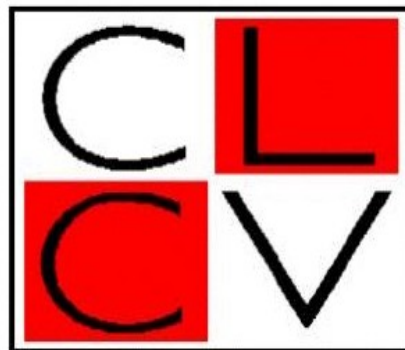


**PUBLIC CONSULTATION ON A NATIONAL
FRAMEWORK FOR ENERGY DISTRIBUTION
AND RETAIL REGULATION**



CONSUMER LAW CENTRE VICTORIA

Response by the Consumer Law Centre Victoria (CLCV)

January 2006

Introduction

This response to the Consultation paper released by the Ministerial Council on Energy (MCE) Standing Committee of Officials (SCO), and prepared by NERA Economic Consulting and Gilbert + Tobin (the **NERA/G+T Paper**) is made by the Consumer Law Centre Victoria (CLCV).

The CLCV is one of Australia's leading consumer and public interest organisations. A not-for-profit, independent organisation, it undertakes research, policy development, advocacy and education. The CLCV's work is focused on advancing the interests of consumers, particularly low-income and vulnerable consumers. We are currently working on a range of issues, including utilities, competition and consumer protection policies, financial services, telecommunications, exploitative credit and access to justice. The CLCV also operates a large consumer legal practice assisting over one thousand low-income consumers each year with free legal advice and representation.

This response is also endorsed by the Victorian Council of Social Service, Kildonan Child and Family Services and the Consumers' Federation of Australia.

The CLCV's response to the NERA/G+T Paper is in two parts.

- In **SECTION A**, we focus on the NERA/G+T Paper's approach to consumer protection — an approach we assess as seeking to reduce the imposition of regulation on energy retailers and distributors, at the expense of existing consumer protections. We present a set of principles for consumer protection and benefit, which we believe should underpin the development of a national framework for energy distribution and retail regulation. We discuss these principles against the NERA/G+T Paper's policy criteria and recommended approaches, and we make a number of recommendations.
- In **SECTION B**, we follow the format of the NERA/G+T Paper, making comment and recommendations on some aspects of it, and referencing back to aspects of our discussion in Section A of this response. We have not commented on all aspects of the NERA/G+T Paper, and stress that absence of comment on any aspect should not be taken as CLCV support for, or opposition to, the points raised by NERA and Gilbert + Tobin, their policy criteria or their recommended approaches.

Our response draws on the CLCV's direct experience in energy regulation consultation processes and debates over more than 10 years; on research we and other consumer and welfare groups and academics have undertaken; and on investigations undertaken by jurisdictional regulators on the effectiveness of full retail competition.

We note that an implementation plan for the national framework for energy distribution and retail regulation will be established separately following public consultation. To this end, the CLCV offers its experience and expertise into the consultation process, and through the development phase, as appropriate.

The CLCV contact for this response is Gerard Brody, Solicitor, Consumer Law Centre Victoria.

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1 Executive summary

1.1 Consumers lose under NERA/G+T Paper's proposed approach

1.1.1 Adoption of the approach put forward in the NERA/G+T Paper would effectively mean a win for industry and an enormous loss for consumers. This is unacceptable when the opportunity exists for the implementation of a balanced national framework for energy distribution and retail regulation, which will safeguard energy supply, allow the growth of alternative energy sources, facilitate retail competition, and protect, inform and empower consumers, building their confidence and encouraging their active participation in the competitive energy retail market.

1.1.2 The NERA/G+T Paper:

- purports to present a 'best practice' approach, but proposes a consumer protection framework which will not deliver best practice outcomes for energy consumers;
- makes broad, recurring statements about perceived shortcomings of the existing jurisdictional regulatory regimes, but provides little rationale or detail in support of these statements;
- proposes a reliance on legislation, rather than more flexible administrative instruments — a move which does not reflect best practice and which would potentially expose consumers to ongoing risk in the event of market failure;
- is premised on 'effective competition' and 'effective choice', yet no existing jurisdictional market is considered to be effective and some jurisdictions are yet to move to full retail competition;
- is industry-focussed, clearly reflecting and recommending positions the energy industry has been espousing to jurisdictional regulators for some time — several of which jurisdictional regulators have, as recently as late 2004, rejected as premature given consumer experiences and market conduct in the still developing jurisdictional retail energy markets; and
- fails to give sufficient weight to the promotion of appropriate standards of conduct, and the avoidance of anti-competitive behaviour and market abuse of customers, in the process of promoting effective retail competition.

1.1.3 The NERA/G+T Paper's proposals will clearly reduce the imposition of regulation on energy retailers and distributors, at the expense of existing consumer protections.

1.1.4 In arguing that this is unacceptable, we present a set of principles for consumer protection and benefit, which we believe must underpin the development of a national framework for energy distribution and retail regulation.

1.1.5 In Section A of this response, we discuss these principles against the NERA/G+T Paper's policy criteria and recommended approaches. We also make a number of recommendations. A summary of those principles and recommendations follows.

1.2 Consumer protection principles and recommendations

1.2.1 *Energy's special characteristics*

Principles

- Energy, in particular, electricity, is properly described as an essential service.
- Energy's special characteristics demand strong regulation for consumer protection.
- Universal access to safe, reliable, affordable and sustainable energy must continue to underpin energy market reforms.

Recommendations

- That the principle of universal access to safe, reliable, affordable and sustainable energy is explicitly recognised in any proposed national framework for energy distribution and retail regulation — and that it continues to explicitly underpin market reforms.
- That the special characteristics of energy are explicitly recognised in any proposed national framework for energy distribution and retail regulation.
- That — recognising the special characteristics of energy — strong regulation for consumer protection is made a primary objective of any proposed national framework for energy distribution and retail regulation.

1.2.2 *Consumer vulnerability*

Principle

- Consumers must never be denied access to energy on the basis of their financial hardship or vulnerability characteristics.

Recommendations

- That the concept of consumer vulnerability, in its broadest sense, is explicitly recognised in any proposed national framework for energy distribution and retail regulation.
- That appropriate safety net arrangements are included in any proposed national framework for energy distribution and retail regulation, to ensure all consumers continue to have access to safe, reliable, affordable and sustainable energy.
- That any proposed national framework for energy distribution and retail regulation includes specific provisions to address energy consumer hardship.

1.2.3 *Effective energy regulation*

Principles

- Consumer protection and the delivery of consumer benefits must be explicit objectives for energy regulators.
- Energy regulation must be transparent, vigilant, proactive, well-resourced, vested with appropriate powers and publicly accountable.
- Energy regulation will benefit from strong, sustained consumer and public interest advocacy.

Recommendations

- That both the Australian Energy Regulator (**AER**) and the Australian Energy Market Commission (**AEMC**) are given explicit mandates and objectives for consumer protection.

- That the AER's monitoring and public reporting roles are explicit and robust, underpinned by appropriate enforcement powers and a mandate to actively pursue compliance failure.
- That the AER and the AEMC are each required to put in place formal and transparent mechanisms for consumer input to regulatory processes.

1.2.4 *Legislative vs administrative instruments*

Principle

- Regulatory instruments for business authorisation must have the capacity to respond quickly and effectively to market changes.

Recommendation

- That, for reasons of regulatory flexibility, capacity to respond to the changing energy market and effectiveness, licensing is retained as the form of business authorisation.

1.2.5 *Effective retail competition*

Principles

- While the energy market needs to work effectively for all stakeholder groups, effective retail competition for consumers must be a priority.
- Because an energy market, which is generally considered to be effective, may still not deliver benefits for all consumer groups, the crucial role of state government safety net programmes in delivering community service obligations must be explicitly recognised in any proposed national framework for energy distribution and retail regulation.
- The direct participation of informed consumers is crucial to the development of effective retail competition.

Recommendations

- That market effectiveness for all consumers is made a primary objective of any proposed national framework for energy distribution and retail regulation.
- That state government safety net programmes currently required as community service obligations are explicitly recognised in the legislation for any proposed national framework for energy distribution and retail regulation, and not left to jurisdictional direction.
- That energy retailers, as well as regulators and government, have a responsibility to contribute to market effectiveness by providing accurate, appropriate, timely and understandable information to energy consumers.

1.2.6 *Consumer protection framework*

Principles

- A robust, flexible and responsive consumer protection framework is fundamental to energy market effectiveness.
- Existing jurisdictional protections for energy consumers must not be diluted.
- Mandatory codes of practice are a common, effective and widely accepted means of protecting and empowering consumers, and creating supplier compliance.

Recommendations

- That neither the Ministerial Council on Energy (MCE) nor the Standing Committee of Officials (SCO) countenance the introduction of a national framework for energy distribution and retail regulation which represents a significant step backwards in regulation for the protection of energy consumers.

- That the important role of existing jurisdictional mandatory codes of practice, and other jurisdictional consumer protections and environmental provisions, is recognised and respected, and that these instruments are built upon, rather than dismissed and dismantled.

1.3 Specific recommendations on Parts B, C and D of the NERA/G+T Paper

1.3.1 *Part B: Price regulation of distribution*

- That — in the interests of transparency and the best outcomes for all stakeholders — as the form of distribution price regulation evolves, consumer representatives are actively assisted to understand what is being proposed and their views are sought about the potential impact on consumers and classes of consumers.
- That consumer protection is included as an explicit objective of the distribution pricing regulatory framework, and that regulators are held accountable for ensuring this objective is delivered on.
- That the content of the Victorian *Electricity Industry Guideline No. 11, Voltage Variation Compensation* is adopted nationally as part of any service quality regulatory regime.
- That the AER has an explicit requirement to monitor distributors' performance and publish timely and regular public reports on quality, service and profitability indicators.
- That particular attention is given to the matter of connection and capital contributions in the context of rural and regional customers and their communities.
- That jurisdictional external dispute resolution/ombudsman schemes are given the power to deal with augmentation disputes.

1.3.2 *Part C: Consumer protection*

- That the principles for consumer benefit and protection, which the CLCV presents in Section A of this response, are explicitly incorporated into the national framework for energy distribution and retail regulation.
- That, in line with existing practice, a consumer's primary relationship continues to be with their retailer.
- That licensing, supported by legislation, continues to be the mechanism by which consumer protection obligations are imposed on energy distributors and retailers.
- That a clear, comprehensive, uniform, enforceable and accessible national Consumer Protection Code — including distribution, retail, marketing and other relevant consumer protections — is developed to underpin the national regulatory framework.
- That the distribution terms and conditions of the national Consumer Protection Code be based on those in the Victorian *Electricity Distribution Code* and *Gas Distribution System Code*.

- That the responsibility for initiating disconnection and/or reconnection remains with retailers.
- That the national Consumer Protection Code includes strong protections for consumers in hardship.
- That all energy retailers selling into the household market are obligated to supply household consumers by way of a fair and reasonable default offer for a basic regulated service.
- That the standard terms and conditions of retail contracts in the national Consumer Protection Code are based on those in the Victorian *Energy Retail Code*.
- That the marketing terms and conditions of the national Consumer Protection Code are based on those in the *Code of Conduct for Marketing Retail Energy in Victoria*.
- That jurisdictional external dispute resolution/ombudsman schemes are required to report publicly on a regular basis, and to report systemic and compliance issues to the AER.
- That membership of an ombudsman scheme is made a legislative requirement, if licensing is not adopted as the form of business authorisation.
- That the AER has an explicit requirement to monitor energy retailers' performance and to publish timely and regular reports on customer service and affordability indicators

1.3.3 ***Part D: Other distribution and non-price retail regulation***

- That a full suite of sub-ordinate administrative instruments is incorporated into the national framework for energy distribution and retail regulation — to achieve a genuinely 'best practice' framework and to facilitate transfer of jurisdictional functions over time.
- That the importance of demand management is explicitly recognised in the national framework for energy distribution and retail regulation, and included in the remit of the economic regulator.

CLCV RESPONSE: SECTION A

2 Energy's special characteristics

Principles

- Energy, in particular, electricity, is properly described as an essential service.
- Energy's special characteristics demand strong regulation for consumer protection.
- Universal access to safe, reliable, affordable and sustainable energy must continue to underpin energy market reforms.

2.1 Essentialness

2.1.1 Energy is not a normal commercial product and it is not a discretionary purchase. It is properly described as an essential service. Energy enables basic health and living, and increasingly, it facilitates our contact with the outside world. We have virtually no scope to withdraw from energy use — it determines our capacity to live to an acceptable standard and, as a society, we expect to be able to access it.

2.1.2 Langmore and Dufty¹ point out that the essentialness of energy is suggested by the high premium households place upon access to electricity and the priority they place on paying their energy bills.

2.1.3 Essentialness was raised by the Essential Services Commission Victoria (**ESC**) in its consideration of factors which will affect the effectiveness of competition:²

...the conditions of consumption (ie whether it is a discretionary or essential product or service) the responsiveness of demand to changes in price, consumer preferences regarding quality and terms and conditions of supply and the availability and comprehensibility of relevant information to facilitate effective consumer choice can also impact the effectiveness of competition.

2.1.4 And, as recently as November 2004, the Victorian Government legislated to require the ESC to have regard to the essential nature of electricity and gas services when setting the terms upon which an energy retailer may disconnect customers.³ In announcing the reforms, the Minister for Energy Industries & Resources said, 'It cannot be stressed enough that gas and electricity are essential services, not just commodities.'

2.1.5 It is disappointing, therefore, that the NERA/G+T Paper barely acknowledges the essentialness of energy, and does not discuss its special characteristics of limited substitutability, inelasticity of demand, information asymmetry and monopoly power.

2.2 Substitutability

2.2.1 Electricity remains the dominant source of energy for households, with limited scope for its substitution with other energy sources, and substitution not being possible for some types of appliances and lighting. Further, the cost of infrastructure to enable substitution between gas and electricity, at least for heating and cooking, may be prohibitive for low-income consumers.

¹ M Langmore and G Dufty (June 2004), *Domestic electricity demand elasticities, issues for the Victorian energy market*, p.5

² ESC (September 2002), *Special Investigation: Review of the Effectiveness of Full Retail Competition for Electricity – Final Report*, p.21

³ Minister for Energy Industries & Resources, Media Release, *Major Energy Reforms Protect Consumers*, 5 November 2004

2.2.2 The ESC in discussing substitutability also notes that:⁴

... gas and electricity, where supply of both is available, are not always perfect substitutes in consumption for each other. They may be substitutable for cooking, heating a room and water heating, but reticulated gas cannot substitute for electricity for lighting and household appliance or business equipment operation.

