



Submission to:

Ministerial Council on Energy

Public consultation on a national framework for energy distribution and retail regulation

**Centre for Credit and
Consumer Law, Griffith University**
with funding from the National Consumers Electricity
Advocacy Panel

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About the Centre for Credit and Consumer Law

The Centre for Credit and Consumer Law is an academic centre, hosted by Griffith University Law School.

The Centre for Credit and Consumer Law was established in March 2004 to be a source of expertise, and a centre of excellence, on credit and consumer law issues, and it has the overall objective of promoting the attainment of a fairer, safer, and more efficient marketplace, particularly for low income and vulnerable small end-users.

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About this Submission

The Centre for Credit and Consumer Law (CCCL) welcomes the opportunity to provide a submission in relation to the paper prepared by NERA Economic Consulting and Gilbert + Tobin entitled 'Public consultation on a national framework for energy distribution and retail regulation', May 2005 (herein referred to as the Paper).

The responses and proposals made in this submission draw on the outcomes of the roundtable meeting of consumer advocates held in Melbourne on the 30th of November 2005. Comments made in this submission are focussed on small end-users of electricity as part of Queensland's further integration into the National Electricity Market (NEM). This submission is targeted particularly at Part B of the Paper: 'Price regulation of distribution' where there are clear identifiable impacts on small end-users and Part C: 'Consumer Protection' which is specifically targeted at small end-users.

As the Queensland Government is still in the process of integrating into the NEM (full retail contestability (FRC) will be implemented in July 2007) and due to a lack of utility advocacy work to-date in Queensland there is a lack of documentation and precedent in Queensland upon which to build this submission. Hence, we have referred in a number of instances to the Victorian Government model because it has proved responsive to consumer needs following the introduction of Full Retail Contestability (FRC) comparative to other states.

We agree with the point made by the Queensland Consumers Association in respect of the proposed framework that any final arrangements should '...take adequate account of the special needs and circumstances of individual jurisdictions, including geographical, technical and policy differences'. This includes the Queensland Government's recent decision to introduce FRC for electricity and gas in July 2007 and the adoption of the best possible arrangements for the provision of consumer protection measures, codes and quality standards in that national arrangements.¹

¹ Queensland Consumer Association (2005), Submission on proposed framework schedule for transfer of distribution and retail functions.

While no specific recommendations are made in this submission a series of overarching principles of consumer needs in respect of energy are outlined. These principles make explicit specific consumer needs which we believe need to inform the development of an energy distribution and retail regulation framework.

This submission begins with general comments about the Paper followed by a list of overarching principles and more specific comments related to Parts B, C and D of the Paper. Where we refer to parts B, C and D we use the same numbering system as listed in the Paper.

General comments

The central premise of this submission is that there will always be a tension between consumer rights of small end-users and the operations of a National Energy Market.²

This tension between competition policy and consumer protection is identified numerous times in the Paper particularly in Part C where it is deemed that the scope of regulation that might 'benefit' small end-users should not be offset by the broader economic 'benefit' of the NEM. In particular the paper states that 'the scope of regulation should be sufficient to ensure small end-users are treated 'fairly' but should not be so wide or prescriptive as to impose regulatory costs which exceed the benefit'.³

While the NEM will bring particular benefits to small end-users the operations of the NEM are constrained in market terms because electricity is an essential service.⁴ Therefore it is critical that there is an appropriate level of regulation that protects the needs of small end-users in the NEM. We do not believe that the framework outlined in the Paper gives this surety.

We have two main overall concerns with respect to the proposals outlined in the Paper –

- the lack of integration of small end-users into the framework
- a lack of detail about the scope of policy recommendations in respect of small end-users.

² 'Competition policy and consumer protection policy are both meant to serve consumers, but there are tensions between the two'. Helen Jenkins (2005) 'Agenda Advancing economics in business' *Oxera Agenda*, p 1.

³ This sentence or similar variations on it are mentioned at least nine times in the Paper particularly in Part C Paper (2005), pp 47-pp 60.

