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## Review of Energy Regulatory Instruments

AGL **Energy** Limited (**AGL**) welcomes the opportunity to participate in the review of energy regulatory instruments.

### Introductory comments

AGL strongly supports the Victorian Government in its efforts to identify opportunities to improve and streamline the energy regulatory framework, and its overall commitment to reducing the regulatory burden on all Victorian businesses.[1] The energy industry in Victoria is subject to a greater number of regulatory instruments than any other Australian state. These regulatory instruments come in various forms; including legislation, licences, codes, guidelines, Orders in Council and determinations. Some of these were introduced prior to full retail competition (**FRC**) and others have been introduced progressively since. Somewhat perversely, as the competitive energy market has matured, there has been an increase, rather than a decrease, in the level of costly regulatory obligations with which retailers are to comply.

Due to time constraints, AGL has been unable to undertake a comprehensive review of all Victorian energy regulatory instruments for the pupose of this submission. Rather, we have focussed on a relatively narrow list of regulatory obligations that we suggest could be removed, resulting in significant cost savings in a short period of time. In addition, we have addressed the other issues which the Essential Services Commission (**the Commission**) will be examining as part of this review.

In undertaking its review, AGL encourages the Commission to assess the worthiness of each existing retail obligation against principles of good regulatory practice; such as those set by the OECD or the Commonwealth Office of Best Practice Regulation.[2] This will ensure that those regulations imposed without any

[1] In the 2006-07 Budget, the Victorian Government committed to reducing the regulatory burden for all Victorian businesses and it has committed to target reductions of: 15% cent of the current administrative costs by 2009; and 25 per cent of the current administrative costs by 2011.
[2] OECD, Guiding Principles for Regulatory Quality and Performance, Paris, 2005 and Australian Government, Best Practice Regulation Handbook, Canberra, August 2007.

cost-benefit analysis or without a clear objective are in fact appropriate and necessary.

### *1. Remove regulatory provisions that may have become redundant*

#### Small Business

In Victoria, customers are "demonstrating a clear willingness to participate in the competitive retail market"[3] with 60% of electricity customers on market contracts.[4] It is this evidence of customer behaviour, amongst other factors, that led the Australian Energy Market Commission (**AEMC**) to recommend that the regulation of standing offer retail prices cease from 1 January 2009[5] and the Commission to remove price oversight for small business customers from 1 January 2008.

For the same reason, and also because small businesses are adequately protected by national and state-based general consumer protection laws, there appears no justification for applying industry specific consumer protection provisions to business customers. As recognised by the Commission in its *Special Investigation: Review of Effectiveness of Retail Competition and Consumer Safety Net in Gas and Electricity* energy is not more essential then any other business input – a service procured in order to successfully run a business.[6] In this review the Commission also concluded that:

> "*in the longer term, it would be preferable to rely on the general protections of the fair trading and trade practices laws in dealing with unconscionable, misleading and deceptive conduct (including unfair contractual terms) for small business energy customers*."[7]

As there is no longer an obligation to supply or offer a standing offer contract to small business customers AGL urges the Commission to consider whether it is still necessary and appropriate for the Energy Retail Code and other consumer protection guidelines, such as the Marketing Code of Conduct, to apply to business customers.

If the Commission finds that it is still necessary and appropriate for the retail and business customer relationship to be regulated, then the Commission should reconsider implementing the recommendations from the 2004 competition effectiveness review on the aggregation of customer sites. The Energy Retail Code prevents retailers from treating a number of separate, but associated business supply points, as one customer and negotiating market contract terms with that aggregated business customer. For example, if AGL won a Victorian Education Department tender to provide energy services to all schools in Victoria, AGL would be required to treat each site as a small customer with a separate contract and would not be able to negotiate one single contract for the benefit of all parties.

AGL strongly believes that the Commission should amend the relevant Order in Councils to enable customers "with multiple supply points to elect not to be a

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[3] Australian Energy Market Commission, *Review of the Effectiveness of Competition in* Electricity and Gas Retail Markets in Victoria: Second Final Report, 29 February 2008 (***Second Report***) at 7.
[4] AEMC, Second Report at 19.
[5] AEMC, Second Report at 17.
[6] Essential Services Commission of Victoria, *Special Investigation: Review of Effectiveness of Retail Competition and Consumer Safety Net in Gas and Electricity* 22 June ***2004 (ESC Competition Review***) at 34.
[7] ESC Competition Review at 7.

'relevant customer' so as to enable them to negotiate with retailers in relation to aggregated supply points outside of the regulatory safety net."[8]

**Wrongful Disconnection Operating Procedures**

*The Operating Procedure Compensation for Wrongful Disconnection* states that:

> *"the intention in enacting the wrongful disconnection compensation obligations was to provide a simple mechanism to compensate small retail customers for the disruption to households and small businesses arising from disconnection which is unfair because a retailer has procured disconnection in breach of its Energy Retail Code obligations."*[9]

AGL understands that the Government was also keen to ensure that retailers were compliant with respect to the disconnection procedures in the Energy Retail Code, particularly in relation to taking into account a customer's capacity to pay prior to disconnection.