2.3 Demand inelasticity

2.3.1 Commentators generally agree that essentialness and limited scope for substitutability make energy's price elasticity (the change in demand when there is a change in price) and income elasticity (the change in demand after changes in income) weak. Langmore and Dufty⁵, in discussing research undertaken by the National Institute of Economic and Industry Research (**NIEIR**) for the National Electricity Market Management Company (**NEMMCO**) using data from 1980-1995, conclude that 'to elicit a 4% drop in demand for electricity, price changes in the order of 30-40% would be required ... highlighting how extraordinarily small consumer responses are relative to price changes'.

2.3.2 Regardless of income or price, a reasonably constant level of demand for energy is likely to exist because it is necessary for survival. It follows that the impact of this constant level of demand is likely to be greater on low-income households.

2.3.3 On this point, Ernst⁶ notes:

Consumption and expenditure studies have consistently underlined two central themes in the structure of domestic fuel demand:

- (i) that fuel expenditure represents a far greater proportion of low-income household budgets than it does the budgets of higher income groups, and
- (ii) that although household expenditure on fuel generally rises with income, it does so at a proportionally lower rate than for most other commodities, and for expenditure generally ... The implications of the finding that fuel expenditure forms a disproportionately high component of low income household budgets, and that fuel demand is relatively inelastic, are at least two-fold. First, it underlines the status of energy services as 'basic social primary goods' ... Second and most importantly, it highlights the distributionally sensitive nature of energy policy and practice.

2.4 Monopoly power

2.4.1 Reforms in the electricity industry are aimed at removing, as much as possible, the anti-competitive pricing and inefficiencies said to result from monopoly power.

2.4.2 Experience here and overseas suggests, however, that for a variety of reasons — household customer participation rates, metering technology costs, retailers participating in the market and the nominal savings available to household consumers — competition at the consumer end of the market is likely to be impeded, limiting consumers' exercising of choice and creating de-facto monopolies.

⁴ ESC (March 2004 Overview Paper), *Draft Public Report – Special Investigation: Review of Effectiveness of Retail Competition in Gas and Electricity* p.31

⁵ M Langmore and G Dufty (June 2004), p.12

⁶ J Ernst (1994), *Whose Utility? The Social Impact of Public Utility Privatization and Regulation in Britain*, p.40

2.5 Information asymmetry

- 2.5.1 Information asymmetry — customers at a disadvantage in their knowledge and understanding relative to energy suppliers — is recognised as one of the main barriers to effective consumer participation in the energy market. The Essential Services Commission of South Australia (**ESCOSA**)⁷ also views it as a source of market failure.
- 2.5.2 Consumers have little or no experience in comparing or assessing the relative merits of energy services. Indeed, because of the way in which these services have traditionally been delivered — via government monopoly businesses — most consumers will not have felt much need to delve into their purchasing of electricity or gas, unless there was a problem.
- 2.5.3 While, in some jurisdictions, the introduction of full retail competition (**FRC**) will have improved some consumers' understanding and knowledge, there is a long way to go before consumers generally will be able to make well-informed decisions about their energy purchasing.

2.6 Regulation and consumer protection

- 2.6.1 In contributing to energy regulatory consultation processes over the past 10 years, the CLCV has written extensively about the special characteristics of energy.⁸ We submit that together, these characteristics demand specific regulation of the terms of energy production, supply and consumption, and strong regulation for consumer protection.
- 2.6.2 While the impact of some of these characteristics — information asymmetry and monopoly power — may be reduced over time; others, such as essentialness and inelasticity of demand are likely to remain, directly affecting the potential for effective energy retail competition.

Recommendations

- That the principle of universal access to safe, reliable, affordable and sustainable energy is explicitly recognised in any proposed national framework for energy distribution and retail regulation — and that it continues to explicitly underpin market reforms.
- That the special characteristics of energy are explicitly recognised in any proposed national framework for energy distribution and retail regulation.
- That, recognising the special characteristics of energy, strong regulation for consumer protection is made a primary objective of any proposed national framework for energy distribution and retail regulation.

⁷ ESCOSA (September 2004) *Final Decision – Monitoring the Development of Energy Retail Competition in South Australia* p.5

⁸ Including (1) CLCV and Consumers Federation of Australia (1999) *Consumer Participation and Protection in the Victorian Electricity Market following Retail Contestability in the below 160MWh per annum Tranche*, (2) CLCV, Consumers' Federation of Australia, Financial and Consumer Rights Council and Victorian Council of Social Service (June 2002), *Assessing the effectiveness of Full Retail Competition for electricity for low income and vulnerable consumers*, (3) CLCV and CUAC (December 2004), *Access to Energy and Water in Victoria – A Research Report* and (4) A Stewart (January 2005), *Do the Poor Pay More for Utility Services in CLCV, Do the Poor Pay More? A Research Report*

CLCV RESPONSE: SECTION A

3 Consumer vulnerability

Principle

- Consumers must never be denied access to energy on the basis of their financial hardship or vulnerability characteristics.

3.1 Vulnerability is complex

3.1.1 The NERA/G+T Paper does not define ‘vulnerable’, but does give an indication of the consultants’ thinking on this matter when it states:

For more vulnerable customers (for example consumption less than 10 TJ or 160MWh pa) regulation should impose “fair” contract terms (standard terms and conditions).⁹

3.1.2 We submit that vulnerability is much more complex than a customer’s energy consumption thresholds and may be temporary or permanent. It is important, therefore, that a flexible approach is undertaken to assessing it.

3.1.3 For example, a consumer may be considered ‘vulnerable’ if they:

- are eligible for a concession rate on their energy bill;
- are experiencing short-term financial hardship (e.g. from sudden loss of employment or a relationship breakdown);
- are experiencing chronic/long-term financial hardship (e.g. as a result of a sustained period of illness or a mental or physical disability);
- do not speak English as a first language;
- have a physical, psychiatric or intellectual disability, which affects their ability to enter contracts or requires certain energy usage;
- live in a rural or remote location;
- have a large household to support;
- have high energy consumption due to inefficient appliances and/or housing stock;
- go without other essential items, including food, to pay for energy service/s; or
- are subjected to ongoing and unresolved energy supplier billing errors, or practices, which leave them with significant account arrears.

3.1.4 And, in a March 2004 discussion of customer ‘vulnerability’ in the context of competitive energy markets, the ESC¹⁰ highlighted:

... *vulnerability* problems, where customers may be open to harm in entering market contracts for electricity and gas supply services, due to energy market factors such as uncompetitive price offers, misleading marketing conduct ...

3.1.5 Commentators point out that vulnerability also takes on a potentially much wider meaning in the context of competitive energy markets:

International experience within legal and economic domains suggests a far wider definition [of vulnerability] may be appropriate when Full Retail Competition exists across the economy.¹¹

⁹ NERA/Gilbert+Tobin (May 2005), p.46

¹⁰ ESC (March 2004), p.13

¹¹ Bowman, Coghill and Hodge (2004), p.3

In addition to the concepts of socio-economic characteristics and risk of disconnection, we might also look at the vulnerability of consumers from a system-wide perspective. From this point of view, consumer vulnerability is coupled with the notion of ‘the perfect market’ and ‘effective competition’ ... To the degree to which either physical system failures or system-wide pricing failures may occur in the electricity market, all groups of consumers become vulnerable.¹²

3.2 The importance of safety net provisions

3.2.1 Since FRC was introduced in Victoria in January 2002, the ESC has undertaken two full investigations into the effectiveness of competition for household and small business consumers. It has also issued a number of Draft and Final reports on its investigations (**FRC Reports**). A Final Report on the first investigation was issued in September 2002¹³ and a Final Report on the second investigation was issued in June 2004.¹⁴

3.2.2 In its June 2004 FRC Final Report¹⁵, the ESC confirmed the importance of maintaining safety net provisions to ensure all household and small business customers — and in particular those in vulnerable circumstances — have access to safe, reliable, affordable and sustainable energy services:

In the transition to an energy market in which competition is fully effective there remains a need to maintain safety net arrangements for residential and small business customers ... This will ensure that customers who, by virtue of their location, personal circumstance or usage patterns, may be in vulnerable circumstances, can still access a fair price service offering and obtain the support of basic consumer protections.

3.2.3 While noting the ESC’s acknowledgment¹⁶ that ‘competition can never be fully effective for all customers all of the time’, we submit that, for some vulnerable consumers, it is unlikely to ever be effective, let alone fully effective.

3.3 Addressing consumer hardship

3.3.1 The NERA/G+T Paper also fails to recognise the importance of addressing energy affordability problems for low-income and vulnerable consumers within the national consumer protection framework. We believe the MCE, the jurisdictions and the national regulators must take a whole-of-government public policy approach to this issue.

3.3.2 In August 2004, the Committee for Melbourne published its *Utility Debt Spiral Study* — a joint community, government and business initiative undertaken as part of the Committee’s involvement in the UN Global Compact. The study explores the relationship between utility debt and poverty, and identifies social and regulatory frameworks and policies to assist people at risk.¹⁷ In Chapter 6, it presents a comprehensive best practice model for responding to energy [and water] consumers

¹² Energy Action Group (2002) *Provider of Last Resort: Can Vulnerable Electricity Customers be protected in Deregulated Electricity Markets?* in Bowman, Coghill, Hodge (2004), p.3

¹³ ESC (September 2002), *Special Investigation: Review of the Effectiveness of Full Retail Competition for Electricity, Final Report*

¹⁴ ESC (June 2004 Overview Report), *Final Report to Minister – Special Investigation: Review of Effectiveness of Retail Competition and Consumer Safety Net in Gas and Electricity*

¹⁵ ESC (June 2004 Overview Report), p.4

¹⁶ ESC (June 2004 Overview Report), p.14

¹⁷ Committee for Melbourne (August 2004), *Utility Debt Spiral Study, Chapter 6 A best practice model for responding to energy and water customers who are experiencing financial hardship*

experiencing financial hardship. This model should be adopted as part of the national energy consumer protection framework.

- 3.3.3 The importance of acknowledging, understanding and addressing the issue of energy consumer hardship was also recognised by the Victorian State Government, in its March 2005 announcement of a *Committee of Inquiry into Financial Hardship of Energy Consumers*.¹⁸ The Committee has been asked to assess the impact on consumer hardship of the policies and practices of all energy retailers, government departments and agencies, and financial counsellors and welfare agencies. It has also been asked to recommend a broad allocation of responsibility for mitigating against energy hardship between retailers, government and consumers. In announcing the *Committee of Inquiry*, the Minister for Energy Industries and Resources described it as an important initiative to ensure that energy sector reform delivers real benefits to Victorian families. The Committee was due to provide a final report to the Minister in late 2005, and the findings and recommendations in that report should be used to inform the development of the national energy consumer protection framework.

Recommendations

- That the concept of consumer vulnerability, in its broadest sense, is explicitly recognised in any proposed national framework for energy distribution and retail regulation.
- That appropriate safety net arrangements are included in any proposed national framework for energy distribution and retail regulation, to ensure all consumers continue to have access to safe, reliable, affordable and sustainable energy.
- That any proposed national framework for energy distribution and retail regulation includes specific provisions to address energy consumer hardship.

¹⁸ Minister for Energy Industries and Resources (13 March 2005), Media Release: *New Inquiry into Energy Consumer Hardship*

CLCV RESPONSE: SECTION A

4 Effective energy regulation

Principles

- Consumer protection and the delivery of consumer benefits must be explicit objectives for energy regulators.
- Energy regulation must be transparent, vigilant, proactive, well-resourced, vested with appropriate powers and publicly accountable.
- Energy regulation will benefit from strong, sustained consumer and public interest advocacy.

4.1 Effective regulation is more than just economics

4.1.1 The national framework for energy distribution and retail regulation argued in the NERA/G+T Paper is about economics. Regulatory frameworks are not just about economics — they are about people and societies. We submit that, in the case of energy regulation, this is even more so — as recent research undertaken by the Foundation for Effective Markets and Governance (**FEMAG**)¹⁹ for the NSW Public Interest Advocacy Centre (**PIAC**) (the **FEMAG/PIAC Paper**) concludes, ‘without effective regulation the [energy] market is likely to be somewhat dysfunctional for most small consumers and highly dysfunctional for some’.²⁰

4.1.2 The ultimate test of a regulatory framework is the outcomes it delivers for energy consumers and society generally.

4.1.3 The NERA/G+T Paper is clearly proposing a national framework with a significantly reduced level of industry regulation from that which presently exists in several jurisdictions. We believe adoption of such a framework will mean significantly fewer consumer protections and significantly more consumer risk — hardly conducive to encouraging consumers to actively participate in the market.

4.1.4 Themes, such as the following which are repeated ‘mantra-like’, add to our concerns:

... to ensure that the compliance burden for energy suppliers is not duplicated

In setting out Rules for consumer protection only those matters that are appropriately specific to the energy industry would be included.

Energy sector specific regulation should not duplicate consumer protection regulation of general application.

The scope of regulation should be sufficient to ensure small end-customers are treated “fairly” but should not be so wide or prescriptive as to impose regulatory costs which exceed the benefits.

4.2 Best practice for whom?

4.2.1 The NERA/G+T Paper sets out a proposed ‘best practice’ approach to regulation of energy distribution and retail regulation. Our review of the proposed policy criteria

¹⁹ The members of the FEMAG project group included Allan Asher, CEO of Energywatch in the UK and former Deputy Chair of the ACCC; Robin Brown, President of ACTCOSS and Council Member of the Australian Consumers’ Association; and John Wood, former Director of the Federal Bureau of Consumer Affairs and former Deputy Commonwealth Ombudsman;

²⁰ FEMAG/PIAC Paper (December 2005), p.7

and recommended approaches raises the question of ‘best practice for whom?’, since we cannot accept that it is ‘best practice’ regulation for consumer protection.

