



3 April 2008

Essential Services Commission
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Melbourne VIC 3000

By email to EnergyRegulatoryReview@esc.vic.gov.au

Joint Consumer Submission to the Review of Energy Regulatory Instruments

The following represents the views of the Consumer Utilities Advocacy Centre, Consumer Action Law Centre, and St Vincent de Paul Society Victoria.

We welcome the opportunity to participate in the Essential Services Commission's Review of Energy Regulatory Instruments.

We are of the view that the Victorian regulatory regime is the best developed in Australia, and has set a benchmark for other jurisdictions. There has been significant work done to ensure that it strikes the right balance between providing an appropriate level of discretion and flexibility to energy retailers and distribution businesses, and ensuring consumers have sufficient confidence to participate actively in this market.

Given industry's constant complaints about regulation - we note usually presented without any substantive evidence - we want to make clear that we do not perceive the Victorian regulatory framework to be over-regulated or restricted.

Indeed two major reviews that have recently investigated regulation in the energy market thoroughly endorsed the existing consumer protection regime:

- Productivity Commission's draft report into consumer policy framework acknowledged energy as an essential service and strongly affirmed the ongoing need for sector-specific regulation in energy; and
- Australian Energy Market Commission's (AEMC) review of the effectiveness of competition assessed the appropriateness of Victorian regulatory protections for small customers, and recommended **no change** to the existing framework, but in fact stronger enforcement of regulation in relation to instances of marketing misconduct.

Furthermore, the Retail Policy Working Group (RWPG) is currently developing a national regulatory regime for retail and distribution (non-economic) which will be completed by September 2009 – we see little value in pre-empting the decisions of the RPWG, and imposing obligations on consumers and on businesses that realistically are likely to be in place for such a short time, and incur costs in changing existing systems.

Following are our initial recommendations relating to the Review.

1. This process should not consider the removal of any small end-user protections except in instances of duplication or where the protection has been superseded.

We do not believe this process should consider the substance of regulation pertaining to small end-user protections.

The Commission should therefore reject industry's inevitable calls for further deregulation. While there may be benefit in streamlining the structure of regulatory instruments, we see no case to reduce the level and substance of protections for Victorian households, and neither did the Productivity Commission or the AEMC.

2. The review must facilitate frequent, timely and close consultation with consumers.

We have not had the opportunity to examine in detail each of the eight codes and 21 related guidelines to assess the relevance of individual consumer protections, or in which regulatory instrument that protection best sits. At the last meeting of the Commission's customer consultative committee, members were advised that the Commission did not expect a detailed response on each of the instruments under review.

As such, the comments on specific instruments outlined below should not be construed to signify that consumers are not interested in all other areas. We expect to actively participate in the consultation processes of the review, and as the Commission provides more detail on its thinking.

3. The substance of consumer protections relating to marketing must not be changed.

The current *Code of Conduct for Marketing Retail Energy* in Victoria was first developed in May 2002 with the introduction of full retail contestability into the Victorian electricity market. It was reviewed in 2004 and amended to cover both electricity and gas. There has been some criticism that the Marketing Code duplicates consumer protection provisions in the *Fair Trading Act 1999* (Vic) (FTA). However, rather than duplicating the FTA, it reinforces and extends provisions of generalist consumer protection legislation.

Generalist consumer protections do not provide regulation with respect to:

- Training, product and regulation knowledge of marketing representatives;
- The keeping of 'no contact' lists; and
- The information required to be given by a retailer to ensure a customer's explicit, informed consent.¹

The recent AEMC review of the effectiveness of competition identified a series of problems relating to marketing misconduct, following numerous research collected by consumer organisations that clearly demonstrated the need for robust consumer protection and regulatory oversight. Customer complaints about marketing have remained at high levels since the introduction of full retail competition.

¹ For more information, see *Consumer Protections in the National Energy Market – the need for comprehensive energy-specific consumer protections*, Consumer Action Law Centre, November 2006, available at <http://www.consumeraction.org.au/downloads/Energy-specificConsumerProtectionsintheNEM.doc>

The case studies collected by Consumer Action and Financial and Consumer Rights Council² indicated a range of misconduct in relation to marketing practice including:

- misleading and deceptive conduct;
- retailers switching customers without consent;
- unconscionable conduct;
- marketing to non-account holders; and
- harassment.

In addition, there were several cases which demonstrate marketers taking advantage of a lack of understanding on behalf of consumers including instances of consumers signing multiple contracts.