Unfortunately, in many instances, the procedures have lead to situations where the retailer is obliged to pay a consumer considerably more than what the consumer would have been entitled to under general law. Indeed, the procedures have resulted in several extremely large payouts whereby disconnections for non-payment have resulted in wrongful disconnection claims based on technicalities and human error (as opposed to disconnection in circumstances of financial hardship).

AGL is of the view that payments for wrongful disconnection in excess of what a customer would be entitled to be compensated for arising from a breach of contract, is not consistent with the intention of the procedures. Payments made which are out of all proportion with respect to the loss suffered by the customer as a result of the disconnection are simply inappropriate and are a costly burden on retailers – a burden which is not replicated in any other state. AGL understands that the wrongful disconnection obligations are legislative in nature, rather than regulatory. However, AGL submits that the Commission should recommend to Government that the wrongful disconnection legislation be subject to separate review, with a view to either repealing the legislation, or at the very least, introducing a cap on the level of payments made to customers.

**Code of Conduct for Marketing Retail Energy in Victoria**

The original Marketing Code of Conduct was drafted prior to the commencement of FRC when there was limited understanding of how the competitive energy market would operate. As the Commission is aware, national and state-based general consumer protection laws protect residential consumers. While AGL understands that there is a need to maintain safety net arrangements for residential customers in the transition to a competitive energy market, such as through an obligation to supply, AGL is of the view that there is nothing inherently unique in the marketing process of energy products that warrants an industry specific marketing code. Even the code itself acknowledges it replicates key provisions of the Victorian *Fair Trading Act 1999* and the *Trade Practices Act 1974* (***TPA***), specifically those provisions covering misleading and deceptive behaviour and unconscionable conduct.[10] Furthermore, AGL is not aware of other services, such as telecommunications (which could also be considered essential services) being

[8] ESC Competition Review at 6 .
[9] ESC, *Operating Procedure Compensation for Wronful Disconnection* at 1.
[10] *Code of Conduct for Marketing Retail Energy in Victoria* at 1.

subject to industry specific marketing codes – despite the fact that significant consumer detriment can arise from the mis-selling of these services.

During the 2006/ 07 financial year, the Energy and Water Ombudsman Scheme of Victoria (***EWOV***) received a total of 18,412 residential customer enquiries and complaints. Of these, only 1,549 related to marketing or the provision of customer information.[11] Some of these enquiries or complaints may have arisen from door-to-door sales, others from phone contact, advertising or direct marketing campaigns. On an average business day AGL's Victorian call-centre would receive more than 5000 customer enquiries, illustrating that the number of marketing and provision of customer information complaints that EWOV receive annually is extremely small compared to the number of contacts (in whatever form) retailers may have with consumers.

Withcompetition in the Victorian retail energy market considered to be effective, AGL submits that the Marketing Code of Conduct has now become redundant.

**Credit Management and Hardship**

Credit management obligations in Victoria are spread across regulatory instruments from the Energy Retail Code, Guidelines 1 and 4 Credit Assessment, Wrongful Disconnection Operating Procedures, Guideline 21: Energy Retailers' Financial Hardship Policies and the Government's hardship amendments to the electricity and gas industry acts.

Unsurprisingly, given the number of these regulatory instruments, there is unnecessary repetition and overlap, with respect to, for example,disconnection, hardship, the obligation to offer instalment plans, financial counselling assistance and energy efficiency advice.

Furthermore, the disconnection and the 'condition subsequent' supply obligations within the credit management provisions lead to the absurd conclusion that retailers can effectively disconnect a customer for say, not providing a refundable advance (condition subsequent), but then because of the obligation to supply that same retailer would need to reconnect that customer because the act of not providing a refundable advance is not a condition precedent.

This peculiar outcome is also true for outstanding debt. There is currently no obligation on a customer to finalise a debt with their current retailer before they can transfer to another retailer. This means that a customer can start consuming with a new retailer before they have to make any attempt to pay a debt with their previous retailer. Similarly, the new retailer would not be able to request the customer to go on an instalment plan or pay a refundable advance until after the customer started consuming.

AGL submits that regulatory instruments pertaining to credit management and hardship urgently require streamlining, in order to achieve consistency and greater clarity.

**Confidentiality and Explicit Informed Consent Guideline**

Guideline 10 on Confidentiality and Explicit Informed Consent was published in 2002 (prior to the extensive amendments to the Commonwealth *Privacy Act 1988*) to guide retailers on:

[11] Energy and Water Ombudsman (Victoria) 2007 Annual Report

- use and disclosure of customer information; and
- the meaning of explicit informed consent for contracts.

Contract law, the Commonwealth *Privacy Act*, the TPA and the Victorian fair trading legislation all address privacy and contract consent. As a guideline of this type is not considered necessary in any other industry, and also given the extensive amendments to the Privacy Act since this guideline was introduced, AGL queries the necessity of maintaining this guideline.

