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**SUBMISSION TO THE MINISTERIAL COUNCIL ON ENERGY
NATIONAL FRAMEWORK FOR ELECTRICITY AND GAS
DISTRIBUTION AND RETAIL REGULATION ISSUES PASPER
SECTION 6 – INDUSTRY CODES AND RULES**

1. Background

The Consumer Law Centre Victoria (CLCV) welcomes the opportunity to make this submission to the Ministerial Council on Energy (MCE). This submission relates to section 6 (Industry Codes and Rules) of the MCE's National Framework for Electricity and Gas Distribution and Retail Issues Paper, released 30 August 2004 (**Issues Paper**).

The CLCV is Australia's second largest and fastest growing consumer organisation. The CLCV undertakes research, policy development, advocacy and education. The CLCV also operates a large consumer legal practice assisting more than one thousand low-income consumers each year with free legal advice and representation. The CLCV's work is focussed on advancing the interests of low-income and vulnerable consumers. The CLCV is currently working on a range of issues that affect the consumer interest, including utilities, competition and consumer protection policies, financial services, telecommunications, exploitative credit and access to justice.

In August 2003 the CLCV secured funding from the National Electricity Code Administrator (NECA) Advocacy Panel to undertake a project on behalf of the Consumer Consultative Committee of the Australian Competition and Consumer Commission (ACCC CCC). The object of the project was to investigate the need for and proposed content of a harmonised electricity retail consumer protection code (**Code**) to operate in the National Electricity Market (NEM) (**Harmonisation Project**). The Harmonisation Project was initiated on the basis of a shared view that all domestic energy consumers should enjoy the same high level of protection irrespective of their geographical location. There was also broad support for the principle that a harmonized framework may result in efficiencies and certainty leading to increased competition, better price and service outcomes, and greater participation in the market by consumers.

The ACCC CCC is comprised of a number of Australian community-based organizations. The ACCC CCC includes the Aboriginal Co-ordinating Council, the Australian Consumers' Association, the Australian Federation of Disability Organisations, the Communications Law Centre, the Consumer Credit Legal Service (WA), the Consumers' Federation of Australia, the

Country Women's Association of Australia, the Tasmanian Council of Social Service and the CLCV.

The CLCV makes this submission on behalf of the ACCC CCC, although the views expressed in this submission do not necessarily represent the views of each of the individuals or organisations comprising the ACCC CCC. The submission is focused on ensuring that changes to the regulatory framework for the development and enforcement of national uniform consumer protection provisions does not have a detrimental impact on Australian electricity consumers, particularly low-income and vulnerable consumers.

This submission primarily concentrates on the proposal to harmonise the consumer protection measures for retailing of electricity. Some of our comments may, however, also be applicable to consumer protection considerations in relation to the distribution of electricity and in the retail and distribution of gas.

2. Recommendations

Below is a summary of the main recommendations included in this submission.

- 2.1 *The single Code not result in dilution of consumer protections currently available in the NEM jurisdictions. This is achieved by adopting, as a minimum, the protection of the jurisdiction identified in the last column of the Comparison Document (Annexure A). Further consultation with consumer and social welfare organisations should be carried out to identify gaps in existing consumer protections with a view to amending existing provisions or developing new protections (for example a prohibition against unfair contract terms and a requirement that retailers develop hardship policies).*
- 2.2 *The AER is provided with a clear mandate to take on a robust monitoring and enforcement role.*
- 2.3 *The single Code be underpinned by, and include, financial and other penalties for failure to comply by retailers.*
- 2.4 *The development of a national regulatory framework is accompanied by an appropriate and sustainable mechanism to fund community sector participation in regulatory and policy debates.*
- 2.5 *Responsibility for making and amending the Code is allocated to the Australian Energy Market Commission with the role of the AER being to monitor and enforce compliance with the Code.*
- 2.6 *Retailers with an obligation to supply must offer to do so according to a standing-offer contract, the actual terms of which (except for price) are specified, uniform and contained in or attached to the Code.*

3. Issue 20 – Single Consumer Protection Code

3.1 *Is there benefit in adopting a single consumer protection code?*

3.1.1 Increased competition and better price and service outcomes

We agree that retailers operating under different regulatory frameworks in each of the NEM jurisdictions may face uncertainty and increased costs. Although a number of retailers participate across jurisdictions despite the regulatory and infrastructure costs, arguably a consistent and simplified regulatory framework should lead to an increase in retailer efficiency and therefore stimulate competition.