⁴ NERA Economic Consulting and Gilbert + Tobin (2005), 'Public consultation on a national framework for energy distribution and retail regulation', p 7. Energywatch, the independent watchdog for gas and electricity consumers in the United Kingdom asserts seven rights for consumers in line which inherently incorporates the principles of 'essentialism'; Foundation for effective markets and Governance (2005) 'Regulation and consumer benefit: compliance in the National Energy Market, A discussion paper for the Public Interest Advocacy Centre', p 40, p 56. See also Consumer Law Centre Victoria and Consumer's Federation of Australia (nd), 'Consumer Participation and Protection in the Victorian Electricity Market following Retail Contestability in the Below 160 MWh per annum Tranche', p 25; Gavin Dufty (2005), 'Committee of Inquiry into Financial Hardship of Energy Consumers', St Vincent de Paul Society, Victoria.

A key aim of the Paper is to ‘...improve the transparency of the regulatory arrangements, lessen duplication and reduce compliance costs...’ as part of ‘...significant rationalisation of the current arrangements’ and as part of ‘best practice’ arrangements.⁵ These are all necessary aims in the NEM but what is currently missing in the framework outlined in the Paper is a full integration of consumer protection arrangements into these arrangements. Currently the framework presents with a clear industry focus and where mention is made of proposed policy decisions in respect of small end-users there is both generalisation and a lack of detail. The result is ambiguity from a small end-user perspective. We draw attention to an earlier submission from the Public Interest Advocacy Centre on the Proposed Framework Schedule, which stated that the framework document [Paper] ‘...fails to capture the complexity of many of the issues it lists.’⁶

For instance there is a lack of detail with regard to the economic test of ‘benefit’ and what defines a reasonable balance between regulation and regulatory costs, which exceed the ‘benefit’. This lack of detail extends to defining the term ‘fair’ for small end-users in assessing the benefits of regulation.

The lack of detail makes it difficult to comment specifically on the proposed framework.

Overarching principles

In the absence of key principles, which support small-end users in the Paper, we have listed some basic principles below:

- Electricity supply is an essential service and the essential nature of this service needs to be recognised explicitly in the proposed framework particularly in respect of consumer vulnerability.
- Consumer vulnerability needs to be carefully and explicitly defined in the proposed framework. This includes outlining appropriate safety net arrangements.
- There is a need for strong consumer protection energy regulation at a national level that is based on a baseline of ‘best practice’ regulation to ensure a firm foundation upon which to build an appropriate national framework. The Victorian model offers a good starting point.
- Generic consumer protection state legislation such as the *Trade Practices Act*, *Fair Trading Acts* and Door-to-Door Sales legislation should not be the default legislation in the proposed framework for consumer protection. Rather, because of the unique qualities of energy and its essential nature specific legislation and associated energy codes should be enacted.

⁵ Paper (2005), p 9, p.11.

⁶ Public Interest Advocacy Centre (PIAC) (2005), ‘PIAC on high level functions. Submission to the MCE on the Proposed Framework Schedule Transfer of Distribution and Retail Functions’, p 3.

- The Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC) should be charged with a clear and concise mandate for consumer protection
- We encourage the states to commit to strong protections, where these are left to them including environmental protections and community service obligations.
- Environmental issues should also be addressed at a national level as they are part of the stated objectives of the MCE.
- For full consumer participation in the NEM and to address information asymmetries in service delivery of electricity, small end-users including their advocates need to have access to appropriate market information from energy retailers, regulators and government and have input into the regulatory processes of the AER and AEMC as necessary.
- We welcome the decision for the MCE to fund a body to undertake and commission research that focuses on the needs of small to medium end users. However this, or another proposed national body should be explicitly given a national advocacy role, and the ability to employ its own staff to that end.

Specific points of discussion

The numbering system in Parts B, C and D below reflect the numbering system in the Paper and are not necessarily consecutive.