- 4.2.2 Years of actively participating in debates about protections for consumers across the board leads us to be highly sceptical of descriptors such as ‘matters that are appropriately specific’ and ‘fair’ treatment of consumers. In our experience, these will generally mean as few protections as industry can get away with.
- 4.2.3 Neither is it helpful that the NERA/G+T Paper presents overarching assertions, such as the following, without supporting arguments or evidence:

The current Jurisdictional regulatory regimes are often not simple, are often inconsistent between gas and electricity and conflict as between jurisdictions. In some cases the scope and degree of prescriptive regulation is so wide and deep that the costs of regulation may exceed the benefits.

- 4.2.4 On the contrary, we submit that the scope and degree of existing jurisdictional energy regulation — even though it varies among jurisdictions — provides a huge consumer and public benefit in terms of certainty, clarity and enforceability of consumer protections and public accountability.
- 4.2.5 We agree with the NERA/G+T Paper’s suggestion that it is desirable for there to be ‘consistency between the regulation of gas and electricity and as between the Jurisdictions’ — as long as that does not mean a diminution of existing consumer protections in favour of a lowest common denominator approach. Effective consumer protection must not be traded off for the sake of consistency.
- 4.2.6 And while we also agree that ‘clear and simple regulation’ is desirable, we do not believe this must mean fewer regulations. An underlying premise of the NERA/G+T Paper seems to be that less regulation will mean greater competition and, therefore, greater benefits for consumers. We disagree, and take the view that the consumer protections lost would undoubtedly outweigh the potential gains for consumers, certainly in the short-term and possibly in the long-term if the market remains less than effective.
- 4.2.7 We express our strong concerns about the framework for national regulation proposed in the NERA/G+T Paper. We believe that it represents a potentially backward step in regulatory practice and policy, and apparent disregard for years of work by consumer representatives and community groups across the various jurisdictions, to ensure energy as an essential for living remains accessible and affordable for household and small business consumers.

4.3 Delivering on an explicit mandate to protect consumers

- 4.3.1 The MCE and the SCO have a social responsibility to implement a national energy regulatory framework which genuinely represents best practice. Given energy’s essentialness and other special characteristics, society expects no less.
- 4.3.2 The Australian Energy Regulator (**AER**) and the Australian Energy Market Commission (**AEMC**) must each have explicit mandates and objectives in respect of consumer protection. Bowman, Coghill and Hodge,²¹ in their study on market failure in utility markets, conclude — and we agree:

²¹ Bowman, Coghill and Hodge (2004), p.4

In a market in which participation is all-but-mandated, consumer protection is therefore also mandated.

- 4.3.3 The AER must also be vested with strong powers to enforce the consumer protection framework and be publicly accountable for using these powers. Consumer protection frameworks are only as strong as the enforcement mechanisms behind them. Problems arise when regulated businesses fail to comply and this lack of compliance is not effectively addressed by the relevant regulator.
- 4.3.4 To this end, we are concerned that existing consumer protections are not being enforced strongly enough in any of the NEM jurisdictions. We are aware of ongoing compliance failure, but we are not aware of any regulator having penalised a retailer for such failure.
- 4.3.5 As an example, for years Victorian consumer and welfare groups have been bringing retailer non-compliance with the ‘capacity to pay’ provisions of the *Energy Retail Code* to the attention of the ESC. The Energy and Water Ombudsman (Victoria) (EWOV) has also been raising the matter at seminars, in its publications and in meetings with the ESC. Endeavouring to understand what had been formally advised to the ESC by EWOV, the Energy Action Group (EAG) took FOI action in mid-2004. Having reviewed a series of documents which it thus obtained, the EAG reported and observed that:
- ... the ESC was made aware five years ago that there was a problem with disconnection relating to handling of the ‘incapacity to pay’ provisions of the Codes. Whilst the EWOV was inconsistent in the way it handled the matter it did alert the regulator to the systemic nature of the problem – widespread retailer non-compliance with the Retail Code – and kept putting it on the agenda. The ESC apparently would never acknowledge that there was a systemic problem.²²
- 4.3.6 Not long after this, the Victorian Government enacted legislation introducing an obligation on retailers to compensate electricity consumers, whose supply is disconnected contrary to the *Energy Retail Code* — showing the State Government was convinced of the need to promote code compliance, even if the ESC was not.
- 4.3.7 The reality is that, generally, the community is unlikely to inquire into the regulatory framework until the energy industry fails to deliver reasonable outcomes — illustrated by the public outcry in Queensland over system and service response failures following widespread storms in early 2004. In the meantime, consumers and the community are relying on regulators to do their jobs, a primary objective of which must be enforcement of mandated consumer protections.
- 4.3.8 And, as the authors of the FEMAG/PIAC Paper point out, explicit inclusion of consumer protection within the mandate of the economic regulator contributes to greater public confidence in the regulatory function:

Fusion of competition and economic regulation with consumer protection regulation in one agency is highly beneficial. Community organisations, media commentators and the community at large can understand consumer protection regulation much more readily than competition and economic regulation. The general community support and confidence that a regulatory agency needs to be effective is more easily developed if at least part of its role is generally well understood.²³

²² Energy Action Group (September 2004), *Report on the Essential Services Commission/Energy and Water Ombudsman Victoria, Response to Retailer non-compliance with ‘capacity to pay’ requirements of the Retail Code*, p.3

²³ FEMAG/PIAC (December 2005), p.70

4.4 Effective regulators encourage advocacy and debate

- 4.4.1 Effective regulators actively encourage consumer advocacy and consumer participation in regulatory debate. Most regulators will agree that they inevitably find themselves dealing in economic and social theory. Robust and ongoing input from a range of consumer, welfare and customer groups brings a critical reality-check to regulatory decision-making.
- 4.4.2 As indicated in the CLCV's November 2004 response to the MCE/SCO's August 2004 *Issues Paper: National Framework for Electricity and Gas Distribution and Retail Regulation*, we have concerns that a centralised regulator will remove the ability of many community organisations to maintain the contact and influence they presently have in relation to jurisdictional regulatory decisions. The AEMC and the AER must each have specific mandates to actively involve consumer, welfare and customer groups in their consultation and decision-making processes.
- 4.4.3 However, to be able to deliver in this way, consumer, welfare and customer groups must be well-informed and specifically resourced. For consumer and welfare groups, robust contributions are almost impossible to deliver without such support, since for many contributors, this work falls outside of paid employment. The involvement of the CLCV and other consumer and welfare groups in responding to the NERA/G+T Paper has highlighted yet again the obvious need for a properly funded consumer advocacy and research capacity.
- 4.4.4 To this end, we are pleased that the jurisdictional Ministers have taken the decision to strengthen the arrangements for consumer advocacy in the energy sector, with a particular focus on small to medium end-users. We are also generally pleased with the November 2005 decision by the MCE to fund a consumer advocacy funding body to be responsible for grant allocation activities and commissioning research that focuses on the needs of small to medium end-users.
- 4.4.5 However, we strongly submit, that the proposed consumer advocacy body should be given an explicit 'advocacy' role. As it is envisaged, it will essentially be a passive actor in the marketplace — leaving Australian consumer, welfare and public interest advocacy on energy issues under-resourced and ad hoc, and lagging behind that of the United Kingdom and the United States.

Recommendations

- That both the Australian Energy Regulator (**AER**) and the Australian Energy Market Commission (**AEMC**) are given explicit mandates and objectives for consumer protection.
- That the AER's monitoring and public reporting roles are explicit and robust, underpinned by appropriate enforcement powers and a mandate to actively pursue compliance failure.
- That the AER and the AEMC are each required to put in place formal and transparent mechanisms for consumer input to regulatory processes.

CLCV RESPONSE: SECTION A

5 Legislative vs administrative instruments

Principle

- Regulatory instruments for business authorisation must have the capacity to respond quickly and effectively to market changes.

5.1 Capacity to respond to the market is critical

5.1.1 Based on our experience with the *Uniform Consumer Credit Code (UCCC)*, we have significant concerns about the capacity of legislation to respond to markets, and in particular to address exploitative practices and systemic issues.

5.1.2 Since 1 November 1996, the UCCC has operated as a uniform national legislative scheme — having been enacted as template legislation in Queensland, and then adopted in other States and Territories. Since the implementation of the UCCC, there have been two rounds of review, which have given rise to important recommendations — a Post Implementation Review (**PIR**) in 1998, followed by a National Competition Policy Review (**NCPR**) in 2000.

5.1.3 Yet, as late as August 2004, Niven and Gough²⁴, in undertaking their review of the UCCC observed that:

Many of the Recommendations of the PIR have yet to be adopted (other than a number of largely technical amendments), despite being supported in the NCPR.

and went on to conclude that:

Whatever issues are identified it continues to be the case that the nature of the uniform scheme means that amendment can be a difficult and cumbersome process. As a result the legislation is far less responsive that it needs to be, allowing consumers to be exposed to dangerous practices that have long been identified, and from which they might justifiably expect protection.

5.1.4 The UCCC legislation has failed in many respects and it has proven impossible to amend. On this point, in responding²⁵ to the Victorian Government's Consumer Credit Review and the *Consumer Credit Review Issues Paper* published by Consumer Affairs Victoria in June 2005, the CLCV and the Consumer Credit Legal Service (**CCLS**) jointly expressed our disappointment that, despite previous recommendations arising from these two major reviews, consumers — in particular low-income and vulnerable consumers — have continued to suffer detriment as a result of a failure by the national regulatory regime to implement the recommendations.

5.1.5 We highlighted the fact that, unlike other forms of financial services regulation, such as the regulation of financial products and services under the *Corporations Act 2001* (Cth), there is no effective licensing regime for credit providers. This limits the ability of Consumer Affairs Victoria, as the jurisdictional regulator in this case, to take effective action to address exploitative practices or systemic issues until well after problems have occurred.

²⁴ D Niven and T Gough (August 2004) for Consumer Credit Legal Service Inc (Vic), *The Operation of the Uniform Consumer Credit Code: Why is it failing consumers?*

²⁵ Joint CLCV/CCLS submission to James Merlino MP, Member for Monbulk, *Consumer Credit Review Issues Paper* (August 2005)

- 5.1.6 Our concerns are such that we are encouraging the Victorian State Government to step away from the national process, to introduce an effective licensing regime for credit providers which will provide Victorian credit consumers with appropriate protection — if that cannot be achieved on a national basis.
- 5.1.7 Bringing the discussion back to energy, the last thing Australian consumers need is another national regulatory regime which, because it is based in legislation, is cumbersome and unresponsive to market failures, thereby exposing consumers to serious detriment.

5.2 The case for moving away from licensing is unconvincing

- 5.2.1 The requirement to have a licence to carry on business is a common feature of existing jurisdictional regulatory regimes. It is understood by stakeholders generally, and has proven effective in driving retailer and distributor accountability and compliance.
- 5.2.2 While the August 2004 MCE/SCO Issues Paper, *National Framework for Electricity and Gas Distribution and Retail Regulation*, discussed a national licensing regime in some depth and sought stakeholder feedback, it now appears that licensing has been discounted in favour of legislation. The NERA/G+T Paper does not put a convincing case for this change of approach.
- 5.2.3 Without discussion, and with no examples of specific problems which have arisen with the use of licensing, the NERA/G+T Paper moves quickly to principles and policy recommendations, such as the following:²⁶

Licensing/authorisation regimes create barriers to entry and regulatory costs that should only be imposed where it is clear that the benefits of the regime outweigh its costs.

As a general principle licensing/authorisation regimes should not be used as a device to impose legal obligations, the consequences of which are considered, from a policy perspective, to be serious ...

Where a matter is judged to be sufficiently serious, from a public policy perspective, that legal obligations should be imposed on how firms conduct their business in relation to that matter; obligations should be clear, and should be applied in a transparent manner.

... where a licence or authorisation requirement is used to impose obligations via administrative rather than legislative action, there is the risk that the obligations are not subjected to the rigorous drafting process that is specifically designed to ensure that legislative instruments are expressed with precision ...

- 5.2.4 These comments appear to have been written in a time and political vacuum. The NERA/G+T Paper presents the options of legislative and administrative requirements as ‘either/or’ choices. In practice, this scenario is appropriate in the lead-up to the passage of the legislation only. Thereafter, governments and regulators are faced with the choice of legislative amendment, or the imposition of an administrative requirement. The NERA/G+T Paper completely ignores the nearly insurmountable constitutional and political difficulties inherent in any process to amend legislation of this type.

²⁶ NERA/Gilbert+Tobin (May 2005), p.65

5.2.5 While there is room for debate about the respective merits of the effectiveness of regulation by legislation and/or administrative instruments, our view is that governments would be foolish to restrict their options, by ruling out use of administrative instruments, in the period after the passage of a national legislative package.

5.3 Regulation has to be flexible

5.3.1 Relying on economic theory, and appearing to ignore regulatory practicalities, the NERA/G+T Paper promotes the view that licensing creates barriers, while ignoring the long history of practical difficulties which have confronted governments and regulators in the maintenance and enforcement of national legislation within the jurisdictions.

5.3.2 As we have observed, the pursuit of legislative amendments in federal and state jurisdictions is difficult at the best of times — and seeking legislative amendments to national or uniform state legislation is virtually impossible.

5.3.3 Moreover, the complexity of processes for legislative amendment has led governments and regulators to commonly — and over a long period of time — express the view that flexible administrative instruments, such as codes and licences, are preferable to unwieldy legislative instruments.

5.3.4 Recent examples of this thinking may be found in:

- the passage of the *Corporations Act 2001* (Cth) as amended by the *Financial Services Reform Act 2001* (Cth) which, in the words of the Minister for Financial Services & Regulation, Joe Hockey, introduced a ‘single licensing regime for all financial sales, advice and dealing’ within which ‘industry codes will play an important role in fleshing out standards for meeting the requirements of the new regime’;²⁷
- amendments made in 1997 to the *Trade Practices Act 1974* (Cth) to allow industry codes of practice to be prescribed in regulation and where necessary, enforced as mandatory industry codes;²⁸ and
- the May 2005 move by ESCOSA to have criteria in place in advance of an application by a retailer to market prepayment meters in South Australia — jurisdictional legislation was silent on the matter of prepayment meters, and deciding that such criteria would benefit all stakeholders, ESCOSA used a subordinate administrative instrument, the *Prepayment Meter System Code* to achieve this.

5.3.5 In our view, the fact that so many key energy consumer issues have been left to be resolved by jurisdictional directions suggests that — to develop an effective national framework for energy distribution and retail regulation — there will need to be significant amendments to the legislation in the first few years of operation, or a reliance on a national licensing regime. In the short to medium term, licensing will offer a far easier and more effective path, than will the fraught process of legislative reform.