In terms of price, however, the cost-savings for consumers that might follow are likely to be limited given that the retail component of a domestic customer's bill accounts for a small component of the total bill (approximately 10%). Further, any savings that result from reduced compliance and infrastructure costs, must in the short term at least, be balanced against the costs of implementing (regulator and government costs) and responding to (retailer costs) the national framework, particularly in respect of how these costs may ultimately be borne by consumers.

There may be non-price outcomes of a single Code that will deliver benefits to consumers. With greater certainty around the minimum consumer protection obligations to be met, retailers may more readily compete in the national market. However, in our view, a single Code alone will not provide the necessary incentive to encourage competition between retailers.

3.1.2 Consumer confidence

It is clear that an efficient market requires both supply and demand signals. The NEM has, to date, provided for little demand-side participation from residential and small business consumers. One reason for relatively low levels of participation by these consumers is the information asymmetry that exists. These consumers cannot easily access the information required to make informed decisions about the benefits and risks associated with accepting market-based energy offers.

The information needed by consumers to make such informed decisions is primarily price related, including tariffs and other applicable fees and charges such as early termination fees and late payment fees. In this regard we recommend that web-based price comparators be developed for all States/Territories and also that the MCE require each retailer to publish market-based energy offers on their websites (as is now required by the Victorian Government).

A clear, comprehensive and uniform Code setting out all of the rights and protections afforded to residential and small business consumers may provide a level of understanding and confidence that may, over time, lead to greater participation¹. That is, a single Code may positively impact consumer behaviour if it:

- creates certainty for consumers; and
- facilitates ease of access to information;

¹ See comments recently made by Louise Sylvan, Deputy Chair of the Australian Competition and Consumer Commission regarding why the inability of consumers to exercise choice impedes effective competition – Sylvan, Louise, *Consumer regulation – How do we know it is effective?*, National Consumer Congress, March 2004 at 5.

so as to enable consumers to compare more easily and understand the non-price terms of market-based contracts.

The challenge for the MCE is to ensure that the single Code is developed in such a way that certainty and ease of access to information by consumers is achieved.

3.1.3 National best practice

We are concerned that the pressure to achieve consistency could result in a ‘lowest common denominator’ approach to consumer protection. In our view, however, the development of a single Code presents an important opportunity to ensure that all Australian consumers receive a high level of protection with respect to energy services. We have carried out extensive analysis of the current consumer protections in order to advocate that there be no reduction in the protections already in place in the NEM jurisdictions. Annexure A to this submission is a document in which the consumer protection provisions currently operating in the NEM jurisdictions and Tasmania are compared (**Comparison Document**).

The Comparison Document includes an opinion as to the current best practice protections offered in each of the NEM Jurisdictions. There are a number of instances where the current best practice protection identified in the Comparison Document is not, in our view, adequate and amendments to existing provisions or new protections should be developed. On this occasion we do not propose to identify all of those instances where more robust protections are needed (although some are apparent in the list below). The list below includes some of the key protections and corresponding minimum protections that we consider must be included in a national retail Code. We have also noted the jurisdiction from which the current best practice is taken (if applicable) and the Comparison Document page references.