Specific points of discussion: Part B

Price regulation of distribution

There is a lack of some important detail with regard to economic regulation in this section and this leads to concerns that small end-users will not be appropriately served by the proposed framework. For instance, there is a lack of clear description of how the jurisdictional directions (also discussed elsewhere in the Part D) will be articulated with the implementation of the higher level principles in the National Electricity Law (NEL) and in the National Electricity Rules (NER). This has implications for the scope of price caps aimed at avoiding price shocks and ensuring some level of horizontal equity between small end-users.⁷

2 Scope of Distribution Price Regulation

There should be a national framework for the regulation of distribution prices in the electricity and gas sectors. There is, however, an inherent problem in defining ‘subsidy free’

⁷ For importance of achieving horizontal equity see Dufty (2005), p 10.

pricing as the gap between ‘marginal’ and stand alone’ costs of supply. This gives the distribution entities very wide discretion in the setting of customer price, which could lead to a situation where prices could be set so as to provide a subsidy of large, commercial energy users by residential small end-users.

Proposed definition of basic regulated service and current exclusions

We agree with the proposed definition of a basic regulated service but have concerns about the reference to ‘...light handed regulation’ for services excluded from the core definition and query whether waiving the price-cap for such services is warranted.

We note that services excluded from the core definition of a basic regulated service are a growth area. Firstly, as the population ages increasing numbers of people will move from traditional housing options to retirement villages or ‘homes’ and secondly as people are forced out of the housing rental market due to high rental prices they will move into more budget-priced and alternative accommodation such as fixed site caravan parks, rooming houses and hostels.⁸

There is currently minimal regulation in this area when compared with the regulated networks and retailers. Therefore customers in exempt networks fall outside many of the protection regimes offered by the regulated network/retailers.

We fully support a review of these services by the AEMC to ‘...determine whether these services should be included/withdrawn from the scope of regulation on a national basis.’⁹ We would like to add, however, that consumer protections for exempt network customers need to be of the same standard for non-exempt network customers. This includes, for example

- independent and free dispute resolution
- price protection.
- access to services including hardship policies and alternative dispute resolution services to address billing and supply issues.
- scope for exempt networks to deliver state government concessions to customers (with many customers unable to currently access Government Assistance provisions in their respective States).
- efficient, economic and sustainable energy sources for those customers currently reliant on diesel generation.

⁸ For discussion of rental market see Tenants Union of Victoria (2004), ‘Submission to the Essential Service Commission’s Review of the Effectiveness of Retail Competition and the Consumer Safety Net for Electricity and Gas’, Prepared by Denis Nelthorpe, pp 2-4.

⁹ Paper (2005), pp 15-17.

3 Price Cap Regulation

We support the proposal that the Rules should allow the regulator to consider whether the network entities should consider ‘appropriate alternatives to augmentation’ which would include demand management projects.

The proposal to use CPI-X regulation is consistent with current practice in most jurisdictions and we agree that services falling under the basic definition of a regulated service should be regulated on the basis of a form of CPI-X price cap. However, a lot more detail is required for small end-users to be able to understand what is being proposed. The Paper proposes that guidance on this form of regulation be incorporated into the Rules without any form of public consultation on this matter. Economic efficiency, noted by the Paper, cannot be relied on to deliver public interest outcomes. Accountability of the regulators in relation to this goal remains a vital concern for end-users.

The key elements outlined by the Paper highlight the concern of a lack of transparency (at least from the end-user point of view) where they include the proposal that the NEL/NGL and the market rules should contain the minimum prescription for the process by which network prices will be set. These would comprise a far too limited test of the costs and benefits of any proposal for the form of regulation.

4 Tariff setting

This section of the paper on distribution pricing is one of the most contentious for small end-users. This deals with the translation of ‘price caps’ (including revenue caps) into actual customer prices. The Paper asserts that the regulatory criteria for rules on customer prices should rely on economic criteria.

This proposal does not appear to meet the objects of the National Electricity Law in relation to long-term consumer benefit.

It appears that there is little understanding of the economic functioning of side constraints and tariff rebalancing. Instead the consultants have relied on the theory of markets and the goal of protecting the regulated businesses.

Setting a ‘subsidy free’ band of pricing between ‘stand alone’ and marginal’ costs is good regulatory practice in that it simplifies the task of regulators. In practice this gives considerable discretion in setting customer prices to the monopoly businesses.

