By email: EnergyRegulatoryReview@esc.vic.gov.au

14 November 2008

Review of Regulatory Instruments
Essential Services Commission
Level 2, 35 Spring Street
MELBOURNE VIC 3000

Dear Sir/Madam

Review of Energy Regulatory Instruments – Stage 1
Amendments to relevant codes and guidelines

The following represents the views of the Consumer Utilities Advocacy Centre and Consumer Action Law Centre. We welcome the opportunity to comment on proposed amendments to relevant codes and guidelines that are a consequence of the Essential Services Commission's (the **Commission**) *Review of Energy Regulatory Instruments – Final Decision* (the **decision**).

Amendments to Energy Retail Code

Clause 2 – Retailer's obligation to connect

We acknowledge that the proposed amendment to this clause is designed to reflect the changes to how the retailer's obligation to connect is invoked. That is, only retailers that are financially responsible for a particular connection site will have the obligation to connect.

However, we continue to have concerns about how consumers locate their financially responsible retailer. We believe that the code should impose obligations on retailers and distributors to provide the relevant information to a consumer.

Clause 4.2 – Information on a bill

We support the proposed requirement that information about contacting a local distributor in the case of faults or emergency should be included on a consumer's bill. We believe that

rather than requiring retailers to state "To report faults or emergencies, call your local distributor on …", that it would be beneficial to require the retailer to name the relevant distributor. This would improve consumer understanding about which company they are required to deal with.

It is also noted that the Commission's decision is that retailers should only be required to include this additional information when other bill changes are being implemented. We do not support this approach, and consider that the retailers should be given a time frame in which to make the required changes to their billing system. We would suggest that 6 to 9 months would be appropriate.

Clause 5.3 – Bill smoothing

We strongly oppose the proposal to enable a variation from clause 5.3 for market contracts. The policy justification for this protection is to prevent large price shocks, which may occur should the monthly payment as part of a smoothed billing arrangement be insufficient. So as to reduce the likelihood of a large price shock, the protection requires a retailer to re-estimate the monthly usage after six months of a bill-smoothing arrangement. If the difference between the initial estimate and the re-estimate is greater than 10 per cent, the amount payable each month is to be re-set to reflect that difference.

It is not clear to us why consumer protection from price shock in such circumstances should be limited to consumers on standing offer contracts. In fact, we are not aware of standing offer contracts that offer a bill smoothing arrangement. We submit that standing contracts are designed to be the default option in the market and it is inappropriate for standing contracts to be provided through a bill smoothing arrangement. Consequently, we submit that the protection should apply to all contracts, including market contracts.

Clause 6.2 – Undercharging

We oppose the proposed amendment to clause 6.2, in particular the first dot point under paragraph (a). The Commission proposes to delete the words: "To avoid doubt, a retailer's billing system fails if the retailer does not receive relevant billing data from a distributor, no matter whether it is the retailer or the distributor at fault in respect of that failure".

The introduction of the limit of 9 months on recovery of undercharging was introduced to create incentives on retailers to improve their billing systems.[1] Unfortunately, there are still widespread problems with billing resulting in late issuing of bills and high bills.[2] Some of the late and high bill problems are caused by retailers, and others by distributors.[3] We see no reason why a consumer should only be protected if the undercharging is due to a fault in the retailer's billing system. We submit that it is appropriate that the incentive described above to apply in relation to both retailers and distributors, with the consumer's rights lying against the retailer but with the retailer having the ability to recover the amount outstanding from the

[1] Essential Services Commission, *Review of Electricity and Gas Retail Codes - Energy Retail Code*, Final Decision, May 2004, p 22.
[2] Energy and Water Ombudsman (Victoria), *Resolution 26*, September 2008.
[3] Ibid.

distributor if the undercharging is the distributor's fault. In fact, the Commission agreed with these principles in introducing the 9 month limit, explicitly acknowledging at the time that late billing may be attributable to external factors including the lack of timely and accurate information provided by distributors. It made the decision to limit recovery of undercharged amounts due to late billing to 9 months after specifically taking this issue into account.[4]

We also note the Commission's comments that it is difficult to regulate the relationship between the retailer and the distributor. That might be so, but it must be possible. Regardless, we do not see any reason why it necessarily follows that consumers should suffer reduced protection due to that fact.