- Cooling-off period – An energy contract must provide for a cooling-off period of at least 10 business days from when the contract is entered into. A customer’s cancellation must be in writing. Retailers are not entitled to costs when contracts are cancelled within the cooling off period (modelled on NSW, but with amendments) (page 12);
- Meter read frequency – A customer’s meter must be read at least every 6 months (NSW) (page 18);
- Notification of estimated bill – Each estimated bill must prominently state that it is based on an estimated meter reading (SA) (page 20);
- Consumption information and graphs – Each bill must include a meter reading for the period, tariff codes and rates, the quantity of electricity in each category, average daily consumption for the period and for previous periods displayed in graph format (modelled on NSW with amendments) (page 26);
- Proportionate billing and bill smoothing – Where an unusual billing cycle occurs and the customer is on a step tariff, or where tariff’s are changed during a billing cycle, a retailer must charge in proportion to the relevant period and clearly show the calculation in the bill. Where a bill is ‘smoothed’ over a 12 month period to provide for equal monthly payments a retailer must in the sixth month re-calculate and, if applicable, re-set the monthly payment amount if there is more than a 10% difference between the previous estimate and the new estimate (Victoria) (pages 27, 28);
- Customer notification where tariff changes – An increase in a tariff applies from the date of the customer’s notice or a later date specified in the notice (ACT) (page 29);

- Minimum payment period – A customer must be provided with at least 14 days to pay an account (calculated from the date of the account) where the billing period exceeds 1 month or at least 10 days (calculated from the date of the account) if the billing period is less than 1 month (Tasmania) (page 30);
- Late payment fees – Late payment fees are prohibited (see discussion in our submission to the Essential Services Commission (Victoria) 4 June 2004, attached as Annexure B and also note that the Victorian Government has recently introduced a bill to prohibit late payment fees), (page 32);
- Bill payment during review – A retailer is entitled only to receive payment for that part of a bill that is not in dispute (ACT) (page 35);
- Undercharging/overcharging – Where overcharging occurs a retailer must inform a customer within 10 business days and seek instructions for reimbursement. If none are provided a retailer must credit the customer's next bill and pay interest on the overcharged amount at the prescribed rate (NSW with amendments). Where undercharging occurs a retailer can recover the amount of the overcharging that occurs in the previous 6 months. The amount must be charged as a separate item in the customer's next bill with an explanation or in a separate bill. No interest can be charged and the customer must be offered an equal amount of time to pay by way of instalments as the period over which the undercharging occurred (Victoria and Tasmania, with amendments) (page 35,36);
- Meter checking – A customer can request a meter to be checked at any time including when a bill review is in progress. A retailer must arrange for the meter to be checked and payment can only be levied where the meter, found to be accurate. This amount must be limited to a set amount (to be determined) (Tasmania and SA with amendments) (page 37);
- When to offer payment plans – Retailers must monitor their customer's payment record and make an offer for the customer to enter into an affordable payment plan when the customer reaches arrears of a set amount (to be determined) (page 38);
- Period of instalment plan, whether maximum number - The period of any instalment plan and the amount of each instalment must reflect the customer's consumption needs and capacity to pay and must be agreed to by the customer (Victoria) (page 40);
- When disconnection permitted (notices) – Disconnection is permitted only when the amount outstanding exceeds a set amount (to be determined) and if the customer is on a payment arrangement two consecutive payments must have been missed. Two written notices of disconnection must be served at least 7 days apart (with prescribed information including relief programs) and the amount outstanding (including any amount determined according to a payment arrangement) must not have been paid within at least 5 business days of the second notice. A retailer must make a reasonable attempt to contact the customer by phone or in person on the day before disconnection is scheduled to occur. A retailer must not disconnect a customer where an application for relief (such as a Utility Relief Grant) or a complaint against the retailer is pending. A retailer must not disconnect a customer for a lack of capacity to pay (Victoria and ACT, with amendments) (page 46, 49); and
- Restricted disconnection times – A retailer/distributor must not effect disconnection of any premises after 2pm on a business day, any time on Friday, Saturday or Sunday, on a public holiday or on the day before a public holiday (unless disconnection is

necessary to respond to an emergency or for an upgrade where notice is provided) (Tasmania) (page 51).

As stated earlier, the MCE should ensure that the development of a single national Code does not result in dilution of the protections in any jurisdiction, by adopting, as a minimum, the protection of the jurisdiction identified in the last column of the Comparison Document. In some instances a more robust protection should be developed, for example, in relation to late payment fees. As stated previously, we have not been able to indicate all of these instances in this submission.