In the long term this proposal sets up an environment where prices for customers can be set by criteria other than efficiency. In these circumstances side constraints are crucial for protecting small end-users and for ensuring the regulatory arrangements deliver appropriate outcomes for all stakeholders.

In conclusion, a broader approach to criteria for tariff setting is needed. This must include consumer protection so that end-users do not end up paying inappropriate rates. The avoidance of price shocks is an important consideration. So, too, is horizontal equity.

5 Service performance targets and
8 Connection and capital contribution requirements

In general terms system reliability is an ongoing concern in the supply of electricity.¹⁰

We would like to draw the reader to the attention of Queensland in terms of both service performance targets and connection and capital contribution requirements as this is an area of particular concern. In July 2004 an Independent Panel produced a detailed report on electricity distribution and service delivery in Queensland (known as the ‘Somerville Report’) and found that the networks had not had ‘...sufficient expenditure outlaid on them to adequately maintain them and to meet increased demand from growth.’¹¹ While the Queensland Government is seeking to address this issue it will remain an area of ongoing concern in Queensland due to high population growth, unique geographic situation of Queensland along with the need for upgrading an ageing distribution network.

As the Somerville report points out ‘...the Queensland distributors operate in a combination of geographic and climatic conditions generally not found in other parts of Australia.’¹² This has implications particularly for rural and remote Queensland, which are largely serviced by Single Wire Earth Return (SWER) Systems with limited load bearing capacity. Another key issue in Queensland is the increasing need and use of air conditioning which adds significantly to power requirements in summer months. It is noted that customers in north and west Queensland may not even have access to cooling systems because of limitations in the network. The Somerville report found that the current regulatory regime in Queensland was insufficient to deliver reliable supply to Queensland customers, and this includes metropolitan customers.¹³

The issue of reliability of supply in Queensland forms the backdrop to discussions below however.

Service performance targets

Service performance is a crucial part of regulation. It is difficult to separate service quality from service reliability (as occurs in the Paper) particularly in areas (rural, regional and metropolitan) where reliability of supply is a key issue.

For instance, voltage variation is not just an issue for technical and safety regulation as the Paper contends. Increasing reliance on appliances in work and home means that reliable supply is important. Moreover, with increasing temperatures in the summer months in Australia access to appropriate cooling systems becomes a health issue.

¹⁰ Ross C. Hemphill, Mark E. Meitzen, Philip E. Schoech (2003), ‘Incentive Regulation in Network Industries: Experience and Prospects in the U.S. Telecommunications, Electricity, and Natural Gas Industries’, 2 *Review of Network Economics* 4, p 333.

¹¹ Department of Natural Resources (2004), Mines and Energy, Queensland, Detailed Report of the Independent Panel, Electricity Distribution and Service Delivery for the 21st Century, Queensland, p 8. (Herein referred to as the ‘Somerville Report’).

¹² Somerville Report (2004), p11.

¹³ Somerville Report (2004), p 29.

Connection and capital contribution requirements

We agree that ‘...for small customers, there is no economic justification for seeking a capital contribution to cover the cost of upstream augmentation.’¹⁴

We draw attention to the interests of regional townships and small remote communities and their difficulty in securing improvements to their energy supply, as is currently the case in Queensland.¹⁵ These communities have insufficient load to make such upgrades commercially viable, and usually lack the resources to negotiate network augmentations with a distributor. Poor energy supply in these communities places real and immediate constraints on their capacity to expand local business or attract new investment. In Queensland consumers face a number of problems in securing network augmentation. In addition there are small end-users who cannot access the grid for their power.

One result of insufficient capital contribution is that business small end-users (and large end-users) are effectively subsidizing a community’s supply, either in upgrading significant portions of the network, or in being forced to install expensive solutions to ameliorate their usage on a poor line (in effect, subsidizing poor supply). The result is that there is a potential to entrench market failure at a national level in rural and regional areas and a lack of exploration of suitable and sustainable energy sources including renewable energy sources such as that offered by the Remote area power supply (RAPS) scheme in Queensland.