The report confirmed anecdotal evidence that marketing misconduct is widespread, and that marketers regularly take advantage of consumers, particularly vulnerable, disadvantaged and culturally and linguistically diverse consumers.

As such, we see no case for any deregulation of the marketing provisions contained in the Marketing Code, and would strongly oppose any move to do so, given the wealth of evidence demonstrating the need for such consumer protections.

The research collected by consumer organisations resulted in a recommendation by the AEMC that there needs to be rigorous monitoring of compliance with existing regulation. The Commission remains the regulator best placed to monitor compliance with the Marketing Code of Conduct as it has the data, the experience and the systems in place.

4. Consumer protections relating to credit management should remain in place, recognising the need to prevent consumers being unreasonably denied access to energy, and the substandard credit reporting system.

An integral part of the consumer protection framework is those regulations pertaining to access, to ensure consumers retain connection to energy. We are aware of industry criticisms that the Retail Code restriction enabling a retailer to only take into account utilities-related debt in a credit report incurs additional costs to gain that information.

However we strongly oppose any attempt to enable a retailer to deny access to energy on the basis of a general poor credit rating, which could be incurred due to an unpaid debt relating to overdue videos, or late payment of a cable television account. As the Commission knows, the Government's Inquiry into the financial hardship of energy consumers clearly demonstrated that consumers – well aware that energy is essential – are much more likely to renege on other financial commitments in order to keep paying their energy bills. A poor credit rating is therefore not necessarily indicative of a consumer's payment behaviour in relation to essential services.

The Commission should also be aware of systemic problems within the credit reporting framework that raise real questions – these include:

- quality and accuracy of information provided on credit reports;
- capacity and willingness of the regulator to enforce compliance with regulation;
- ineffective complaints handling and external dispute resolution schemes; and
- misuse of information in credit reports.

Indeed, the Australian Law Reform Commission's Review of Australian Privacy Law now underway explicitly addresses some of these issues.

² *Coercion and harassment at the door - Consumer experiences with energy direct marketers* Consumer Action Law Centre and the Financial and Consumer Rights Council, November 2007 available at <http://www.consumeraction.org.au/downloads/EnergyMarketinginVictoria-Finalv.3.pdf>

While the credit reporting system remains substandard, we strongly oppose any move to remove consumer protections enabling utilities-related debt to be the criterion for restricting access or making it conditional.

5. Regulation pertaining to information disclosure should be strengthened.

The Government has informally signalled its intention to deregulate energy retail prices. While that is not a position we endorse, if prices are deregulated the regulator must ensure that there is sufficient information in the market for consumers to be well enough informed to feel confident to participate and thereby promote competition.

Consumers must

- have the capacity to compare energy products easily
- are able to access information in a timely manner
- are alerted to key terms and conditions (e.g. early termination fees, payment arrangements etc).

One key weakness in the current framework is that while a customer can request an offer in writing without obligation, there is no similar obligation to provide that within a certain timeframe. The practical effect is that retailers are not providing that information to consumers within a timeframe that provides the consumer with the capacity to use it.

We recommend that the regulation pertaining to that obligation include a timeframe of no more than 3 business days for compliance.

6. The concept of explicit informed consent must be clearly defined in the Retail Code.

While general contract law allows for consent to be implied from particular circumstances, in the context of essential services for which contractual relations have not been historically required, informed consent is integral to the operation of a fair and effective market.

In our view, informed consent consists of five principle components:

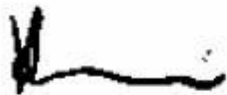
- information disclosure;
- capacity of the consumer to understand the information;
- genuine understanding by the consumer;
- complete voluntariness of the transaction; and
- that the decision making to enter the arrangement/contract is made by the consumer.

Explicit consent ensures that the consent is verifiable and auditable (in writing signed by the customer or recorded by electronic communication).


Energy-specific marketing regulation informs how the concept of explicit informed consent is implemented. Clause 6.3 of the Victorian Marketing Code of Conduct provides the types of information that must be provided to consumers before entering into a contract. While Victorian fair trading legislation provides - for telephone marketing agreements (and not for door-to-door sales) - that the consumer must be informed of “all matters relevant to the consent of the purchaser”, energy-specific regulation clearly identifies what those matters are.

If you wish to discuss any matters raised in this submission, please contact Kerry Connors, CUAC, on 9639 7600 or Gerard Brody, Consumer Action, on 9670 5088.

Yours sincerely



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