3.1.4 Improved enforcement and advocacy

We are deeply concerned that current consumer protection measures are not adequately enforced in any of the NEM jurisdictions. We are aware of ongoing compliance failure, for example, retailers failing to take into account capacity to pay when determining payment plans. Despite the number of instances of compliance failure, we are not aware of any regulator having penalized a retailer for compliance failure. We take this opportunity to encourage the MCE to ensure that the AER is provided with a clear mandate to take on a robust monitoring and enforcement role. To ensure that active enforcement occurs, the MCE must underpin the Code with financial and other penalties for compliance failure. We recommend that these penalties be included in the Code, or appropriate legislation.

We are concerned that a centralized regulator will remove the ability of many community organisations to maintain contact and influence in relation to ongoing regulatory decisions. While the community sector can leverage off the national framework by collaborating nationally to a greater extent, to prioritise responses and combine skills and resources, these activities cannot occur without adequate funding. The MCE must ensure that the development of a national regulatory framework is accompanied by an appropriate and sustainable mechanism to fund community sector participation in regulatory debates.

3.2 *Are all of the relevant matters for inclusion in such a code listed in table 9?*

It is apparent when comparing the Comparison Document with Table 9 of the Issues Paper that a number of essential provisions are absent from Table 9. We recommend that the following further categories of consumer protection provisions be added to Table 9 as follows:

Preconditions for sale/connection - add:

- Form of application/request for supply and any payments required;
- Information about tariffs; and
- Information about commencement.

Billing (change this heading to billing and meter reading) – add:

- Frequency (including for meter reading);
- Calculation where tariff changes.

Payment of bills – add:

- Proportionate billing;
- Bill smoothing;
- Minimum payment period;
- Interest on late payments;
- Late payment fees; and
- Advance payment.

Review of bills – add:

- Bill payment during review; and
- Meter checking requirements.

Payment Default – add:

- Prohibited disconnection;
- Restricted times for disconnection;
- Reconnection;
- Hardship policies; and
- Concession information provision requirements.

Service standards – add:

- Enquiries and complaints handling.

Marketing – add:

- Complaints against marketers.

In addition, as discussed above, there are a number of instances where new consumer protections should be included in the Code.

For example, the Code should contain a prohibition against market-based contracts including unfair contract terms. In determining what would be considered to be unfair, the minimum standard to be adopted should be the provisions of Part 2B of the Victorian *Fair Trading Act*. In addition, a ‘black list’ of contract terms should be developed which are considered to be detrimental to consumers and to competition. An example of a ‘black listed’ term is a unilateral change term.

In addition, we believe that the MCE should take this opportunity to effectively target issues of financial hardship and capacity to pay. Retailers should be required to implement processes to identify customers in hardship. These processes could include training of call centre staff and monitoring customer accounts for indicators of payment difficulties (such as high debt and entitlement to concessions). We recommend that the Code include an obligation that retailers develop hardship policies in accordance with certain guidelines, which could be included in the Code. With better infrastructure built around a single Code retailers should have an opportunity to incorporate improved mechanisms to monitor for indicators of customer hardship.

We also recommend that the following regulatory instruments be added to those listed in Table 8 of the Issues Paper:

- Queensland - *Electricity Act 1994 (Reprint 5)* contains provisions relating to disconnection, an obligation to provide demand and supply side options to ensure efficient delivery of electricity, setting of service standards, enquiry and complaints procedures and limitation of liability;
- Victoria - *Guideline No 4 - Credit Assessment (April 2002)* contains provisions specifying when security deposits can be required;
- New South Wales - *Electricity Regulated Retail Tariff 2004/5 to 2006/7 Final Determination June 2004* contains provisions regarding when and in what amount late payment fees may be levied;
- Australian Capital Territory - *Electricity Metering Code (August 2003)* contains provisions relating to when meters are to be read, when estimates can be used and the ways in which bills should be adjusted where they are based on estimated meter readings; and

- Tasmania - *Electricity Supply Industry (Tariff Customers) Regulations 1998 (as at 28 October 2003)* contains numerous relevant provisions including relating to commencement of supply, charges for illegal use, minimum billing periods, payment periods and reminder notices, late payment fees, billing reviews and the mechanism for adjustment when undercharging or overcharging has occurred, payment plans, security deposits and disconnections.