These communities also face considerable regulatory impediments in accessing alternative sources of supply: renewable embedded generation provides a viable means of securing better reliability and quality for a small community, as well as offering the community the opportunity to own the asset and so reduce its export of capital, and of course to reduce greenhouse gas emissions. However national and state regulations make the investigation of such alternatives incredibly and unreasonably difficult – through competition rules geared to the interests of large generators, information asymmetries and imbalance of negotiating power, and the degree of financial risks that must be borne by the community.

7 Information disclosure

Where there are information asymmetries such as those that currently exist between Industry/advocates and small end-users and/or advocates it is vital that information of sufficient quality and application is collected and disseminated in the public domain.

¹⁴ Paper (2005), p 40.

¹⁵ Interview data currently being collected (in confidence) for the project entitled ‘Implications for small end-users of Queensland’s further integration into the National Electricity Market, 2005.

The AER needs to be able to collect adequate information in order to perform its role; and relevant information that will be in the public interest (and thus of benefit to small end-users) should be made publicly available.¹⁶

We agree ‘...that the Rules should require that network businesses collect, compile and provide to the AER information that the AER reasonable requires for the purpose of its regulatory function’ but that this relevant information also needs to be in the public domain. For instance, the Paper states that the AER can ‘...issue Statements of Requirements in relation to other reporting requirements, where such reporting is reasonably required for the purposes of the AER’s regulatory functions’.¹⁷ We are concerned that this may be interpreted too narrowly so that wider public interest uses are not considered.

The AER should be required to consult on the content and format of information to be published. In our view it should cover not only issues around pricing, but also consumer, environmental and social considerations.

It is not clear from the Paper what powers the AER will have to enforce compliance. The AER should also have the power to ‘audit’ the information it receives.

Specific points of discussion: Part C

Consumer protection

1 Overall Comments

Our main concern is to ensure that consumer protection is not diminished. The Paper has failed to give sufficient weight to the avoidance of market abuse of customers in the process of promoting an effective competitive market. One of the main areas of concern is the reliance on ‘generic regulation’ as opposed to the ‘...imposition of energy sector specific consumer protection regulation ‘...unless the generic regulation is demonstrated to be insufficient.’¹⁸

The Paper states:

We 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 the subject of those pieces of legislation. However, the scope of energy specific consumer protection regulation is broader and in most instances (such as specific regimes to limit the circumstances in which distributors

¹⁶ See for example Energy Action Group (2005), ‘Submission to the Review of Decision Making in the Gas and Electricity Regulatory Framework, Discussion Paper’.

¹⁷ Paper (2005), p 36 and p 37.

¹⁸ Paper (2005), p.44.

may disconnect an end-customer and the regulation of contract terms for small customers) this additional scope of business regulation is appropriate.¹⁹

The Paper proposes a default position, which is unsupported and does not take into account the inter-state differences in legislation nor properly addresses the fact that electricity is an essential service.

Reliance on the *Trade Practices Act* and the *Fair Trading Acts* are not adequate in relation to an essential service. Energy specific regulation is needed. The Paper does include disconnection and contract terms within its proposed framework but stops short of any kind of comprehensive coverage-strategy for small end-users.

There is also evidence to suggest that Australian energy market is 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 regulatory codes or guidelines simply on the basis that they may be duplicated in other general consumer protection legislation.²⁰

What is a vulnerable consumer?

The lack of an appropriate definition of what constitutes a vulnerable consumer is an omission in the Paper. The authors of the Paper make the following comments about vulnerable customers:

- vulnerable customers would benefit from fair contract terms (standard terms and conditions);
- there is a need to regulate connections/disconnections for vulnerable customers;
- Alternative Dispute Resolution schemes are most important for the most vulnerable of small end-users;
- vulnerable customers will benefit from any default tariff regime, CSO regimes and other jurisdictional directions.

While we do not disagree with the above points their articulation presents as ad hoc. Because of the essential nature of an electricity service the definition of what constitutes a vulnerable consumer needs to be targeted, precise and comprehensive.

For example the paper describes vulnerable small end-users are described as ‘...consumption less than 10 TJ or 160 MWh.’²¹ Vulnerability is much more complex than energy consumption — a range of factors can contribute to a person's categorisation as a vulnerable consumer and vulnerability may be a temporary or permanent state — it is therefore important to get the definition right.