²⁷ *Financial Services Reform Bill 2001*, Second Reading Speech, pp.1-2

²⁸ Parliament of Australia, Bills Digest No. 55 1997-98, *Trade Practices Amendment (Fair Trading) Bill 1997*

- 5.3.6 We also point out that the NERA/G+T Paper actually recognises the importance of flexibility, and in fact recommends the use by the AER of sub-ordinate administrative instruments, in the form of Statements of Requirements, to specify information disclosure requirements:

Placing the requirements in an instrument that can be amended by the AER also provides greater flexibility to modify the arrangements as the need arises.²⁹

5.4 Perceived barriers provide public protections

- 5.4.1 The NERA/G+T Paper points to the following matters which applicants for retail and distribution licences must typically demonstrate to jurisdictional regulators before they are granted a licence:³⁰

- (a) prudential soundness: minimum financial wherewithal (eg investment rated company, bank guarantee, assets on balance sheet or the like);
- (b) technical competence: often must show technical capacity to participate in the industry; and
- (c) ability to comply with specified laws, codes and guidelines (principally in relation to consumer protection and environmental obligations).'

- 5.4.2 We submit that requiring aspiring market entrants to demonstrate 'prudential soundness', 'technical competence' and the 'ability to comply with specified laws, codes and guidelines' is entirely appropriate, whether achieved by licensing or legislation — these so called 'barriers to entry' help protect the public from 'fly-by-nighters' and are particularly important when it comes to an essential service.

- 5.4.3 The licensing process also delivers tangible benefits for applicants, including helping them develop internal compliance systems. The authors of the FEMAG/PIAC Paper³¹ report that their consultations with regulators strongly suggested that:

... companies actually find the licensing process valuable. It is seen as more efficient to go through such a process and to get the business plan right, especially including internal compliance systems, than it is to find a mismatch between regulation and the business plan after entry and to go through a retrofitting exercise.

- 5.4.4 Licences are also subject to renewal, which means that they are assets which can be threatened or lost if energy businesses fail to comply with their obligations — a further safeguard for consumers and from a public interest perspective.

- 5.4.5 We agree that the rules and obligations on businesses 'should be clear and applied in a transparent manner', but we believe that clarity and transparency are achieved in the current licensing regimes — for all stakeholders. Licences serve to focus licensees on what the community — via the regulator — expects from them and in this way, a licensing regime drives the high level of accountability particularly appropriate to essential services such as energy.

5.5 Reducing costs to industry participants

- 5.5.1 We have some sympathy for the fact that energy companies presently operating across a number of jurisdictions incur costs due to jurisdictional differences. On this

²⁹ NERA/Gilbert+Tobin (May 2005), p.37

³⁰ NERA/Gilbert+Tobin (May 2005), p.65

³¹ FEMAG/PIAC (December 2005), p.68

point, we submit that the introduction of one national licensing regime will guarantee significantly reduced costs for these companies — and thus for most of the existing energy retailers.

5.5.2 New entrants will have compliance costs whichever way the regime is structured.

5.6 Precision and rigour in drafting

5.6.1 The NERA/G+T Paper argues that legislative instruments are preferable to administrative instruments because the legislative process ‘results in greater precision because of a more rigorous drafting process’. We submit that ‘rigorous drafting’ is not the sole province of the legislative process. The authors of the FEMAG/PIAC Paper, who between them have decades of experience in the drafting of administrative and legislative instruments, observe:³²

Our experience is that consultations on draft administrative instruments are usually comprehensive. In fact the consultation processes used also usually allows scrutiny by interested members of the public. Indeed codes are often developed by stakeholder committees. We also note that legislative instruments run the risk of last minute (sometimes late night) unexpected amendments.

5.6.2 If the quality of drafting of regulatory instruments is a potential issue, the regulator must be held responsible for ensuring the drafting process is rigorous and will stand up to public scrutiny.

5.7 External dispute resolution schemes

5.7.1 The NERA/G+T Paper overlooks the fact that non-statutory ombudsman schemes are given life by jurisdictional licence conditions.

5.7.2 In Victoria, the electricity and gas retail and distribution licences require licensees to submit ‘an ombudsman scheme’, complying with certain terms and conditions, for the ESC’s approval, and to implement any such scheme that the ESC approves. While these licence conditions are underpinned by legislative requirements — in the *Electricity Industry Act 2000* (Vic) and the *Gas Industry Act 2001* (Vic) — for energy retail and distribution licensees to enter into a customer dispute resolution scheme approved by the ESC, it is in the licences that the ‘ombudsman’ scheme is specified.

5.7.3 Should licences not be the final form of business authorisation under the national framework, we would expect membership of an ombudsman scheme to become a specific legislative requirement. Anything less would be unacceptable.

Recommendation

- That, for reasons of regulatory flexibility, capacity to respond to the changing energy market and effectiveness, licensing is retained as the form of business authorisation.

³² FEMAG/PIAC (December 2005), p.68

CLCV RESPONSE: SECTION A

6 Effective retail competition

Principles

- While the energy market needs to work effectively for all stakeholder groups, effective retail competition for consumers must be a priority.
- Because an energy market, which is generally considered to be effective, may still not deliver benefits for all consumer groups, the crucial role of state government safety net programmes in delivering community service obligations must be explicitly recognised in any proposed national framework for energy distribution and retail regulation.
- The direct participation of informed consumers is crucial to the development of effective retail competition.

6.1 Assessing effectiveness

6.1.1 While the CLCV supports a competitive marketplace, we submit that it is far too early to assess retail competition in any of the jurisdictional energy markets as being effective for household or small business customers.

6.1.2 Although the NERA/G+T Paper frequently refers to effective competition and effective choice, there is no definition or discussion of what 'effective' might mean.

6.1.3 Bowman, Coghill and Hodge³³, having concluded that 'perfect markets exist only in theory', provide the following assessment of electricity market effectiveness:

...the provision of an essential service such as electricity also introduces new complexities further undermining any notion that electricity markets would ever seriously be regarded as perfectly competitive ... the policy aims of government will amount to pursuing incentives that aim to improve the likelihood that we can ensure electricity is provided through an 'effective market', rather than a 'perfect market'.

6.1.4 The ESC provides further clarification of effectiveness in its FRC Reports pursuant to two investigations it has completed into the effectiveness of full retail competition for Victorian household and small business consumers. In its September 2002 FRC Final Report, the ESC presented a number of elements of market structure and conduct which it states will determine market outcomes and performance, and together:

... allow an informed judgement to be made as to whether the market performance is, or is likely to be, consistent with that of an effectively competitive market or whether it is more consistent with the presence and exercise of market power.³⁴

6.1.5 The ESC identified the following market structure indicators of effectiveness:³⁵

- number of competing consumers in the market;
- number of competing retailers in the market;
- history of entry and exit of retailers;
- market shares and concentration of the market among retailers;
- existence of economies of scale and scope; and
- existence of barriers to entry (including any related to regulatory arrangements).

³³ Bowman, Coghill, Hodge (2004), p.34

³⁴ ESC (September 2002), p.62

³⁵ ESC (September 2002), p.21

- 6.1.6 And, the ESC³⁶ identified the following market conduct indicators of effectiveness:
- customer awareness of competition of choice;
 - ease of obtaining and comparing information;
 - extent and type of marketing activity;
 - extent of offers being sought and made;
 - the number of customers accepting market offers and/or switching retailers; and
 - anticompetitive or misleading behaviour.

In doing so, it assessed the most important of these as the extent to which customers are entering into market contracts with either their existing retailer, or switching to an alternative retailer.

- 6.1.7 We will come back to the issue of customer switching shortly. Generally though, we submit that any assessment of energy market effectiveness must be comprehensive and take account of the experiences of different consumer groups — including low-income and vulnerable consumers, rural/regional and metropolitan consumers, and homeowners as compared to tenants. An approach which is too broad or generalised will fail to capture the experiences of different consumer groups — experiences which may be very different from the average. It would be of great concern if protections were removed from consumers generally, and in particular vulnerable consumers, based on a partial, general, average or premature consumer experience of the developing energy marketplace.
- 6.1.8 We also believe that energy market effectiveness should be judged according to the extent to which competition delivers policy outcomes consistent with the broad social and environmental objectives of State and Federal governments.

6.2 Retail competition in Victoria — effective for some

- 6.2.1 Unsurprisingly, in its 2002 Final Report on the effectiveness of retail competition, the ESC concluded that, although considerable progress had been made towards a competitive electricity retail market, the market was still at an early stage of development, with competition not consistent with that expected from an effectively competitive market.³⁷
- 6.2.2 In March 2004, the ESC acknowledged³⁸ that the electricity and gas markets in Victoria (even after two years of full electricity retail competition) were not yet effectively competitive for all classes of Victorian energy consumers and that further development in the strength and reach of competition would be necessary to reach that position.
- 6.2.3 Then, in its June 2004 Final Report on the effectiveness of retail competition, the ESC found competition to be effective for some customers in ‘profitable sub-markets’:

...generally effective in constraining prices and delivering non-price benefits in those sub-markets where sufficient margin exists or has emerged to make market contracts attractive to those customers and the customers profitable to serve for retailers. These profitable sub-markets account for about 40 per cent of small customers and generally

³⁶ ESC (September 2002), p.22

³⁷ ESC (September 2002), p.79

³⁸ ESC (March 2004), p.7

involve customers consuming more than 6MWh of electricity or 150 GJ of gas annually, operating dual fuel accounts and located in metropolitan and large regional centres.³⁹

6.2.4 The obvious corollary of this is that, 2.5 years into electricity FRC in Victoria, retail competition was not effective for 60% of small customers — in particular, it was assessed as not effective for:

- rural and regional consumers (except those in large regional centres);
- consumers who elect not to have dual fuel accounts; and
- consumers from whom retailers do not envisage making a profit (as the ESC pointed out, these tend to be lower volume and more remotely located energy consumers, who may also have relatively high off-peak energy usage).

6.2.5 The ESC goes on to recognise that there are groups of consumers at a relative disadvantage in their ability to access market contracts:⁴⁰

Many customers currently offer small or even negative margins to retailers compared to the standing offer prices. Other customers are more difficult and costly for retailers to access with their marketing program (for example, small business and remote rural customers). Many of these customers are not yet able to take advantage of the developing retail energy market and others, due to their low consumption or high off-peak usage, may still be paying standing offer tariffs which are below the cost of supply.

6.2.6 That retail competition is working better for some groups of consumers than others is supported by commentators such as Langmore and Dufty:⁴¹

Profiles of households participating in the market are not representative of the population in general, due to retailers' profitability imperatives and cost pressures driving certain segments of the market to be excluded. This includes low volume and off peak users and those households with a poor credit record. Low-income earners constitute the most price sensitive households and are most keen to participate in the market. Although not overtly discriminated against in the market, these nonetheless may experience indirect exclusion by their overrepresentation as low volume consumers, off peak users or credit risks.

6.2.7 Some useful insight into how retail competition is developing can be gained from a survey of retailers undertaken by the ESC in 2004. Amongst other things, the ESC's survey revealed that:

- for all retailers, customer attractiveness was largely driven by consumption — the greater the consumption, the greater the dollar retail margin;⁴²
- several retailers would not make offers to customers with consumption below a particular threshold level;⁴³
- several retailers would not consider making market offers to customers with consumption below a particular threshold level;⁴⁴
- consumers living in rural areas and smaller regional centres are at a relative disadvantage in their ability to access market offers because they are less likely to be targeted by retailer marketing strategies;⁴⁵ and
- customers on off-peak tariffs are targeted for exclusion by retailers.⁴⁶

³⁹ ESC (June 2004) p.3

⁴⁰ ESC (June 2004), p.4

⁴¹ M Langmore and G Dufty (June 2004), *Domestic electricity demand elasticities, issues for the Victorian energy market*, p.5

⁴² ESC (June 2004, Background Paper), p.62

⁴³ ESC (June 2004, Background Paper), p.62

⁴⁴ ESC (June 2004, Background Paper), p.62

⁴⁵ ESC (June 2004, Background Paper), p.51

⁴⁶ ESC (June 2004, Background Paper), p.63

- 6.2.8 These retailer responses to the ESC's survey raise significant issues — to do with whether consumers can access the competitive energy market in the first place (i.e. attract offers), and if they can, whether they will actually benefit from competition. We have recently undertaken further research into outcomes for consumers under Victorian electricity market reforms.⁴⁷ This research leads us to the view that while the reforms have produced some significant benefits over the past decade, many of these benefits have accrued to higher volume industry and commercial users and metropolitan consumers. Disappointingly, rural and regional and low-income and disadvantaged consumers have seen mixed impacts.
- 6.2.9 The limited effectiveness of retail competition to this point highlights the importance of maintaining the state government safety net programmes currently required as community service obligations (CSOs). To this end, we submit that CSOs should not be treated as secondary issues to be regulated via jurisdictional directions — they should be explicitly recognised in the legislation for any proposed national framework for energy distribution and retail regulation.

6.3 Informed consumers will drive retail competition

- 6.3.1 Informed consumers are critical to the development of effective retail competition, and, consumer understanding and confidence is critical to the exercising of informed choice.
- 6.3.2 For its part, the ESC⁴⁸ has stated that, where competition is effective, consumers should be able to access clear and concise product information.
- 6.3.3 Yet, in its June 2004 FRC Final Report⁴⁹, the ESC acknowledged factors such as a general lack of information and poor consumer understanding of retail competition as inhibiting access to an energy market contract for many consumers — a telling observation made some 2.5 years into full retail competition in Victoria.
- 6.3.4 It is therefore obvious that, despite some quite extensive consumer information programmes, substantial information asymmetry unquestionably remains in the Victorian competitive energy marketplace.
- 6.3.5 Leading up to the introduction of full retail competition in Victoria, the CLCV conducted interviews with representatives of distribution and retail businesses. It became clear to us that differing views were held within industry about who should be responsible for consumer education. Some retailers saw consumer education and marketing as inextricably linked and others saw the educative component as the responsibility of the Victorian Government and (then) Office of the Regulator-General.
- 6.3.6 We submit that, because consumer education is fundamental to informed choice, all retailers should be required to put in a significant effort to ensure consumers are provided with accurate, appropriate, timely and understandable information upon which to base switching decisions. The aim should be to build consumers' confidence in their ability to exercise choice in the market and thus encourage them to do so.

