations. We recognise that these pricing principles are in accordance those developed as part of the national energy regulatory framework and reflect good practice for economic regulatory pricing determinations.

We would not support, however, these pricing principles replacing the facilitating objectives of the Act. As outlined above, we believe that facilitating objectives assist with guiding the regulator, and such guidance should apply to all of the Commission's activities, and not be limited to pricing determinations.

We also do not support the removal of section 33(4) of the Act, which requires the Commission to ensure that, wherever possible, the costs of regulation do not exceed the benefits, and that decisions take into account and clearly articulate any trade off between costs and service standards. It is a good regulatory principle to ensure the costs of regulation, costs which are ultimately borne by consumers through the prices of essential services, do not outweigh benefits. Further, pricing determinations, both in energy and water, are critical to determining adequate standards of service are delivered. It is in the consumer interest for the Commission's determinations to clearly explain the trade off between costs and service standards, which should also improve transparency of decision-making.

We also have concerns about the recommendation requiring the Commission to consider form of regulation factors when it determines the form of, or need for, regulation. While the factors listed are useful in determining whether a particular service is competitive, we're not convinced that this should be the limit of the Commission's regulatory functions. In our view,

---

<sup>3</sup> Productivity Commission, *Review of National Competition Policy Reforms (Report No 33)*, April 2005, p 150.

the Commission should have ambit to regulate where it identifies consumer detriment (subject to a comprehensive and consultative cost-benefit analysis).

### 3 Providing the Commission with code-making powers

Consumer Action broadly supports the recommendation to provide the Commission with a general power to make codes, as well as appropriate penalty provisions for their breach. We note that the Commission has, to date, made extensive use of codes under energy and water industry legislation, to define the obligations of regulated entities. We agree that the current reliance on licence revocations to enforce such obligations is insufficient, and would welcome a civil penalty regime. Such a regime would provide a better incentive for regulated businesses to comply with their obligations.

We also broadly support the recommendation that the process for creating a code should be consistent with the *Subordinate Legislation Act 1994* (Vic) requirements that statutory rules are subject to regulatory information statement (**RIS**) processes, and that codes are disallowable by Parliament. We agree that there should be appropriate regulatory gate-keeping to ensure that regulatory burdens do not outweigh benefits, noting that any costs associated with regulation are ultimately borne by consumers through increased prices.

We note, however, that current RIS processes are ineffective at assessing the benefits of applying interventions to address problems affecting consumers. For example, the Victorian Competition and Efficiency Commission's Annual Report 2005-06 noted that improvements could be made in the quality of regulation through improving the quantification of the extent of problems that regulation is addressing, and the costs and benefits of proposed options for addressing these problems.<sup>4</sup> In detailing its work in these areas, it highlighted that quantification of the problem to be addressed in Victorian RISs improved in 2005-06, as did cost quantification.<sup>5</sup> However, in contrast, quantification of the benefits of proposed regulation in Victorian regulatory impact statements actually declined in 2005-06. It reported:

Improvement in quantifying benefits, however, has not progressed from 2004-05 where 64 per cent of RISs contained some type of quantification. This compares to 50 per cent of United Kingdom RISs that quantified benefits to businesses and 32 per cent that quantified benefits to consumers and the environment....<sup>6</sup>

In terms of measuring the benefits of regulation, the Victorian Competition and Efficiency Commission noted that '[i]t is widely recognised that it can be more difficult to estimate the

---

<sup>4</sup> Victorian Competition and Efficiency Commission, *Annual Report 2005-06*, September 2006 at 63.

<sup>5</sup> As above at 64 – 67. Regarding problem quantification, it reports: 'In 2005-06, 73 per cent of RISs assessed had some quantification of the extent of the problem requiring regulatory action, unchanged from 2004-05. The proportion of RISs that comprehensively quantified and monetised the problems however, increased from none in 2004-05 to 17 per cent in 2005-06.' Regarding cost quantification, it reports: 'The proportion of RISs that contain some quantification of the predicted costs of the proposal has increased from 88 per cent in 2004-05 to 93 per cent in 2005-06...Further, half the RISs included a comprehensive quantification of direct costs, and 3 per cent included a rigorous quantification of all direct and indirect costs, a significant improvement on last year when only 27 per cent of RISs quantified direct costs and none quantified indirect costs.'