There has been a large body of work which considers what constitutes a vulnerable consumer and this submission draws the attention of the reader to the Utility Debt Spiral Project conducted by the Committee for Melbourne in 2004 and the ongoing work of the

¹⁹ Paper (2005), p.44.

²⁰ Essential Services Commission (2004), ‘Public Draft Report – Review of Effectiveness of Retail Competition in Gas and Electricity’, p 7.

²¹ Paper (2005), p.46.

Consumer Law Centre Victoria, the Consumer Utilities Advocacy Centre and the Public Interest Advocacy Centre.²²

It is vital that consumer protections within regulatory arrangements focus on the most vulnerable of small end-users as the benchmark for establishing appropriate consumer protections. At a jurisdictional level it is also vital that utility concessions are made available to this group of small end-users.

2 Distributor Obligation to Provide Connection Services

The standard terms and conditions of a contract should be based on the current Victorian contract, as a minimum benchmark. We also concur that ‘the regulatory framework for the provision of connection services will need to be consistent with the regulatory frameworks for retailer consumer protection, metering, customer transfer, curtailment and load shedding.’²³ However, as previously stated the contract terms must be drafted with small end-user interests in mind.

We support the proposal that the obligation to supply that is imposed on distributors and retailers be captured in legislation, as is now the case in Victoria.²⁴ As an essential service, access to affordable and reliable energy determines an acceptable standard of living for Australians - this obligation should be permanent for residential small end-users.

For the great majority of small end-users, and all households, their relationship with the distributor will be restricted to problems of reliability, quality or interruptions to supply. Connection is, and should continue to be, arranged through a consumer’s contractual arrangement with a retailer and not a distributor. The only circumstances in which a distributor should have a right to disconnect are for health and safety reasons.

We would recommend that the Standing Committee of Officials (SCO) provide more detail on the impact of this proposed framework for classes of customers and particularly, how this would affect households.

3 Disconnections and reconnections of small end-customers

As discussed earlier it is not enough to make generalised ambiguous comments about ‘vulnerable customers’. Some of the most important consumer protections come under disconnection and reconnection rules. In New South Wales and Victoria there are key disconnection protections.

²² Committee for Melbourne (2004), ‘Utility Debt Spiral Project, A joint community, government and business initiative designed to explore the relationship between utility debt and poverty, and to identify social and regulatory frameworks and policies to assist people at risk’, Melbourne. See also Nicole Rich and May Maseuth (2004), ‘Access to Energy and Water in Victoria – a research report’, Consumer Law Centre Victoria, Consumer Utilities Advocacy Centre.

²³Paper (2005), p 46 and p.49.

²⁴ Essential Services Commission (2004), ‘Energy Retail Code’.

In late 2004 the Victorian parliament re-issued the *Code of Conduct for Marketing Retail Energy* in Victoria. This re-issue indicates the on-going need for consumer protection for low income and vulnerable small end-users against unfair practices such as the imposition of discriminatory fees or disconnections.

Any proposed framework needs to recognise the importance of addressing energy affordability problems for low-income and vulnerable small end-users within the national framework and our view is that the MCE, the jurisdictions and the national regulators must take a whole-of-government public policy approach to this issue.

4 Distributor: Customer Dispute Resolution and
8 Retailer: Customer Dispute Resolution

Overall the Paper does not make substantive enough comment on the importance of this area for small end-users.

We agree that distributors be required to ‘...have internal dispute resolution regimes consistent with standards made by the AEMC...’ with the proviso that they follow ‘best practice guidelines’ and that ‘small-end customers should have access to informal, fair and efficient dispute resolution arrangements’.²⁵ Therefore alternative dispute resolution (ADR) schemes need to be of the highest possible standards. The problem with jurisdictionally based ADR schemes at present is that they are not all of the same standard. We draw the reader’s attention particularly to the situation in Queensland which is unique compared with other states in that it’s dispute resolution body is not an arms length dispute resolution body. It does not follow the mainstream Industry-based external dispute resolution model operating in Victoria, New South Wales or South Australia. Rather, it sits within the Department of Energy within the Queensland government which is also responsible for regulating the energy sector. This situation is not satisfactory.