⁴⁷ CLCV and the Centre for the Study of Privatisation & Public Accountability (PPAC) (draft at December 2005), *Electricity Reform in Victoria: Outcomes for Consumers*

⁴⁸ ESC (May 2002), *Issues Paper: Special Investigation: Review of the Effectiveness of Full Retail Competition for Electricity*, p.18

⁴⁹ ESC (June 2004, Overview Paper), p.4

6.3.7 As the ESC has observed:

Provision of relevant, accessible information to consumers and their capacity to understand and utilise it to make informed retail market choices has the potential to speed the development of an effectively competitive market as uninformed consumers allow incumbents to take advantage of market power.⁵⁰

6.3.8 The need for consumer education exists on two levels — informing consumers that they have a choice and teaching them how to make informed choices.

6.3.9 However, even the best information takes time to filter through, and in the meantime, a robust consumer protection framework is needed to bridge the gap.

Recommendations

- That market effectiveness for all consumers is a primary objective of any proposed national framework for energy distribution and retail regulation.
- That state government safety net programmes currently required as community service obligations are explicitly recognised in the legislation for any proposed national framework for energy distribution and retail regulation, and not left to jurisdictional direction.
- That energy retailers, as well as regulators and governments, have a responsibility to contribute to market effectiveness by providing accurate, appropriate, timely and understandable information to energy consumers.

⁵⁰ ESC (September 2002), p.82

CLCV RESPONSE: SECTION A

7 Consumer protection framework

Principles

- A robust, flexible and responsive consumer protection framework is fundamental to energy market effectiveness.
- Existing jurisdictional protections for energy consumers must not be diluted.
- Mandatory codes of practice are a common, effective and widely accepted means of protecting and empowering consumers, and creating supplier compliance.

7.1 Capacity to respond to industry developments

7.1.1 The NERA/G+T Paper proposes a consumer protection framework which reduces the compliance burden on energy suppliers, simplifies the regulatory environment for energy suppliers, helps energy suppliers comply with their regulatory obligations and reduces costs for energy suppliers:

With limited exceptions ... the use of other forms of regulatory instrument (such as Codes, licences, mandatory Guidelines and Regulations) to apply regulatory obligations would be discontinued thus simplifying the regulatory environment that is currently characterised by a myriad of instruments of different types applying to Australian energy retailers and distributors.⁵¹

7.1.2 While we acknowledge the existence of numerous jurisdictional instruments, what the NERA/G+T Paper does not acknowledge is that governments, regulators and in some cases, industry, have deliberately gone down this path to develop more effective and flexible consumer protection instruments and to avoid inflexible legislation.

7.1.3 We present as just two examples of this:

- the establishment (with industry support) of the *Code of Conduct for Marketing Retail Energy in Victoria* — the ESC's introduction to the Code states that 'Recognising the importance of flexibility, the Code is designed to remain a "live" document, subject to continuous improvement through consultation with electricity retailers, government, relevant regulatory authorities and consumer organisations';⁵² and
- the ESCOSA's introduction of the *Prepayment Meter System Code* — in its March 2005 *Draft Final Decision*, the ESCOSA states that it considers it 'desirable to establish an appropriate regulatory framework against which it can assess any application for approval of a prepayment metering system'.⁵³

7.1.4 The CLCV is not aware that governments, or regulators, have abandoned a preference for 'living' documents — that is, a preference for administrative instruments as the most effective means of ensuring regulation keeps pace with the needs of a rapidly changing marketplace. To this end, the approach recommended in the NERA/G+T Paper appears to fly in the face of accepted regulatory practice.

⁵¹ NERA/Gilbert+Tobin (May 2005), p.8

⁵² ESC (October 2004), *Code of Code for Marketing Retail Energy in Victoria*, p.1

⁵³ ESCOSA (March 2005), *Prepayment Meter System Code – Draft Final Decision and Code*, p.7

- 7.1.5 The NERA/G+T Paper also fails to recognise that the flexibility it specifically recommends in relation to the AER's information gathering powers, is the same flexibility needed for an effective consumer protection framework — namely the 'flexibility to modify the arrangements as the need arises'.⁵⁴

7.2 Supplier benefits at the expense of consumer protections

- 7.2.1 We do not argue with simplification as a regulatory objective, but it cannot be at the expense of existing consumer protections, on the basis of broad-brush and poorly researched proposals, such as:

Matters commonly duplicated in energy specific consumer protection instruments and generic consumer legislation should be applied only through Federal, State or Territory generic consumer protection legislation and the Rules would not duplicate those provisions.⁵⁵

- 7.2.2 The consumer protection framework proposed in the NERA/G+T Paper will do more to benefit energy suppliers, than it will do to protect energy consumers. To this end, we reference the very similar position put by the Energy Retailers Association of Australia to the ESCOSA's 2004 investigation into the effectiveness of energy retail competition in South Australia:⁵⁶

... competition in the retail energy market should be assessed as it is in other Australian markets, via the Trade Practices Act. Potentially competitive markets are assumed to produce acceptable outcomes for consumers unless there is compelling evidence to the contrary, based on comparison with other comparable markets ...

and similar positions put by energy suppliers, AGL, Origin Energy and TXU Retail in responding to the MCE/SCO's August 2004 Issues Paper.

- 7.2.3 As consumer experiences clearly show, the assumption that competitive markets will automatically produce acceptable outcomes for consumers is flawed. That aside, the energy market is not like most other markets — energy's essentialness and other special characteristics mean that it is completely unacceptable to rely on any assumption that a competitive energy market will produce acceptable outcomes, in the absence of consumer protections.
- 7.2.4 For customers in some jurisdictions, the loss of existing consumer protections would be huge. In Victoria and South Australia for example, the mandatory energy codes and guidelines administered by the ESC and the ESCOSA play a critical role in helping consumers understand and enforce their rights, and understand and fulfil their responsibilities. These are clear and accessible documents that work to empower consumers in a marketplace which is still unfamiliar for many and still evolving.
- 7.2.5 For consumers in jurisdictions, such as Queensland which are in the process of introducing full retail competition, the potential loss is also huge, since it would mean that these consumers would never have the benefit of the protections afforded their southern counterparts — protections which are playing an important role in the development of more effective jurisdictional energy markets.
- 7.2.6 We also submit that the push in the NERA/G+T Paper towards a reliance on general Fair Trading and Trade Practices legislation under a national regulatory regime,

⁵⁴ NERA/Gilbert+Tobin (May 2005), p.37

⁵⁵ NERA/Gilbert+Tobin (May 2005), p.8

⁵⁶ ESCOSA (September 2004) p.4

within six months of the Victorian Government announcing its ‘most comprehensive set of energy industry reforms to protect consumers since coming to office’⁵⁷ seems quite incongruous. The provisions of those November 2004 reforms are discussed later in this response, but we note that in announcing the reforms, the Minister for Energy Industries & Resources said, ‘It cannot be stressed enough that gas and electricity are essential services, not just commodities.’

7.2.7 On that point, we couldn’t agree more — energy consumers need clear and comprehensive energy-specific consumer protections which make sense to them and which reflect their day-to-day experiences with energy suppliers. They do not want to, and should not have to, wade through Fair Trading and Trade Practices legislation to be able to understand and enforce their rights, and comply with their obligations.

7.2.8 And, looking at it from a compliance perspective, the existence of provisions in general Fair Trading and Trade Practices legislation is no guarantee that energy retailers will be aware of these provisions and how they link to energy, or even realise they may be bound by them.

7.3 Consumers don’t necessarily benefit in competitive markets

7.3.1 The NERA/G+T Paper fails to give sufficient weight to the promotion of appropriate standards of conduct, and the avoidance of anti-competitive behaviour and market abuse of customers, in the process of promoting effective retail competition. Even in markets with the appearance of healthy competition, consumers will not necessarily be protected, or have access to clear and concise product information, or even be benefiting.

7.3.2 The telecommunications market is characterised by a lack of comparable information on products and services, poor selling practices, and unintelligible and often unfair contract terms. It is relevant that the Victorian consumer reforms we reference above also give the Minister for Energy Industries & Resources reserve power to prohibit or regulate early exit fees imposed on consumers electing to terminate their energy retail contract prior to the nominated period. In announcing this provision, the Minister referenced the mobile phone market, stating that, ‘We don’t want a situation arising in Victoria similar to what happened with mobile phones where companies imposed huge fees on consumer wanting to switch to a competitor’.

7.3.3 The Telecommunications Industry Ombudsman’s (TIO’s) 2005 Annual Report provides the latest guide to consumer experiences in that competitive market:

- a 145% surge over the past year in complaints about landline contracts, 75% of which relate to incorrect advice given by providers and agents to customers at point of sale — the TIO suggests this may be due to ‘increased competition between companies ... offering discount packages and bundled deals’;⁵⁸
- doubling of landline privacy complaints, with the largest number about telemarketing — the TIO notes that ‘many of the complaints referred to instances where complainants claimed to have asked the company to cease calling and remove their details from marketing lists, yet the calls continued’;⁵⁹

⁵⁷ Minister for Energy Industries & Resources, Media Release, *Major Energy Reforms Protect Consumers*, 5 November 2004

⁵⁸ Telecommunications Industry Ombudsman (TIO), *2005 Annual Report*, p.28

⁵⁹ TIO *2005 Annual Report*, p.28

- a 50% increase in landline transfer complaints, with 75% of customers ‘claiming that their telephone services had been transferred to another company without their authority or informed consent, otherwise known as slamming’,⁶⁰ — in this respect the TIO notes ‘a clear and worrying trend is the dramatic rise in complaints about unauthorised transfer as a result of telemarketing’;⁶¹ and
- an almost 50% increase in complaints about mobile phone contract accounts, 47% about incorrect advice provided at point of sale.

7.3.4 Looking to banking, commentators on consumer participation in the banking industry argue that banks use fees as a means of excluding non-profitable customers. It is suggested that fees are also determined with the intention of ‘cherry picking’ profitable customers, for example, those customers with mortgages and term deposits, who in turn receive fee exemptions on the basis of the number of banking services they use.⁶² All of these factors, combined with the myriad of fees on accounts primarily used by low income and disadvantaged bank customers — monthly service fees and over-the-counter fees — compound the financial hardship experienced by these consumers.

7.4 Proposed framework is premised on effective competition

7.4.1 The NERA/G+T Paper’s proposed consumer protection framework is also premised on there being effective competition and effective choice:

Where competition is effective, legislative regimes of general application which deal with fair dealings, misleading and unconscionable conduct should be sufficient. That is, where full retail competition is effective no energy specific regulation of Market Contracts should be needed.⁶³

We have already stated our concerns about assumptions as to how ‘effective’ retail competition will be for many customers, at least for the foreseeable future.

7.4.2 It is simply far too early in the development of competitive energy retail markets across Australia to remove energy-specific consumer protections. We are supported in this view by conclusions reached by the ESC and the ESCOSA in their respective investigations into the effectiveness of energy retail competition in Victoria and South Australia.

7.4.3 In June 2004, on the importance of effective consumer protections, the ESC concluded:⁶⁴

In view of the essentiality of energy services ... effective consumer protection will still be necessary for residential and small business customers after fully effective retail competition has been established. Such protections exist for other essential services provided under competitive market conditions and they can play an important role in building confidence in customers that they can participate proactively in the new energy market. They are also important in providing support for the more vulnerable customers in the competitive energy market.

⁶⁰ TIO 2005 Annual Report, p.28

⁶¹ TIO 2005 Annual Report, p.34

⁶² C Connolly and K Hajaj (2000) in CLCV, CFA, FCRC and VCOSS (June 2002), p.29

⁶³ NERA/Gilbert+Tobin (May 2005), p.57

⁶⁴ ESC (June 2004, Overview Paper), p.5

7.4.4 Similarly, in September 2004, the ESCOSA concluded:⁶⁵

While it may be the case that in time it will be appropriate to assess competition in the energy retail market via general competition mechanisms such as the Trade Practices Act, it needs to be recognised that the electricity and gas retail markets have only recently been created and it is considered responsible to closely monitor their early development.

7.5 An essential service, energy requires more

7.5.1 In the CLCV's submission of November 2004 to the MCE/SCO's Issues Paper, we supported the general proposition that where new markets such as energy are emerging, industry-specific regulation is necessary. As we stated then, we believe this debate (legislation vs codes) turns on the question of whether consumers can adequately be protected by general consumer protection laws, such as those contained in Fair Trading Acts and the *Trade Practices Act 1974* (Cth).

7.5.2 Our strong view is that the Australian energy market is far too immature to rely solely on general consumer protection legislation. As a result, we do not support the exclusion of any of the consumer protection categories in the existing Victorian regulatory consumer protection codes or guidelines, simply on the basis that they may be duplicated in general consumer protection legislation. Reliance on Fair Trading Acts and the *Trade Practices Act 1974* (Cth) is not sufficient for an essential service. Energy-specific regulations must be in place to address energy-specific matters, including connections, disconnection, reconnection, billing and payment, and marketing practices.

7.5.3 Our view is supported in the following assessment by the ESC in June 2004⁶⁶:

In the longer term, as the reach of effective energy market competition is extended to all customer groups, the Commission considers it would be appropriate to integrate the non-price energy market consumer protection arrangements into the general framework of the *Fair Trading Act 1999*, possibly by means of an enforceable code. In the meantime, the industry specific protections administered by the Commission, as amended from time to time, should be retained.

7.6 Energy marketing — a case for energy-specific consumer protection

7.6.1 We point to energy marketing as an excellent example of why energy-specific consumer protections — in addition to those under Fair Trading Acts and the *Trade Practices Act 1974* (Cth) — are needed to ensure that as the energy market develops, consumers, and particularly low-income and vulnerable consumers, are protected from unscrupulous marketing by retailers.

7.6.2 The NERA/G+T Paper proposes that only matters 'appropriately specific to the energy industry' would be included in the consumer protection framework, with the following matters not covered in the consumer protection Rules:⁶⁷

(a) the prohibition against misleading or deceptive conduct generally, prohibitions against specific forms of misleading or deceptive conduct (eg bait advertising) and related prohibitions (eg against harassing

⁶⁵ ESCOSA (September 2004) p.4

⁶⁶ ESC (June 2004 Overview Report), p.4

⁶⁷ NERA/Gilbert+Tobin (May 2005), p.7

marketing practices);

- (b) the prohibition against unconscionable conduct;
- (c) the implied warranties in consumer transactions such as that goods and services are of merchantable quality; and
- (d) door-to-door sales provisions such as the requirement for salespeople to carry identification’.