In addition, we are of the view that the protections that apply when a retailer cannot meet its obligation to supply (that is, retailer of last resort provisions) should be included in the Code. The South Australian *Retailer of Last Resort: Pricing and Charging Framework Guideline (No 8, September 2001)*, the Victorian *Electricity Industry Act 2000* and the Australian Capital Territory *Retailer of Last Resort Guidelines (December 2002)* should be reviewed and included in the Code.

3.3 *What are the areas in respect of which justifiable jurisdictional differences are likely to arise?*

In our view, all residential and small business consumers should be afforded the same retail protections irrespective of their geographical location. We would therefore prefer that, where possible, jurisdictional differences are not permitted in relation to the protections afforded to residential and small business consumers in retail of electricity. We accept that in regard to distribution of electricity and retail and distribution of gas, justifiable jurisdictional differences in relation to the protections afforded to residential and small business consumers may arise on technical grounds, for example, where existing network constraints result in supply differences.

3.4 *Is it preferable to include specific topics in separate codes?*

Given that one of the objectives of a single Code is to provide easily accessible information on the rights of residential and small business consumers and obligations of retailers in relation to those consumers, we recommend that as far as possible, all of these protections be contained in a single document. The Issues Paper contains two examples of specific topics that might be included in separate documents, confidential information and customer transfers. In our submission, the rights and obligations associated with these topics should be contained in the Code.

3.5 *Should general protections contained in other legislation be relied upon?*

We support the general proposition that, where new markets are emerging, such as the Australian energy market, industry-specific regulation is necessary. This debate obviously turns on the question of whether consumers can adequately be protected by general consumer protection laws, such as those contained in the *Fair Trading Act(s)* and the *Trade Practices Act*. In our view, the market is too immature to rely solely on general consumer protection legislation.

In the context of energy services, this discussion is mostly relevant to the conditions surrounding marketing practices, particularly the obligations relating to the provision of misleading information and marketing contact methods and times, but also relates to such matters as access to comparable price information and rules surrounding disconnection of supply. Due to the essential nature of electricity for residential and small business consumers, our view is that specific provisions addressing these issues should be contained in the Code. We do not support the exclusion of any of the protection categories listed in the Comparison Document or as otherwise identified in this submission simply on the basis that they are duplicated in other general consumer protection legislation.

3.6 Consumers protected by consumer protection code

Currently most of the NEM jurisdictions provide for minimum consumer protections to apply to all small volume consumers (with usage threshold of less than 160 MWh per annum, except in Queensland where the threshold is 0.1 GWh per annum). In Victoria and South Australia small volume consumers are able to accept lesser protections in some cases (see discussion below). In the Australian Capital Territory, the *Consumer Protection Code* is divided into sections that protect customers on standing-offer contracts (that is, franchise customers) and those that are on market contracts (that is, non-franchise customers) and these are divided into small volume customers (with usage of less than 100MWh per annum) and large volume customers (with usage of more than 100MWh per annum). In New South Wales certain provisions are specified to apply to customers on standing-offer contracts or to small retail customers on negotiated contracts, or both.

The 160MWh per annum threshold currently tends to include a large number of consumers, capturing all residential and most small business consumers and equates to approximately \$20,000 expenditure on electricity accounts per annum. Given that this threshold captures all low-income and disadvantaged residential consumers, we are comfortable with it being uniformly adopted.