The appropriate jurisdictional benchmark for ADR schemes in Australia should be the Industry-based external dispute resolution model. It is vital that the ADR schemes be linked into a national network and that all ADR schemes operate from the level of ‘best practice’ as exemplified by the Energy and Water Ombudsman (Victoria) - EWOV. Queensland does not have a satisfactory ADR scheme at present.

We agree that:

The question of whether to impose obligations to supply (at regulated prices) should remain with the jurisdictions, the framework for regulation of standard offer terms, where they exist, should be national so that there is a single national framework for the regulation of consumer protection matters that pertain to retailers.²⁶

²⁵ Paper (2005), p 51 and p 61.

²⁶ Paper (2005), p 53.

5 Retailer obligation to supply

The fairest approach is to accept that any consumer has a right to receive an essential service at a reasonable price on standard terms and conditions (unless they refuse to pay). Australia, unlike the United Kingdom and New Zealand does not yet have a national mandated obligation to supply to households.²⁷ However, this point is somewhat lost in the discussion in this section of the Paper and there is a risk it could fall between the cracks of state versus national coverage. Whether or not a jurisdiction has full retail contestability there should be some form of default standard supply obligation and it should not necessarily be left up to state jurisdictions. This approach is also inconsistent with the rest of the proposed regulatory framework, which is to take a national approach. If this matter is left solely to state jurisdictions it may potentially result in some small end-users being denied access to an essential service.

6 Market Contracts

Our key concern here is that if a single code were introduced there should be no lessening of consumer protections in any jurisdiction. The standard terms and conditions of a contract should be based on the current Victorian *Energy Retail Code*, as a minimum benchmark. The Victorian experience indicates the need for an ongoing code of conduct. In particular we refer to the Victorian *Code of Conduct for Marketing Retail Energy in Victoria* (2004).

Market contracts are often targeted at less sophisticated customers through door-to-door sales or telemarketing and these small end-users are arguably those most in need of the full suite of current terms and conditions.²⁸

We oppose the recommended approach that the regulation of market contracts should be limited to model terms on the basis that, in an emerging market, all residential small end-users, regardless of whether they are on standing offer contracts or market contracts should be afforded the protections contained in the jurisdictional codes and guidelines.

The adoption of the proposed model terms raises the possibility that low income and disadvantaged small end-users could be advised to avoid market offers to ensure continued access to the full range of safety net protections including the right to approach an industry ombudsman or to seek financial assistance from a state government program. The current safety net arrangements may be worth considerably more than the price decreases offered to this customer group through market contracts.

²⁷ Bowman et al (2005), p.39.

²⁸ Tenants Union Victoria (2004), p 14; Essential Services commission (2002), 'Special Investigation: review of the effectiveness of full retail competition for electricity – final report', pp 22-23.

7 Retail: Small end customer marketing

Like many other topics covered in the Paper there is insufficient detail in this section. There should be no lessening of protections and a national benchmark should be established based on existing Codes in Victoria. For instance, in Victoria, the first jurisdiction to introduce full retail competition for household and small business small end-users, consumer and welfare groups have advocated strongly for the retention of a specific energy marketing code and the Essential Services Commission (ESC) has responded positively to consumer advocates concerns in that state. The ESC's preamble to the *Code of Conduct for Marketing Retail Energy in Victoria* (October 2004) sets out the rationale behind this code including the crucial need to maintain and enhance confidence in the retail energy industry.

Should 'legislative regimes of general application' be the benchmark for marketing of energy to small end-users, the explicit requirements of the Victorian energy marketing code would be lost — since, as indicated in the code itself, they are not required under the *Fair Trading Act 1999* (Vic).

Our view is that specific guidelines in relation to energy marketing is required. It ensures that as the energy market develops, small end-users (particularly low-income and vulnerable small end-users) are protected from unscrupulous marketing by retailers.