7.6.3 The NERA/G+T Paper’s authors go on to say that they:

... are not aware of any basis for concluding that the Trade Practices Act, Fair Trading and Door-to-Door Sales legislation are ineffective in regulating commercial behaviour in the fields that are subject of these pieces of legislation.⁶⁸

Our view is that this statement is uninformed and could only have been made on the basis that the authors have failed to research the topic. We have already pointed to problems with credit, and in telecommunications and banking — energy marketing is already showing signs of going down the same path.

7.6.4 Earlier in this response, we note the ESC’s⁶⁹ acknowledgement that a general lack of information and understanding of the competitive energy market is inhibiting access to an energy market contract for many consumers. What then, did the ESC put the increasing number of customers on market contracts down to, if it was not the switching actions of informed consumers? Significantly, particularly in the context of the NERA/G+T Paper, the ESC’s view was that this increase was:

... largely the result of active door-to-door marketing by retailers rather than market search and contract negotiation on the part of customers.

7.6.5 We submit that this is precisely why existing consumer protections must be maintained until the energy market can be assessed as being truly effective — to this end, we note that the ESC’s observation was made some 2.5 years after electricity full retail competition commenced in Victoria. Door-to-door sales are often targeted at less sophisticated customers — arguably those customers most in need of a full suite of consumer protections. In 2004/05, 55% of the market conduct cases reported by the Energy and Water Ombudsman (Victoria) (**EWOV**) were about door-to-door sales.⁷⁰ A slick, persistent approach by a door-to-door sales representative often pays off, and as the ESCOSA has observed, consumers who are not adequately informed are ‘vulnerable to accepting offers that may not be in their best interests.’⁷¹

7.6.6 Further insight into the marketing practices of energy retailers can be obtained from EWOV’s six-monthly case receipt reports. In the first six months of electricity full retail competition (January – June 2002)⁷², customers complained about pressure door-to-door sales techniques, false claims, not being advised of cooling-off rights, contracts not setting out actual prices, up-front fees and sales representatives failing to identify clearly which retailer they were working for. Three years later (January – June 2005)⁷³, the nature of the market conduct complaints dealt with by EWOV has changed little — misleading information, undertakings which cannot be fulfilled, the

⁶⁸ NERA/Gilbert+Tobin (May 2005), p.44

⁶⁹ ESC (June 2004, Overview Paper), p.4

⁷⁰ Energy and Water Ombudsman (Victoria), *2005 Annual Report*, p.34

⁷¹ ESCOSA (September 2004), p.14

⁷² Energy and Water Ombudsman (Victoria), *Resolution 14* (1 January 2002 – 30 June 2002),p. 9

⁷³ Energy and Water Ombudsman (Victoria), *Resolution 20* (1 January 2005 – 30 June 2005),pp. 14, 17, 37

behaviour of sales representatives, transfer of accounts without the account holder's explicit informed consent, proposed payment plans not being set high enough to cover customers' usage costs, and billing problems following transfer errors.

- 7.6.7 Just twelve months ago, Consumer Affairs Victoria took the step of entering into an enforceable undertaking with one energy retailer — NSW Government-owned retailer EnergyAustralia — under section 146 of the *Fair Trading Act 1999 (Vic)*⁷⁴. The January 2005 undertaking related to door-to-door marketing activity between July 2004 and November 2004. It was alleged that EnergyAustralia or its agents were engaged in misleading and deceptive conduct, and making false representations in the course of a door-to-door marketing campaign between 1 July 2004 and 10 November 2004.
- 7.6.8 In particular, it was alleged that EnergyAustralia and/or its agents:
- made claims to consumers regarding terms and conditions that did not exist in the contract;
 - advised consumers that termination fees were lower than they actually were;
 - incorrectly asserted to consumers that rebates applied to individual bills;
 - made sales pitches to consumers on the basis of bill payment systems that were not available; and
 - refused to leave consumers' premises when asked, and/or behaved in an overbearing manner.
- 7.6.9 In response to the allegations, EnergyAustralia undertook:
- to offer redress to identified consumers in a form agreed with the Director of Consumer Affairs;
 - to conduct compliance programs and product training as agreed with the Director of Consumer Affairs;
 - to review training and/or materials used;
 - to adhere to and enforce the terms of contracts with its independent contractors;
 - to introduce additional payment methods for consumers; and
 - to strengthen and improve its internal dispute resolution processes.

Consumer Affairs Victoria noted that EnergyAustralia co-operated with it fully, with the undertaking representing a commitment by the company to ensure that consumers approached by its representatives are not misled or deceived.

7.7 Why the Victorian energy marketing code has been retained

- 7.7.1 On the basis of energy retailers' market conduct, the CLCV and other Victorian consumer and welfare groups have advocated strongly for the retention of a specific energy marketing code. The ESC, taking account of community concerns and following its 2004 review of FRC, responded by re-issuing the *Code of Conduct for Marketing Retail Energy in Victoria* at October 2004, rather than dispensing with it.
- 7.7.2 The Code's introduction, objectives and principles⁷⁵ clearly show its crucial role — this is not a regulatory instrument of questionable purpose or value:

The Code has been designed to protect consumers, promote the effective transition to full retail competition and ensure uniform minimum marketing standards.

⁷⁴ Consumer Affairs Victoria — www.consumer.vic.gov.au

⁷⁵ ESC (October 2004), *Code of Code for Marketing Retail Energy in Victoria*, p.1

The Code reflects the responsibility of retailers to all consumers that is crucial to maintaining and enhancing confidence in the retail energy industry. It aims to ensure that all retailers are bound by the same standards.

The Code reinforces key provisions of the *Victorian Fair Trading Act 1999* and the *Trade Practice Act 1974*, specifically those provisions covering misleading and deceptive behaviour and unconscionable conduct. Further, it supplements these legislative requirements by addressing such matters as training and auditing.

The Code will:

- protect consumers and promote consumer confidence in the retail energy industry by identifying high standards of behaviour for marketing energy;
- promote honesty, fairness and disclosure of information to consumers;
- enhance efficient retail market operation by clarifying standards and promoting certainty;
- promote ongoing cooperation between the retail energy industry, regulatory authorities, EWOV and consumer representatives;
- reinforce that energy retail contracts are made with informed customer consent;
- promote industry compliance with the Code through regular compliance monitoring and annual reporting by the Commission;
- provide for consumer and industry input into the administration and continuous improvement of the Code; and
- remain flexible and responsive to changing patterns of marketing behaviour and the changing nature of the industry.

The principles of transparency, integrity and inclusiveness underpin the Code. The following additional principles shall guide its ongoing operation and continuous improvement:

- consumer protection;
- enhancement of competition;
- effective dispute resolution; and
- building and maintaining confidence in the retail energy industry.

7.7.3 If, as the NERA/G+T Paper proposes, 'legislative regimes of general application' become the benchmark for energy retailers' market conduct, the following explicit requirements of this Code would be lost to Victorian consumers — since, as indicated in the Code itself, these provisions (and several other provisions) are not required under the *Fair Trading Act 1999* (Vic):

- all of Section 4 'Marketing Representatives', which addresses training, product and code knowledge, training records;
- significant provisions in Section 5 'Contact with consumers', to do with personal contact, telephone contact, the keeping of 'no contact lists', the keeping of records on personal visits and telephone contacts made by marketing representatives to consumers;
- the specific requirement in Clause 6.1 for information required by the Code to be provided to consumers in plain English and designed to be readily understood by consumers;
- most of Section 7, 'Consumer consent', in particular, sections about the consent audit process, record keeping and sales to minors and 'authorised' customers;
- all of Section 8, 'Commencement of Retail Service', which provides for the customer to be given a date from which the retailer will be responsible for the electricity and/or gas service to the supply address; and keeping the customer informed when this will take some time;
- all of Section 9, 'Marketing and Consumer Information', which addresses misrepresentation by retailers that they are conducting market research to encourage customers into contracts; the requirement for retailers to establish and

abide by marketing principles that comply with the National Privacy Principles and any regulatory guideline on privacy; and

- all of Section 10, 'Dispute resolution', which deals with the requirements for retailers' internal dispute resolution and available external dispute resolution.

7.8 Support for a national Consumer Protection Code

- 7.8.1 The NERA/G+T Paper gives no indication of why there has been a shift away from the concept of a national Consumer Protection Code which would '... to the maximum extent possible, be the repository of all consumer protection related provisions such as small customer non-price safety net provisions.'⁷⁶ This type of comprehensive 'one-stop' code was proposed in the MCE/SCO's August 2004 *National Framework for Electricity and Gas Distribution and Retail Regulation Issues Paper*.
- 7.8.2 In the CLCV's submission of November 2004 to the MCE/SCO's Issues Paper, we advised that in August 2003 we had secured funding from the National Electricity Code Administrator Advocacy Panel to undertake a project on behalf of the Consumer Consultative Committee of the Australian Competition and Consumer Commission. The object of the project was to investigate the need for, and proposed content of, a harmonised electricity retail consumer protection code to operate in the National Electricity Market. The 'harmonisation' project was initiated on the basis of a shared view that all household 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 'harmonised' framework may result in efficiencies and certainty, and lead to increased competition, better price and service outcomes, and greater participation in the market by consumers.
- 7.8.3 With our submission of November 2004, we included an extensive analysis of consumer protection provisions currently operating in the national electricity market jurisdictions. Our comparison of these provisions included an opinion as to the current best practice protections offered in each of the jurisdictions. We recommended that the MCE make use of our comparison document to ensure that, if a single Code was formed, no diminution of consumer protections occurred in any jurisdiction. We also identified a number of instances where we considered the current best practice protection was not adequate, and we proposed that amendments to existing provisions or new protections should be developed. We note that there is no reference to the 'harmonisation' project in the NERA/G+T Paper.
- 7.8.4 If the process we suggested at that time for the development of a 'best practice' national Consumer Protection Code is considered to be too big or daunting a task in a short timeframe, we submit that a combination of the existing Victorian consumer protections (codes and guidelines) would provide an acceptable and effective starting point. These are the longest standing and most consulted-on protections of any of the jurisdictions, and they are generally accepted as the most comprehensive and robust.
- 7.8.5 A clear, comprehensive, uniform, enforceable and accessible national Consumer Protection Code is needed to underpin the national regulatory framework, and to help household and small business consumers understand their rights and their obligations. Apart from its obvious consumer protection benefits, the Code will empower consumers and build their understanding of the energy retail market. This will mean

⁷⁶ Allens Arthur Robinson (August 2004), 'Issues Paper – National Framework for Electricity and Gas Distribution and Retail Regulation', p.50

better informed consumers, who are more confident in making decisions to take up market contracts. The CLCV would be pleased to contribute to the development of this Code.

7.9 Reducing the compliance burden

7.9.1 The NERA/G+T Paper points to the compliance burden on suppliers as one of the reasons for proposing the reliance on general legislation:

The approach of avoiding the duplication in the Rules of the provisions of generic consumer protection legislation ensures that the compliance burden for energy suppliers is not duplicated and the potential for conflicting obligations (say when consumer protection provisions are updated) does not arise.⁷⁷

7.9.2 We submit that the adoption of the existing Victorian energy consumer protections would immediately reduce the compliance burden on — and cut the compliance costs for — almost all energy retailers. As these protections are licence conditions for the retailers operating in the Victorian household and small business energy markets, they are already accounted for in most existing retailers' compliance systems.

7.9.3 The adoption of the existing Victorian energy consumer protections — or our preferred option of a single national Consumer Protection Code — would also overcome the 'potential for conflicting obligations' identified in the NERA/G+T Paper.

7.9.4 As far as the burden of compliance goes, we point out that, in its June 2004 FRC Final Report, the ESC concluded that the competitive energy market:

... does not appear to have been constrained by the requirement to comply with the minimum protections established by the energy retail codes.⁷⁸

Recommendations

- That neither the MCE nor the SCO countenance the introduction of a national framework for energy distribution and retail regulation which represents a significant step backwards in regulation for the protection of energy consumers.
- That the important role of existing jurisdictional mandatory codes of practice, and other jurisdictional consumer protections and environmental provisions, is recognised and respected, and that these instruments are built upon, rather than dismissed and dismantled.

⁷⁷ NERA/Gilbert+Tobin (May 2005), p. 8

⁷⁸ ESC (June 2004 Overview Report), p.5

CLCV RESPONSE: SECTION B

8 Part B: Price regulation of distribution

8.1 Overall comments on distribution price regulation

- 8.1.1 While we support a national framework for the regulation of electricity and gas distribution pricing, the NERA/G+T Paper does little to help us understand how the proposed framework takes account of consumers. Indeed, in this section, there is no mention of consumer protection or consumer benefit.
- 8.1.2 And, while, it would appear that the proposals for distribution price regulation are predicated on carrying over elements of existing jurisdictional distribution price regulation for national application, the absence of detail in the NERA/G+T Paper makes it difficult to provide comment as to the benefits or otherwise of the proposals for consumers.
- 8.1.3 In the interests of transparency and the best outcomes for all stakeholders, we request that, as the form of distribution price regulation evolves, consumer representatives are actively assisted to understand what is being proposed and their views are sought about the potential impact on consumers and classes of consumers. In the interim, we offer following broad principles.

8.2 Some principles for distribution price regulation

- 8.2.1 Consumer protection must be an explicit objective of the distribution pricing regulatory framework — and regulators must be held accountable for ensuring this objective is delivered on.
- 8.2.2 Regulation must take account of public interest and consumer benefit criteria, not just economic criteria — economic efficiency cannot be relied upon to deliver public interest or consumer benefit outcomes.
- 8.2.3 There must be consideration of how existing jurisdictional programmes, which deliver important community service obligations, will be affected by national pricing decisions.
- 8.2.4 Consumers must be protected from price shocks and unfair allocation of costs.
- 8.2.5 There must be horizontal equity — consumers should not pay greatly different network charges simply because they are located in certain geographical areas.
- 8.2.6 Jurisdictional cross-subsidies must be transparent.
- 8.2.7 There must be no subsidising of commercial customers at the expense of consumers.
- 8.2.8 Consumer groups, as well as industry, should be consulted on the ‘standard definition of a basic regulated distribution service’.
- 8.2.9 ‘Whether services are added or removed from the scope of regulation’ should be determined by reference to consumer benefit and public interest criteria, as well as the NERA/G+T Paper’s stated ‘clear, economic criteria’.
- 8.2.10 Excluded service charges, which include standard and miscellaneous service charges — connection and reconnection fees, field officer and service truck visits, electrical

inspections and meter tests — as well as metering services and street lighting, directly affect consumers' access to energy services. Whether it is at national or jurisdictional level, these charges must continue to be subject to regulatory approval to ensure they are fair and reasonable.