<sup>6</sup> As above at 67.

value of benefits...Some regulatory proposals impose benefits that are not amenable to quantification or that can be difficult to quantify...'.<sup>7</sup>

We do note that the Commission's current processes for developing codes are consultative and we are concerned to ensure that any extra requirements on the Commission do not mean that it is unable to quickly respond where consumer detriment is identified. Considering this, and the problems identified with RIS processes above, it is our view that the Government should undertake an overhaul of the RIS processes, to ensure consumer interests are appropriately identified and quantified, before proceeding with the recommendation.

### 3 Improving the Commission's access to information

Consumer Action strongly supports the Review's recommendation that the Act be amended to enable the Commission to obtain information from any person who may be able to provide information relevant to the functions of the Commission. We have become increasingly concerned about regulated businesses contracting out services (often to related entities) and then attempting to use the contract price to over recover in the context of a price determination, rather than allowing the ESC to determine whether the proposed costs are efficient.

The recommendation states that improved information gathering powers could be achieved by amending section 37(1) to state that the entities the obligation applies to 'includes, but is not limited to, all regulated entities, and associates of regulated entities'. This was said to be consistent with the draft National Gas Law (**NGL**) which was first released for consultation in November 2006.

Consumer Action notes that since the release of the draft NGL, the Ministerial Council on Energy (**MCE**) Standing Committee of Officials (**SCO**) has released its response to issues raised in submissions. The MCE SCO, noting that the concept of 'associate' is perhaps too broad, state that:

A separate concept from that of an 'associate' will be used to target the scope of information gathering powers to appropriate entities (i.e. persons who significantly contribute to the provision of pipeline services). ...

... The NGL will be amended so that the AER can issue regulatory information instruments to service providers (of covered pipelines) and other persons who significantly contribute (either as an individual or group of related companies) to the provision of pipeline services. Rules may be used to clarify the circumstances in which persons are considered to 'significantly contribute'. MCE will have no ability to prescribe persons by regulation to which the instruments will apply.

The key protections will be that the AER, in exercising its discretion whether to issue a regulatory information instrument:

- may only issue instruments 'reasonably necessary' for the relevant AER function; and

---

<sup>7</sup> As above.

- in addition to the 'reasonably necessary' test, when issuing an instrument to a person other than the service provider is required to take into account:
  - whether the service provider is able to provide sufficient and timely information to address the reasons for issuing the instrument (i.e. whether there is a need to apply the instrument to the other person), and
  - the extent to which the AER considers the services provided by the other person are provided on a genuinely competitive basis having regard to:
    - the competitiveness of the market in which the person provides services to the service provider;
    - whether and how the arrangements were market tested; and
    - any relationship of ownership or control between the parties.

Consumer Action generally supports this approach, but notes that much will depend upon the legislative drafting, given that previous experience suggests that this is likely to be a highly litigated clause. (The Essential Services Commission is currently involved in extensive litigation with Alinta about the scope of essential services regulation). Before supporting any amendments regarding the Commission's access to information powers, Consumer Action would need to view the precise words to be used in the legislation.

Consumer Action also supports the recommendation in relation to the release of commercial-in-confidence information. It is our view that there should be a presumption in favour of disclosure, and for it to be the Commission's policy that all submissions and information provided to it be publicly available. We agree that in some circumstances there are commercial reasons why information should be kept confidential, but we believe that it should be incumbent on the regulated businesses to demonstrate why the Commission should not publicly release the information.

#### 4 Review of regulatory decision-making

Consumer Action does not support the recommendations relating to a limited merits appeal. The Commission's price determinations, in particular, are extensive processes, in which widespread consultation is undertaken. We do not believe that a limited appeals panel can effectively replicate this process in a short space of time. Nor do we believe that, due to resourcing constraints, consumers and consumer representatives can effectively participate in such appeals processes. Finally, we are concerned that the merits review process being considered is open to risks of gaming by regulated businesses.

In our submission to the Review, we supported the recommendations from the independent report, *Grounds for appeal – representing the public interest in the review of regulatory decision making in the energy market*.<sup>8</sup> That report recommended against any form of

---

<sup>8</sup> Catriona Lowe and Denis Nelthorpe, *Grounds for appeal: representing the public interest in the review of regulatory decision making in the energy market*, September 2006.

merits review, and concluded that judicial review alone provides the greatest likelihood of participation by public interest organisations, as well as promoting public interest outcomes. It states that judicial review involves more limited grounds upon which review may be sought and that the nature of the grounds available under a judicial review model focus on the legal correctness and process of decision-making. This limits the ability of regulated businesses to game the process by picking and choosing elements of a decision to appeal. In addition, the issues canvassed in a judicial review application more clearly relate to public interest considerations, focusing on issues of process.

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 style with a large, prominent 'G' and 'B'.

Gerard Brody  
Senior Policy Officer