Specific points of discussion: Part D

Other distribution and non-price retail regulation

2 Business authorisation

We do not believe, as stated in the Paper that '...consumer protection obligations on energy distributors and retailers should be imposed directly by legislation, not through licence or authorisation conditions.'²⁹

We refer the reader to the paper prepared for PIAC by the Foundation for Effective Markets and Governance (FEMAG) which points out that there is '...no convincing evidence available that license systems have been or are barriers to entry nor that other approaches would deliver good compliance outcomes, including for codes for consumer protection, any more efficiently.'³⁰ Moreover the paper notes that '...a license system can be much more responsive to changing market conditions resulting from economic, social and technological changes. Altering a license condition such as by way of revising a code with which the license requires compliance is much more readily done than getting changes to legislation.'³¹

²⁹ Paper (2005), p 44 – see also p.65.

³⁰ FEMAG (2005), p 7.

³¹ FEMAG (2005), p.69.

To abandon the licensing system poses a serious risk of diminishing consumer protection through a weakening of enforcement mechanisms. To move away from a licensing system essentially means that regulators would have less direct control and power to enforce compliance, through the threat of licence removal. Instead, regulators may need to prove breaches in the courts. The regulators may have to rely on external enforcement, which is likely to be much less efficient.

Licensing is a primary tool for enforcing compliance within the regulatory framework, and in particular for the retail codes. No one would disagree that legislation is often preferable – however experience has proved that it is nearly impossible to ensure that legislation is responsive to market conditions. Consumer representatives are keen to see the national regulators able to use the compliance mechanisms currently stipulated including licence conditions, to ensure that consumer protection in the market is enforced, monitored and reported upon.

Licensing has the potential to deliver specific benefits and protections to small end-users in a competitive market. State regulators currently have the responsibility and capacity to deliver that potential. The move towards a national market may create the opportunity to strengthen the regulatory framework to deliver better outcomes to small end-users, but whether or not it is possible to achieve better outcomes by abandoning the use of a licensing system is unproven.³²

6 Metering

We agree with the recommended policy criteria for metering but note that further discussion is needed to define what minimum standards for metering ought to be for small end-users. For instance the Paper is silent on pre-payment metering, although supports permitting ‘...electricity meter standards different from the national minimum standard ... on a jurisdictional basis.’³³

The primary suggestion of the Paper is that any rules for establishing a national regime for regulating energy distribution and retail must take metering into account. However, there have already been parameters established by Joint Jurisdictional Review of Metrology. The lack of reference to the key recommendations of this review is an omission.

We agree that it is particularly important that ‘consumer protection rules in relation to the connection, disconnection, reconnection or transfer of customers must not conflict with the regime(s) for metering.’ Furthermore the paper goes on to say that without a metering regime ‘any attempts to implement national energy regimes for consumer protection and distribution price regulation will risk being ineffective’.³⁴

³² David Niven and Tim Gough (2004), ‘The Operation of the Uniform Consumer Credit Code: Why is it failing small end-users?’, Consumer Credit Legal Service Inc (Vic).

³³ Paper (2005), p 83.

³⁴ Paper (2005), p 76.

9 Jurisdictional directions

This aspect of the framework is one of the most uncertain. The Paper proposes that many important consumer protections, such as community service obligations and tariff equalisation policies, will rest with individual jurisdictions. This raises the question of what happens in states with low standards or, put another way, standards that have not yet been raised (such as Queensland) with the proposed advent of FRC – in contrast to states such as Victoria or New South Wales.

Given that the content of jurisdictional directions will be of major importance to small end-users, at some point we would expect each jurisdiction to engage in a consultation process with interested stakeholders. For example we encourage the MCE to articulate whether the Rules will provide for jurisdictional directives. This is an issue because at present regulators in different jurisdictions have imposed different side constraints on distribution providers.

Finally, with respect to environmental issues - although 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...', environmental obligations will in fact be left to the states/territories and jurisdictional directions. While it is important that certain environmental obligations remain with the states there is also a need for national leadership and incentives on environmental issues particularly in respect of demand management and cost-effective alternatives to augmentation.³⁵

³⁵ Total Environment Centre (2005) 'Submission. Review of the Electricity Transmission Revenue and Pricing Rules: Transmission Pricing Issues Paper'.

Contact for further information

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