- 8.2.11 We agree the form of regulation should be able to adapt over time, but this should be in response to consumer and public interest imperatives, as much as the NERA/G+T Paper's stated criteria of 'changing knowledge and circumstances, and regulatory best practice'.

8.3 Service performance targets

- 8.3.1 It is hard to understand from the NERA/G+T Paper exactly which aspects of service reliability, service quality and customer service measures will remain with economic regulators. Allocation of service quality aspects is particularly unclear.
- 8.3.2 All three of these aspects are important for consumers generally, and particularly consumers in rural and regional areas. All three aspects are also presently covered in the Victorian *Electricity Distribution Code* and *Gas System Distribution Code*.
- 8.3.3 In addition, by way of the *Electricity Distribution Code*, Victorian electricity consumers have the specific protection of the ESC's *Voltage Variation Compensation Guideline*. This guideline requires a distributor to compensate consumers and small business on a 'no-fault' basis for damage due to an unauthorised voltage variation. In the ESC's view⁷⁹, this achieves an efficient allocation of risk, with the payment of compensation also giving effect to good customer service principles.
- 8.3.4 The positive effect of the Guideline has been noted by the Energy and Water Ombudsman (Victoria) (EWOV):

Since the Voltage Variation Compensation Guideline was introduced in Victoria in 2001, the number of customer complaints received by EWOV regarding compensation for damage caused by voltage variation has reduced markedly. For electricity distributors, this has reduced the compliance costs associated with external dispute resolution. In summary, it is more efficient and a sound principle to pay residential and small business customers for damage caused by voltage variation, with the costs of this obligation built into distributors' pricing submissions.⁸⁰

- 8.3.5 It would be unacceptable for Victorian consumers to lose the protection of this guideline in any move to a national regulatory framework — on the contrary, we submit that its content should be adopted as part of a national Consumer Protection Code for the benefit of all consumers.

8.4 Information disclosure

- 8.4.1 The AER must have effective powers to compel energy businesses to provide the financial and service performance information it, and the AEMC, require to fulfil their regulatory responsibilities. The Rules would appear to be an appropriate mechanism for specifying minimum requirements for the nature of that information, its form and the use to which it may be put.

⁷⁹ ESC (April 2001), *Electricity Industry Guideline No. 11, Voltage Variation Compensation*, p.2

⁸⁰ EWOV (November 2004), Response to the MCE's August 2004 *Issues Paper: National Framework for Electricity and Gas Distribution and Retail Regulation*, p.3

8.4.2 We note that the NERA/G+T Paper talks about information disclosure in the context of ‘information that the AER reasonably requires for the purposes of its regulatory functions’. While we would not disagree with this statement, we also note the views put by the Utility Regulators Forum which go to the important question of what the AER might ‘reasonably require’ to achieve the public policy and consumer protection objectives of the national energy regulatory regime:

Regulators are conscious of the need to limit data collection to that which is clearly relevant to the task. But to limit information collection which is necessary to effective informed regulation undermines the public policy objectives of the regime. Regulators need sufficient powers and flexibility to specify the financial and non-financial information that is required and the frequency of such information reporting, to suit the different circumstances of each pipeline or electricity network. Even the most light-handed model of regulation requires reliable, credible and consistent information, as regulators operating on insufficient information can leave consumers and/or upstream and downstream markets exposed to the exercise of market power in pricing and service provision.⁸¹

8.4.3 Ongoing public information disclosure (reporting) must also be a primary regulatory objective, quite apart from general annual reporting responsibilities. The AER must have an explicit requirement to monitor the performance of energy distributors, and to publish timely and regular public reports on quality, service and profitability — such as those issued by the ESC — the purpose of these being to:

- promote competition by comparison, providing the businesses with the incentive to improve their performance relative to that of the other businesses; and
- provide comprehensive service information to customers and the general public.

8.4.4 We believe it would be beneficial if the AER consulted, including with consumer, welfare and public interest groups, on the content, format and regularity of its public reports — to ensure these provide the kind of information the public wants and needs.

8.5 Connection and capital contributions requirements

8.5.1 The significance of this issue for regional and remote communities is not acknowledged or addressed in the NERA/G+T Paper. Poor energy supply places such communities at a significant economic disadvantage, limiting their capacity to attract new investment and expand existing business.

8.5.2 In June 2004, CUAC conducted a *Rural Consumers Energy Forum* to enable Victorian rural and regional consumers to discuss their concerns with policy-makers and industry. As CUAC noted in its response to the MCE/SCO’s August 2004 *Issues Paper*⁸², Forum participants expressed concern about how the energy needs of their communities could be addressed, when there was no commercial imperative for network augmentation and a rapidly aging grid. They cited:

- the potential loss to one particular community of a \$100m business investment because of the high quoted cost of ensuring an adequate supply for the business;
- the loss of business to one town because there was no reticulated gas; and
- the frustration communities feel when they cannot access nearby transmission lines or gas pipelines because access for them is deemed to be too expensive.

⁸¹ Utility Regulators Forum (April 2005), *Paper to the Ministerial Council on Energy*, p.6

⁸² CUAC, Submission to the MCE/SCO’s *Issues Paper on a National Framework for Electricity and Gas Distribution and Retail Regulation*

This situation is likely to be replicated in dozens of communities around Australia and requires an effective and enabling regulatory approach.

- 8.5.3 A further issue for rural consumers is the absence of competitive quoting for augmentation services provided by distributors, and the ineffectiveness of jurisdictional regulators in endeavouring to resolve augmentation disputes in accordance with the provisions of the jurisdictional distribution code. Dispute resolution is not an appropriate responsibility for a regulator. For consistency and effective resolution of complaints, the jurisdictional external dispute resolution/ombudsman schemes should be given the power to deal with augmentation disputes.

Recommendations (listed in the order of the comments above)

- That — in the interests of transparency and the best outcomes for all stakeholders — as the form of distribution price regulation evolves, consumer representatives are actively assisted to understand what is being proposed and their views are sought about the potential impact on consumers and classes of consumers.
- That consumer protection is included as an explicit objective of the distribution pricing regulatory framework, and that regulators are held accountable for ensuring this objective is delivered on.
- That the content of the Victorian *Electricity Industry Guideline No. 11, Voltage Variation Compensation* is adopted nationally as part of any service quality regulatory regime.
- That the AER has an explicit requirement to monitor distributors' performance and publish timely and regular public reports on quality, service and profitability indicators.
- That particular attention is given to the matter of connection and capital contributions in the context of rural and regional customers and their communities.
- That jurisdictional external dispute resolution/ombudsman schemes are given the power to deal with augmentation disputes.

CLCV RESPONSE: SECTION B

9 Part C: Consumer protection

9.1 Principles

- 9.1.1 In Section A of this response [pages 7 to 35], we have already commented extensively on energy consumer protection, focussing on energy's special characteristics, consumer vulnerability, effective regulation, legislative vs administrative instruments, retail competition effectiveness and consumer protection frameworks.
- 9.1.2 We have expressed our strong concern that the NERA/G+T Paper's recommended approach to consumer protection seeks to reduce the imposition of regulation on energy retailers and distributors, at the expense of existing jurisdictional consumer protections — effectively representing a win for industry and an enormous loss for consumers.
- 9.1.3 We have stated that this is unacceptable when the opportunity exists for a balanced regulatory framework, which will safeguard energy supply, allow the growth of alternative energy sources, facilitate retail competition, and protect, inform and empower consumers, building their confidence and encouraging their active participation in the competitive energy market.
- 9.1.4 Rather than building on the strengths of existing jurisdictional codes of practice and other consumer protections, the NERA/G+T Paper proposes an approach which effectively — and without sound basis — dismisses those protections and dismantles them, in favour of a less than robust collection of retailer and distributor obligations.
- 9.1.5 We urge the MCE and the SCO to implement a clear, comprehensive, uniform, enforceable and accessible national Consumer Protection Code — to underpin the national energy regulatory framework, to inform and empower consumers, and to build consumer confidence and encourage active participation in the competitive energy retail market.

9.2 The consumer – retailer – distributor relationship

- 9.2.1 We find the NERA/G+T Paper's discussion of the proposed contractual relationship between distributors and consumers confusing — especially if a more formal consumer-distributor relationship is being foreshadowed.
- 9.2.2 The NERA/G+T Paper proposes 'a direct contractual relationship' between distributors and end customers⁸³, but does not explain what the authors mean by 'direct' and whether that will lead to changes in existing contractual arrangements for household and small business consumers.
- 9.2.3 In Victoria for example, even though household and small business consumers have a 'deemed contract' with their distributor — they are essentially 'retail' customers and are described so under the *Electricity Industry Act 2000 (Vic)* s.40A(5).
- 9.2.4 While this 'deemed' contract arrangement may approximate a triangular relationship, to all intents and purposes it operates as a linear relationship. A consumer's primary

⁸³ NERA/Gilbert + Tobin (May 2005), p.45

relationship — for connection, billing, payments, accounts, consumption information and so on — is with their retailer. The extent to which they have direct contact with their distributor varies depending on how that retailer operates — some retailers, for example, include distributors' phone numbers on their bills as faults contact points, rather than their own phone number — but in any case, for the great majority of consumers contact is with, and through, the retailer. Connection is arranged through the retailer, not directly with distributor. Likewise, disconnection is arranged through the retailer, unless required for reasons of health, safety, emergency, illegal use or at the customer's request. Distributors should not have a right to disconnect for non-payment, unless it is at the express request of the retailer.

- 9.2.5 Although the NERA/G+T Paper does not actually discuss the existing practice of 'deemed' distribution contracts, we note that it does recommend that 'deemed' contracts be provided for in National Gas Law and National Electricity Law. The SCO should clarify the proposed relationship between distributors and consumers, particularly household consumers.
- 9.2.6 We also have potential concerns with what the NERA/G+T Paper describes as the 'principal benefit' of a direct contractual relationship, namely that 'it can allocate liability directly against a party able to manage the risks'.⁸⁴ Since, from our experience, energy distributors go to some lengths to avoid admitting or accepting liability, we would hope that this is not indicative of an attempt to shift greater responsibility for the quality and reliability of the distribution system onto consumers.

9.3 Distributor obligation to provide connection services

- 9.3.1 On pages 16 to 20 of this response, we discuss in detail our preference for the continuation of licensing as the form of business authorisation for energy distributors and retailers.
- 9.3.2 In Victoria, distribution licensees are authorised to distribute or supply electricity within a set distribution area. Amongst other things, the licence imposes on licensees:
- an obligation to have a 'deemed' distribution contract, the terms and conditions of which are based on the *Electricity Distribution Code*; and
 - an obligation to offer connection services and supply to a customer at the request or either a retailer or the customer themselves — within 20 business days and subject to the *Electricity Distribution Code*.
- 9.3.3 The obligations on distribution licensees are supported in legislation by way of the *Electricity Industry Act 2000* (Vic).

9.4 Standard distribution terms and conditions

- 9.4.1 We agree that standard terms and conditions should be mandated for household and small business consumers, who will have little capacity to negotiate directly with distributors.
- 9.4.2 We note that the NERA/G+T Paper proposes a list of matters which the Rules dealing with standard terms and conditions should specify. We find this list confusing since it includes several matters which are currently the responsibility of retailers, not distributors, and which we strongly submit should remain so — namely, calculation of charges, billing, billing disputes, disconnections and reconnections.

⁸⁴ NERA/Gilbert+Tobin (May 2005), p.45

9.4.3 As noted, the terms and conditions of Victorian distributors' 'deemed' distribution contracts must be based on the *Electricity Distribution Code*. We submit that this code, together with the *Victorian Gas Distribution System Code*, would provide a better basis for the development of standard terms and conditions for national application. These should be included in a national Consumer Protection Code with which — by way of the Rules or their licences — energy distributors are required to comply. As we stated earlier, the code should also include retail, marketing and other provisions.⁸⁵

9.5 Disconnections and reconnections of small end-customers

9.5.1 Except in circumstances of emergency, health and safety, illegal use, or the express request of the customer, the responsibility for initiating disconnection and reconnection of supply must lie with retailers, not distributors. It is with retailers that the vast majority of consumers, and all households, have their primary relationship. In addition, disconnection is most commonly related to issues of bill payment, and billing and collection are retail functions.

9.5.2 The ongoing need for consumers to be protected against wrongful disconnection has been formally recognised by the Victorian State Government which, in November 2004, passed legislation introducing:

- an obligation on retailers to pay consumers, who have been disconnected contrary to the *Energy Retail Code*, compensation of \$250 per day; and
- a requirement that the ESC to have regard to the essential nature of electricity and gas services when setting terms on which an energy retailer may seek disconnection.

9.5.3 The rules around disconnection, instalment plans and security deposits must also incorporate strong protections for consumers in hardship. For example, the Victorian *Energy Retail Code* specifically addresses matters such as payment difficulties, debt collection, instalment plans, direct debit facilities and the grounds for disconnection.⁸⁶ Some of these matters are specific to energy, while others may be found in other legislation or codes. The importance of specifying these matters in the Victorian *Energy Retail Code* is that a full suite of provisions is needed to achieve the necessary levels of energy consumer protection.

9.5.4 For example, the rules for direct debit are not contained in general consumer protection legislation, and are only partly covered by the self regulatory *Banking Code of Practice*. The current rules and procedures governing direct debit payments are the *Bulk Electronic Clearing System Procedures* (BECS), which generally apply only to financial institutions. In the *Energy Retail Code*, the ESC has felt the need to expand on these general guidelines to make them energy-specific, partly to protect other key provisions in that Code.

9.5.5 By way of another example, the regulation of debt collection can be found in a single sentence in s.60 of the *Trade Practices Act 1974* (Cth) and is mirrored in the various Fair Trading Acts. Acknowledging the inadequacy of this provision, the Australian Competition and Consumer Commission (ACCC), in conjunction with the Australian Securities and Investments Commission (ASIC) and all state consumer affairs

⁸⁵ We discuss a national Consumer Protection Code in detail in sub-section 7 of this response.