Clause 7.2 – Payment methods (direct debit)

We acknowledge the proposed changes to clause 7.2, including the requirement that a retailer obtain a consumer's explicit informed consent before entering into a direct debit arrangement and the addition of clause (c) which would allow direct debit arrangements to be entered into verbally. We submit that the clause should be modified to make it clear that, before any change is made to the direct debit agreement (particularly in relation to the amount to be debited, the preferred date and the frequency of the direct debit), the retailer must *again* obtain the consumer's explicit informed consent. As outlined in previous correspondence with the Commission, we are concerned that retailers' direct debit arrangements include variation clauses that allow a retailer to change the amount, date or frequency of direct debit agreements.[5] In our view, this ability changes the nature of a direct debit agreement and can result in significant detriment to a consumer, not only in terms of lack of clarity about when direct debits will be made from their account but also in terms of increasing the risk of default fees being imposed by financial institutions.

Clause 20 – Variations

We are concerned that the proposed changes to clause 20(b) regarding variations to tariffs in accordance with a term or condition of a contract previously agreed to may create uncertainties. The Commission proposes that in this circumstance, no further agreement is required, "provided the customer had given its explicit informed consent to the inclusion of the relevant term or condition in the market contract".

We are unclear as to whether this means that, at the time of signing the contract, the consumer's attention has to be drawn to the particular clause that allows variations of tariffs. As the Commission would be aware, the general sale of an energy contract is either through door-to-door marketing or tele-marketing where headline terms and conditions (price, additional benefits/requirements, early termination fees etc) are specifically brought to a consumer's attention. Some days after agreeing the contract, consumers subsequently receive a booklet detailing full terms and conditions which generally include a clause

[4] Essential Services Commission, *Review of Electricity and Gas Retail Codes - Energy Retail Code*, Final Decision, May 2004, p 22. Further. there was a case to limit recovery even further, with the Energy and Water Ombudsman Victoria recommending that retailers only be allowed to recover up to 6 months of outstanding charges.

[5] Consumer Action Law Centre, *Submission to the Essential Services Commission on proposed amendments to direct debit provisions of the Energy Retail Code*, April 2007.

allowing a retailer to vary tariffs. Is the Commission requiring that clauses that allow variation of tariffs be specifically brought to a consumer's attention at the time the contract is entered into?

We further note that clauses which allow variation of tariffs are subject to Part 2B of the *Fair Trading Act 1999* (Vic) (**FTA**), and are likely only to be fair if they propose a process for a consumer to cancel the contract without penalty should a variation that is detrimental be proposed. We submit that clause 20 should be amended to make it clear that, where a retailer seeks to vary a tariff in accordance with a term of a contract enabling them to do this, the consumer should be able to exit the contract without penalty.

Code of Conduct for Marketing

We broadly support the proposed amendments to the Marketing Code. However, we maintain our earlier position that there are some benefits for the Marketing Code to reference marketing protections that exist in the FTA, such as the times at which a marketer can contact a consumer. We think there are significant benefits in a consumer being able to identify all marketing obligations placed on retailers in one document and think that by removing "duplication" with the FTA, the Commission is actually creating additional burden upon consumers and advocates who may be required to identify consumer protections.

We support proposed clause 3.2 relating to marketing conduct and, in particular, the requirement that marketers have (and retailers must ensure that marketers have) adequate product knowledge. We suggest that an additional area of product knowledge should be added to the final sentence of that clause, relating to renewable energy and GreenPower.

We strongly support proposed clauses 3.3, 3.4 and 3.5 which we believe clarify when relevant information must be provided to consumers.

Repeal of Credit Assessment Guideline

We generally support the transfer of the definition of "relevant default" to the Energy Retail Code. This should ensure that retailers do not make a credit assessment (which would require payment of a refundable advance) based upon irrelevant credit defaults (such as those that do not relate to a utility debt).

We maintain our strong objection to the repeal of clause 6.2 of the Credit Assessment Guideline which requires retailers not to report defaults in circumstances where the customer has made a complaint about the bill, where a retailer has agreed to an instalment plan, or where the customer has applied for a utility relief grant. The Commission agrees that repeal of this clause may result in consumers being treated harshly by retailers, but suggests that hardship regulation and the competitive market should mitigate this behaviour. We do not accept this, and note that it is common practice for retailers to refer small debts to debt collectors who are likely to list defaults with credit reporting agencies. We submit that a consumer must have the ability to query a bill or access hardship assistance measures without the threat of being registered with a credit reporting agency.

Should you wish to discuss this submission, please contact Janine Rayner, Consumer Action, on 9670 5088 or May Johnston, CUAC, on 9639 7600.

Yours sincerely

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