**Signature Requirements for Direct Debit Arrangements**

The Energy Retail Code requires a direct debit arrangement to be in writing. This is in contrast to the situation in other states, where voice recording of the customer's consent is sufficient. AGL is of the view that allowing a customer to voice record their consent would promote consistency between the jurisdictions, and would also advance the ease with which customers are able to deal with retailers. Direct debit is offered as a service to customers to assist them with managing their affairs. Requiring a wet signature prior to this being effected hampers this process.

***2. Modify regulation to facilitate advanced interval metering program***

To minimise the regulatory costs of rolling out and managing interval meters the Commission should ensure that any regulatory modification is transitional in nature and is aligned with the national advanced meter rollout process.

AGL believes that any such transitional regulatory instrument should include:

- regulatory reporting obligations on the distributor to provide periodic reporting on the implementation process against key performance indicators

- an obligation on the distributor to develop and comply with a communication plan – including the responsibility to respond to customer enquiries and complaints

- metrology obligations (which should be aligned with NEM metrology with any transitional exceptions clearly outlined in jurisdictional guideline/codes) should include the telecommunication requirements that are now defined as part of "metering" or AMI.

- clear data and AMI service quality obligations on the distributor.

***3. Assess the obligations relating to information provision to customers***

The Victorian energy regulatory framework contains a large number of obligations around the provision of information. For example, some of the these obligations require retailers to provide customers with:

- copies of certain Commission codes and guidelines
- advice on available tariffs within 10 business days
- information on concessions, energy efficiency advice, and historical billing data
- information about dispute resolution and the existence of EWOV
- advice on customers' rights
- product information statements, offer summaries, and particular information on bills
- pre-contractual information on the type, frequency of bills and payment methods, applicable tariffs and service levels, AGL's contact details, cancellation

rights, any applicable early termination fees, that they may be contacted as part of an audit procedure, differences between the customer's contract and the basic terms and conditions under the Energy Retail Code, and whether the marketing representative receives a commission or fee
- information on the right to cancel the energy contract

Retailers are also currently required to publish the terms and conditions of their standing offer contracts and the related prices in newspapers or government gazette. AGL is of the view that there is little benefit for a consumer in publishing this way. If the Victorian Government adopts the AEMC recommendation to remove retail price oversight for residential customers from January 2009, AGL will advocate for the publishing of tariffs on the retailer's website only. Publishing standing offer prices on the retailer's website site, coupled with the existing obligations to provide information on available tariffs prior to the customer entering into the contract and during the term of the contract, provides an appropriate balance between informing customers and the administrative burden of publishing standing offers.

AGL does not support the AEMC's recommendation for a new regulatory guideline that would require estimates of annual expenditure based on pre-determined consumption levels.[12] Estimates of annual expenditure require assumptions to be made regarding energy consumption, in particular surrounding block tariffs and peak and off-peak periods. Accordingly, customers whose products and consumption patterns differ from these base assumptions may be misled as to their actual entitlements.

***4.Examine whether obligations in guidelines should be in existing codes***

AGL considers that consolidating all the numerous regulatory obligations into one code, like the Queensland Electricity Industry Code, would be beneficial. As has already been noted in this submisison, retail obligations are currently dispersed between the codes, licences, guidelines, Orders in Council and various other documents, making it difficult for those not familiar with the regulatory framework to understand how regulation of the Victorian energy industry actually operates. Both consumers and retailers should be able to go to one source (i.e. one code), drafted in plain English so as to minimise ambiguity and misinterpretation, to understand their rights and obligations.

***5. Consider the compliance and reporting requirements arising from the existing framework***

Reducing the number of compliance, auditing and reporting obligations does not necessarily reduce the administrative burden of retailers. The reduction in administrative burden primarily comes from reducing:

- the time it takes to complete the activity; and
- the frequency of the activity.

Accordingly, when the Commission undertakes its review of the administrative instruments, AGL recommends that the Commission consider the frequency with which its requires compliance and service performance reports, and the number and complexity of indicators involved in those reports. It is AGL's understanding that certain reporting information is requested quarterly, but only some of the data is used, and even then only on an annual basis. As there is considerable cost involved in complying with reporting obligations, the Commission should be able to

[12] AEMC, Second Report at 19.

justify, on a cost benefit analysis, whether the data that it requests is both necessary and appropriate.

Similarly, in terms of auditing, the Commission should consider the necessity and frequency of audits.. Particularly, how they interrelate with the more recent changes to compliance reporting. In light of the recent compliance reporting amendments, AGL is of the view that it would be more appropriate if audits were performed only once in every 3-5 years.

As noted earlier, time contraints have necessarily meant that AGL has only covered what it considers to be the main issues in this submission. However, AGL would be willing to participate in a forum should the Commission wish to explore any issues in greater detail. If you require any further information or would like us to elaborate on any of the points raised above please contact Angela Gregory, Manager Regulatory Advice on (03) 8633 6817 or Anna Stewart, Manager Regulatory Development on (03) 8633 6830.

Yours sincerely,

Elizabeth Molyneux

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