⁸⁶ ESC (August 2004), *Energy Retail Code*, clauses 11, 12 and 13

agencies, took the step of producing an explanatory guideline⁸⁷ which ‘helps clarify community expectations of businesses when collecting debts’.

- 9.5.6 There is a strong argument that such guidelines work better when they are made industry-specific, as is the case in the *Energy Retail Code*.
- 9.5.7 And, looking at it from a compliance perspective, the existence of rules — about matters such as direct debit and debt collection — in other instruments, does not mean that energy retailers will be aware of them and how they link to energy, or even realise they may be bound by them, without that link back to an energy-specific instrument.
- 9.5.8 On the general matter of addressing consumer hardship, consumer and welfare groups are not alone in their view that energy providers must be required to assist consumers facing hardship — the Energy and Water Ombudsman (Victoria) has been a consistent voice for the introduction of a requirement that energy companies have effective hardship programmes, as is now required of all Victorian water providers.
- 9.5.9 And, as we noted earlier in this response, in March 2005 the Victorian State Government announced a Committee of Inquiry into Financial Hardship of Energy Consumers.⁸⁸ In announcing the Committee, the Minister for Energy Industries and Resources described it as an important initiative to ensure that energy sector reform delivers real benefits to Victorian families. The Committee was due to provide a final report to the Minister in late 2005 — its findings and recommendations should be used to inform the development of the national energy consumer protection framework.
- 9.5.10 So too should the hardship model proposed in Chapter 6 of the Committee for Melbourne’s *Utility Debt Spiral Study*⁸⁹ which we also discuss earlier in this response.

9.6 Retailer obligation to supply small end customers

- 9.6.1 We do not believe this obligation should be left to the jurisdictions to decide.
- 9.6.2 We submit that all energy retailers who are selling into the household market should be obligated to supply household consumers, by way of a fair and reasonable default offer for a basic regulated service, as long as the consumer pays for that service.

9.7 Standard retail terms and conditions

- 9.7.1 We agree that there should be a single national framework for the regulation of consumer protection relating to retailers, and national regulation of the terms and conditions of standard offers.
- 9.7.2 While we note that the NERA/G+T Paper proposes a list of standard terms and conditions for this purpose,⁹⁰ we suggest that the matters covered in the Victorian *Energy Retail Code* would be a better starting point. These should be incorporated into a national Consumer Protection Code with which — by way of the Rules or their

⁸⁷ ACCC and ASIC (October 2005), *Debt collection guideline: for collectors and creditors*

⁸⁸ Minister for Energy Industries and Resources (13 March 2005), Media Release: *New Inquiry into Energy Consumer Hardship*

⁸⁹ Committee for Melbourne (August 2004), *Utility Debt Spiral Study*, Chapter 6 *A best practice model for responding to energy and water customers who are experiencing financial hardship*

⁹⁰ NERA/Gilbert+Tobin (May 2005), p.55

licences — energy retailers are required to comply. As indicated earlier, the code should also include energy distribution terms and conditions, marketing rules and other relevant provisions.

9.8 Move-in customers

- 9.8.1 Although the issue of ‘move-in customers’ is included under ‘Consumer Protection’, and there are references to making sure these consumers have choice, this discussion appears to be just as much about the energy industry wanting to make sure that these customers are billed and the financially responsible retailer gets paid.
- 9.8.2 We submit that, contrary to the NERA/G+T Paper’s assessment, particular ‘regulation to deal with move-in customers’ is not required. This matter can be effectively addressed as part of a national Consumer Protection Code. In Victoria, for example, the *Energy Retail Code* provides that a customer is responsible for paying for energy until three business days after they give the retailer notice that they are vacating the property, or three days after they vacate, whichever is the later. They must also give a forwarding address for the final bill, which they are required to pay. Thus ends their responsibility for energy used at that property. Whether or not the electricity or gas stays ‘energised’ or is disconnected so it cannot be consumed by someone else, is up to industry participants to sort out.
- 9.8.3 The NERA/G+T Paper’s discussion, does however, raise an important point about ‘move-in customers’ having effective choice of retailer. To ensure that the next occupant of the premises is able to exercise their right to choose a retailer, it should be a requirement in the national Consumer Protection Code for either the local retailer or distributor to leave information at the premises informing them of their options.

9.9 Retailer: Small end-customer market contracts

- 9.9.1 In sub-section 7 of this response [pages 30 – 39], we discuss in detail the reasons why we strongly disagree with any approach to consumer protection that seeks to rely only on Fair Trading and Trade Practices legislation. As we have pointed out, none of the jurisdictional energy markets can be described as effective and some are yet to open to full retail competition. This is not the time to rely on general legislation for consumer protection.
- 9.9.2 We do not support the recommended approach of regulation of market contracts being on the basis of model terms with ‘limited’ provisions — in an emerging market for an essential service, all household consumers regardless of whether they are on standing offer contracts or market contracts, must be afforded a full suite of protections through regulated codes of practice, such as the Victorian *Energy Retail Code* and the *Code of Conduct for Marketing Retail Energy*. Watering down consumer protections because consumers gain the confidence to move onto a market contract is just not acceptable.
- 9.9.3 We also point out that market contracts are often targeted at less sophisticated consumers through door-to-door sales or telemarketing — arguably the consumers most in need of strong protections.
- 9.9.4 Indeed, it is quite feasible that the adoption of the NERA/G+T Paper’s proposed model terms would lead to the situation where low-income and disadvantaged consumers may be advised to avoid market offers to ensure they can continue to access the full range of safety net protections — in other words, the current safety net

arrangements may be worth considerably more to them than any savings they may be offered.

- 9.9.5 Adoption of the NERA/G+T Paper's proposed model terms could also distort other strands of the safety net — if, for example, energy retailers were no longer required to advise consumers in financial hardship of their right to seek financial assistance from a state government programme, or their right to take unresolved complaints to an external dispute resolution/ombudsman scheme.
- 9.9.6 It should also be recognised that circumstances change. Having taken up market contracts, consumers may find that subsequent events (for example, unemployment) mean that they are suddenly 'vulnerable' and more in need than ever of the full suite of protections. This goes to the importance of taking a broad approach to vulnerability, as we recommend in sub-section 3 of this response where we discuss consumer vulnerability in detail.
- 9.9.7 As is now the case in Victoria, the standard terms and conditions of market contracts should be based on the current Victorian *Energy Retail Code*, as a minimum.

9.10 Retail: Small end-customer marketing

- 9.10.1 We agree that there should be specific regulation of the marketing conduct of energy retailers and we refer again to our extensive discussion of the NERA/G+T Paper's proposal to rely on Fair Trading and Trade Practices legislation earlier in this response.
- 9.10.2 We suggest that the marketing rules be based on the *Code of Conduct for Marketing Retail Energy in Victoria*, and be incorporated into a national Consumer Protection Code, with energy retail and distribution terms and conditions, and other relevant consumer protections.

9.11 Dispute resolution (retailer and distributor – small end customer)

- 9.11.1 The internal dispute resolution policies and procedures of energy suppliers must be in line with the *Australian Standard on Complaint Handling – AS 4260*.
- 9.11.2 Jurisdictional external dispute resolution/ombudsman schemes must comply with the *National Benchmarks for Industry-based Customer Dispute Resolution Schemes* issued by the Commonwealth Department of Industry, Science & Tourism in August 1997. In particular there should be an explicit requirement for these schemes to report publicly on a regular basis, and report systemic and compliance issues to the AER. We consider the public and regulatory reporting regimes of the Energy and Water Ombudsman (Victoria) (EWOV) to be minimum benchmarks for such reporting.
- 9.11.3 While we note this section of the NERA/G+T Paper talks about 'small end-users', we point out that access to EWOV (and, as far as we know, other energy industry ombudsman schemes) is not restricted to small consumers. All customers (and affected third parties) have access but, in practice, large customers usually use other avenues.
- 9.11.4 And, as we observe earlier in this response, the NERA/G+T Paper overlooks the fact that non-statutory ombudsman schemes are given life by jurisdictional licence conditions. Should the NERA/G+T Paper's recommendations on legislative regimes be accepted, we would expect membership of an ombudsman scheme to become a legislative requirement. Anything less would be unacceptable.

9.12 Monitoring of, and public reporting on, energy retailers

9.12.1 We have already commented on the need for the AER to have an explicit requirement to monitor distributors' performance and publish timely and regular public reports on quality, service and profitability indicators.

9.12.2 The AER must also have a similar requirement to monitor retailers' performance and to publish timely and regular reports on customer service and affordability indicators. The current reports issued by the ESC provide a starting point.

Recommendations (listed in the order of the comments above)

- That the principles for consumer benefit and protection, which the CLCV presents in Section A of this response, are explicitly incorporated into the national framework for energy distribution and retail regulation.
- That, in line with existing practice, a consumer's primary relationship continues to be with their retailer.
- That licensing, supported by legislation, continues to be the mechanism by which consumer protection obligations are imposed on distributors and retailers.
- That a clear, comprehensive, uniform, enforceable and accessible national Consumer Protection Code — including distribution, retail, marketing and other relevant consumer protections — is developed to underpin the national regulatory framework.
- That the distribution terms and conditions of the national Consumer Protection Code be based on those in the Victorian *Electricity Distribution Code* and *Gas Distribution System Code*.
- That the responsibility for initiating disconnection and/or reconnection remains with retailers.
- That the national Consumer Protection Code includes strong protections for consumers in hardship.
- That all energy retailers selling into the household market are obligated to supply household consumers by way of a fair and reasonable default offer for a basic regulated service.
- That the standard terms and conditions of retail contracts in the national Consumer Protection Code are based on those in the Victorian *Energy Retail Code*.
- That the marketing terms and conditions of the national Consumer Protection Code are based on those in the existing *Code of Conduct for Marketing Retail Energy in Victoria*.
- That jurisdictional external dispute resolution/ombudsman schemes are required to report publicly on a regular basis, and to report systemic and compliance issues to the AER.
- That membership of an ombudsman scheme is made a legislative requirement, if licensing is not adopted as the form of business authorisation.
- That the AER has an explicit requirement to monitor energy retailers' performance and to publish timely and regular reports on customer service and affordability indicators.

CLCV RESPONSE: SECTION B

10 Part D: Other distribution and non-price retail regulation

10.1 Business authorisations

10.1.1 Our detailed comments and recommendations on the matter of business authorisations can be found in sub-section 5 of this response [pages 20 – 24].

10.1.2 Essentially we are of the view that, because licensing and other sub-ordinate administrative instruments are commonly used in the existing jurisdictional regulatory regimes, because they are understood by stakeholders generally, and because they have proven effective in driving retailer and distributor accountability and compliance, they should be retained.

10.1.3 We do not believe that regulation by legislative instrument is sufficient, and argue that the NERA/G +T Paper fails to make a considered case for total reliance on a legislative regime, let alone a convincing one.

10.2 Jurisdictional Directions

10.2.1 Despite the implementation of a national framework, it is clear that, at least for the time being, a number of important consumer protections — such as community service obligations, dispute resolution facilities and tariff equalisation policies — will remain with the jurisdictions.

10.2.2 For consumers in jurisdictions where these policies exist and are effective, this will bring the advantage of those not being lost. But, in jurisdictions with more limited or less than robust policies, it may mean that consumers are not afforded the same protections as their interstate counterparts, at least in the short-term.

10.2.3 Each jurisdiction should be required to specify the matters it will be seeking to have made subject to its jurisdictional direction, so that these matters can be assessed and commented on.

10.2.4 However, we believe that the achievement of a truly effective a national framework for energy distribution and retail regulation will inevitably dictate that over time most, if not all, of the matters listed to remain with the jurisdictions in the first instance will have to be migrated to the national framework.

10.2.5 The effective transfer of functions from the jurisdictions to the national framework will require legislative amendments, flexible administrative instruments such as licences, codes and statements of requirements, and an ongoing commitment to consultation with a broad range of stakeholders.

10.3 Demand management

10.3.1 We note that environmental obligations, including demand management, are to be left to jurisdictional direction and presume that is why there is no meaningful discussion of them in the NERA/G +T Paper.

10.3.2 However, we also note that one of the MCE's stated objectives is to 'provide national leadership so that consideration of broader convergence issues and environmental impacts are effectively integrated into energy sector decision making'.⁹¹ And, we are led to believe that the importance of demand management in the national electricity market has been 'repeatedly highlighted by the Council of Australian Governments and the MCE over many years'.⁹²

10.3.3 The National Electricity Rules require the AER to 'have regard to the need to create an environment in which generation, energy storage, demand-side options and network augmentation options are given due and reasonable consideration'.⁹³ We do not understand how this can be achieved when environmental obligations are to be left to the jurisdictions.

10.3.4 The importance of demand management should be explicitly recognised in the national framework for energy distribution and retail regulation and included in the remit of the economic regulator, not just left to the discretion of the jurisdictions.

10.3.5 As the NSW Total Environment Centre⁹⁴ points out:

The achievement of economic efficiency is central to the NEM. To create economic efficiency, there must be equal emphasis on demand and supply as the basis of standard economic regulation. ... Demand management is a critical means of meeting capacity requirements more cost-effectively than building new generation, transmission and distribution infrastructure. It also reduces ongoing costs, including operation and maintenance, fuel and greenhouse gas emission costs. As part of the NEM's objective to *promote efficient investment in, and efficient use of, electricity services for the long term interests of consumers*, it is in the long term interests of consumers to reduce costs through the implementation of demand management ...

Recommendations (listed in the order of our comments above)

- That, a full suite of sub-ordinate administrative instruments is incorporated into the national framework for energy distribution and retail regulation — to achieve a genuinely 'best practice' framework and to facilitate transfer of jurisdictional functions over time.
- That the importance of demand management is explicitly recognised in the national framework for energy distribution and retail regulation, and included in the remit of the economic regulator.

⁹¹ NERA/Gilbert+Tobin (May 2005), p.1

⁹² Total Environment Centre (November 2005), *Submission to Proposed Framework Schedule for Transfer of Distribution and Retail Functions*, p.2

⁹³ National Electricity Rules (June 2005) 6.2.3(d)(2)

⁹⁴ Total Environment Centre (November 2005), p.3