

13 February 2009

Mr Phil Waren
Manager, Compliance (Retail)
Essential Services Commission
Level 2, 25 Spring Street
Melbourne VIC 3000

By email: phil.waren@esc.vic.gov.au

Dear Mr Waren

Re: Review of Regulatory Instruments: Merger of Guidelines

Thank you for the opportunity to respond to the ongoing Review of Regulatory Instruments as outlined in your email of 23 January 2009.

The Consumer Action Law Centre and Kildonan Child and Family Services support the views presented in this submission.

General comments:

CUAC supports the retention of the customer protections as they apply to Retailers as provided by the three existing Guidelines – Gas Industry Guideline No 8 – Operational and Compliance Audits, Guideline No 16 – Regulatory Audits of Distribution Businesses – Electricity and Gas Industries and Electricity Industry Guidelines No 9: Regulatory Audits of Distribution and Retail Businesses.

We note that the main changes relate to the merger of the documents, the inclusion of schedules into the body of the guidelines, the removal of the reference to distributors (to reflect appropriate jurisdiction) and the inclusion of Clauses 7.2 and 7.3 Code of Conduct for Marketing Retail Energy in Victoria, October 2004 version (the Marketing Code).

Appendix A: As preempted by the Essential Services Commission (ESC), clauses 7.2 and 7.3 of the Marketing Code have been included into the “Draft Guideline No XX. Regulatory Audits of Retail Businesses – Electricity and Gas February 2009” (the Guideline). While CUAC has no objection to this, we note that the current Marketing Code dated 1 January 2009, which is posted on the ESC website has both these clauses removed. CUAC raises its serious concern that this amendment has been made prior to the Review of the Guideline rather than amending the Marketing Code post the Review. This removes the current audit obligation. We note the Marketing Code was posted on the same day as price deregulation was introduced and note our

concern that the audit process (albeit annual) is continuing at this important time for market regulation and oversight by the ESC.

Licence obligation: There are a number of instances throughout the Guideline, where the word licensee or licence has been removed before the word obligation. CUAC believes that the licensee or licence obligation should be specified to make these obligations clear at law.

Clause 1.2.2 b) states that the “scope of the audit is to be approved by the Commission, and must meet any minimum requirements specified by the Commission,”. The following qualification has been added; “but need not cover off obligations, policies, practices, procedures or systems of the licensee where compliance is audited under a separate regulatory regime:”

CUAC notes its concern that this may weaken the existing ESC jurisdiction and give rise to jurisdictional disputes between the ESC and retailers about the extent to which they are separately audited by other regulatory instruments and consequently weaken current retailer obligations.

Clause 3.4.1 which sets out important criteria for the conditions of the audits has been amended to “The audit deed between the licensee, the auditor and the Commission *may* (my italics) include, amongst other things, the following conditions:” instead of “*must*” (my italics) in the previous guidelines. This makes the entire condition clause 3.4.1 discretionary, thereby weakening the conditions clause.

Clause 6.1.8 has been amended to “For example, if a particular data set was of poor quality for half the audit time frame and following procedure and system changes, was more reliable and accurate for the remainder of the period, compliance over the time frame *should* (my emphasis) be assessed as lower than current compliance.” instead of “*must*”. This weakens the compliance obligation.

Please do not hesitate to call me on 03 9639 7600 should you have any queries regarding this response.

Yours sincerely

Jo Benvenuti
Executive Officer