However, we note that currently some small businesses in need of protection, by virtue of having a low annual revenue, such as some fast food outlets, would fall above the 160MWh per annum threshold and thereby not be afforded the minimum protections of the Code. In contrast, a number of businesses that use less than 160MWh of electricity per annum but have high annual revenue are afforded the protection of the Code. A small business definition based on annual revenue may therefore be a more appropriate method by which to apply the Code to ensure that those small business consumers in need of the protection of minimum terms are afforded such protection. The MCE should bear in mind that verification of revenue would only be required if a small business consumer sought a standing-offer contract, or in negotiating a market-based contract demanded, as a minimum, the protections contained in the Code, which the retailer did not want to provide.

While we support the 160MWh per annum threshold for application of the Code, our view is that the MCE should take this opportunity to investigate whether a threshold that is more targeted toward small business consumers in need of protection could be developed.

3.7 Ability to contract out of some protections

In our view, the ability to contract out of some provisions of the Code arguably creates confusion for consumers and may also complicate a retailer's billing system thereby adding additional operating costs. We believe that providing such options does not necessarily benefit consumers, particularly when the costs of doing so are taken into account. In our view, the Code should state the minimum protections offered to all residential and small business consumers and should not be complicated by an ability to vary terms by agreement.

4. Issue 21 – Responsibility for making Industry Codes and Rules

In our view, a separation of the rule-making and rule-enforcement powers will deliver the best outcomes for consumers. This is primarily because separation will allow each regulator to concentrate expertise and effort on either rule-development or enforcement. We recommend that responsibility for making and amending the Code is allocated to the Australian Energy Market Commission with the role of the AER being to enforce the codes.

5. Issue 22 – Variation of, and Exemptions from, Industry Codes

For the reasons stated above, all provisions of the Code should only be varied by the AEMC after extensive public consultation. Given that the object of the Code is to provide the minimum terms for residential and small business consumers, it is essential that any amendments occur with public consultation. The MCE should take this opportunity to ensure that appropriately resourced consultation procedures are put in place, including funding sustainable community sector participation.

We submit that the Code should apply to all retailers without exception to ensure that all consumers receive equal protection irrespective of their retailer and to provide greater certainty for consumers.

6. Issue 23 – Minimum Terms and Conditions (where retailers have a franchise)

In South Australia the terms of the standing-offer contract are specified. In Victoria each retailer must submit to the Essential Services Commission the standing-offer contract to be approved from time to time. In New South Wales a retailer must have regard to comments of its customer consultative committee in preparing the standing-offer contract and different standing-offer contracts can apply to different classes of customers. In the Australian Capital Territory and Queensland the standing-offer contracts themselves are not regulated but rather the minimum provisions are specified (and are therefore mostly the same protections as those applying to small-volume consumers that enter into market-based contracts).

In our view, one standing-offer contract should apply across the NEM jurisdictions so that all consumers are afforded the same high level of protection. In addition to ensuring that all consumers, irrespective of geographical location, are afforded the same protection, a uniform standing-offer contract may have a positive impact on consumer participation. That is, similar to consistent minimum protections in the Code, over time, consumers may become better able to compare the non-price elements of market-based contracts against the uniform non-price terms of the standing-offer contract. This may lead to greater certainty and consumer confidence and should ultimately lead to greater participation in the competitive market.

Like the Code, the standing-offer contract should be developed in consultation with consumer and social welfare organisations, taking into account the newly developed Victorian unfair contract terms legislation. The actual terms of the standing-offer contract (except for price) should be contained in or attached to the Code.

7. Other Issues - further consultation

The Comparison Document contains comprehensive analysis of the current best practice consumer protections available in retail of electricity in the NEM jurisdictions. We have consulted with regulators, ombudsman schemes, industry stakeholders and community organisations in order to develop the Comparison Document. However, considerable further detailed consultation is required to develop the minimum protections to be contained in the Code and the standing-offer contract.

Other issues raised in this submission that we consider will also require further detailed consultation are :

- whether some consumer protection provisions be contained in other codes or regulatory instruments;

- proposals to exclude parts of existing consumer protection frameworks from the Code or other industry-specific instruments on the basis that these are duplicated in general consumer protection laws; and
- development of consumer protection enforcement mechanisms.

Please contact Natasha Leigh on 9629 6300 should you have any questions about this submission.

Yours sincerely

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