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THIS MEMORANDUM is made on the 3rd day of August 2010 26/7/10 Kd.

PARTIES:

ESSENTIAL SERVICES COMMISSION ("Commission")

and

DIRECTOR OF CONSUMER AFFAIRS ("CAV")

BACKGROUND:

- A. The Commission is an independent statutory authority established by the ESC Act
- B. CAV is a prescribed agency for the purposes of the ESC Act.
- C. The parties have entered into a memorandum of understanding to provide for consultation between the Commission and CAV and the integration and co-ordination of their regulatory and other activities, in accordance with sections 15 and 16 of the ESC Act.
- D. This memorandum is intended to replace the memorandum of understanding dated 18 March 2007.

OPERATIVE PROVISIONS:

1. Definitions

In this memorandum, including the background:

"**Chairperson**" means the Chairperson of the Essential Services Commission.

"**Director**" means the Director of Consumer Affairs.

"**FTA**" means the *Fair Trading Act 1999* (Victoria).

"**ESC Act**" means the *Essential Services Commission Act 2001*.

"**prescribed agency**" has the same meaning as in the ESC Act.

"**regulated industry**" has the same meaning as in the ESC Act.

2. Objectives and purpose of this memorandum

This memorandum seeks to:

- (a) ensure that the regulatory and decision making processes of the parties in relation to regulated industries are closely integrated and better informed;
- (b) avoid overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries;
- (c) provide for sharing information between the parties in the context of their respective roles in relation to regulated industries; and
- (d) promote the adoption of a best practice approach to regulation.

3. The role of the Commission

- 3.1 The Commission currently has functions relating to the regulation of the electricity, natural gas, ports, freight rail, taxi, hire car, tow truck, statutory insurance and water industries. The Commission also has responsibilities in relation to energy efficiency programs and the provision of advice to Government. Its specific functions are:
- (a) to perform such functions as are conferred by the ESC Act and the relevant legislation under which a regulated industry operates;
 - (b) to advise the relevant Minister on matters relating to the economic regulation of regulated industries, including reliability issues;
 - (c) when requested by the Minister to do so, to conduct an inquiry into any systemic reliability of supply issues related to a regulated industry or other essential service specified by the Minister in the request;
 - (d) to conduct inquiries and report under the ESC Act on matters relating to regulated industries;
 - (e) to make recommendations to the Minister as to whether an industry which provides an essential service should become a regulated industry or whether a regulated industry should continue to be a regulated industry;
 - (f) to conduct public education programs for the purpose of promoting its objectives under the ESC Act and the relevant legislation and in relation to significant changes in the regulation of a regulated industry;
 - (g) to advise the Minister in relation to any other matter referred to the Commission by the Minister; and
 - (h) to administer the ESC Act.
- 3.2 The Commission's primary objective in performing those functions is to promote the long-term interests of Victorian consumers having regard to the price, quality and reliability of essential services. In seeking to achieve that primary objective, the Commission must have regard to the following matters to the extent they are relevant in any particular case:
- (a) efficiency in the industry and incentive for long-term investment;
 - (b) the financial viability of the industry;
 - (c) the degree of, and scope for, competition within an industry;
 - (d) the relevant health, safety, environmental and social legislation applying to the industry;
 - (e) the benefits and costs of regulation (including externalities and the gains from competition and efficiency) for—
 - (i) consumers and users of products or services (including low income and vulnerable consumers);
 - (ii) regulated entities;

- (f) consistency in regulation between States and on a national basis; and
 - (g) any matters specified in relevant statutes.
- 3.3 The Commission must also perform its functions and exercise its powers in such a manner as the Commission considers best achieves any objectives specified in the relevant legislation under which a regulated industry operates.
- 3.4 The Commission's objectives, functions and particular responsibilities under regulatory instruments are the basis of its concern with market conduct of energy retailers. Its concern is predominantly about systematic misconduct or systemic issues, particularly where it is suggestive of misuse of market power or the absence of effective competition.

4. The role of Consumer Affairs Victoria

- 4.1 CAV is responsible for maintaining an effective framework for consumer protection services in Victoria and for providing an effective business licensing and registration function. The role of CAV is:
- (a) protect and promote the interests of consumers;
 - (b) ensure markets work in the interests of consumers and the broad community; and
 - (c) improve access to consumer protections services, particularly for vulnerable consumers.
- 4.2 CAV administers over 40 statutes. For the purposes of this Memorandum, the FTA is the most relevant. The functions and powers of the Director under the FTA include:
- (a) to advise persons of their rights and obligations under the FTA or related consumer legislation;
 - (b) to receive complaints from persons and to deal with them in accordance with the FTA;
 - (c) to investigate breaches of the FTA;
 - (d) to prosecute breaches of the FTA;
 - (e) to institute and defend proceedings in accordance with the FTA;
 - (f) to encourage the preparation and use of codes of practice and guidelines in safeguarding and promoting the interests of suppliers and purchasers of goods or services and to prepare and submit to the Minister for Consumer Affairs codes of practice for the purposes of the codes and guidelines being prescribed in regulations;
 - (g) in respect of matters affecting the interests of purchasers and suppliers:
 - (i) to investigate those matters; and
 - (ii) to conduct research; and
 - (iii) to collect and collate information.
 - (h) to report to the Minister on any matter in relation to fair trading which CAV has investigated, either on CAV's own motion or at the request of the Minister;

- (i) to educate and inform people on fair trading issues;
- (j) any other function conferred on CAV under the FTA or any other Act.

- 4.3 CAV's role and functions are the basis of its concern with the market conduct of energy retailers. Its concern is predominantly about breaches of the FTA, having regard to the impact of the breach, whether further consumer detriment can be avoided, and whether the retailer has been the subject of previous enforcement actions.

While CAV is most concerned about serious breaches of the FTA, a broader understanding of breaches of the FTA by a trader is important to inform CAV of the most appropriate compliance and enforcement action to take against a trader.

5 How the parties will consult

- 5.1 Where relevant, the Commission will, as early as practicable, consult with CAV:
- (a) in the making of a determination;
 - (b) in the conduct of an inquiry or investigation, after first consulting with the Minister; and
 - (c) in preparing and reviewing the Commission's Charter of Consultation and Regulatory Practice.
- 5.2 CAV will, if requested in writing by the Commission to do so, consult with the Commission:
- (a) in relation to any matter specified by the Commission which is relevant to its objectives or functions; and
 - (b) in respect of a matter specified by the Commission which may impact on a regulated industry.
- 5.3 Each party will notify the other of market conduct complaints by energy consumers and will act in relation to them as set out in the Appendix.
- 5.4 Each party having regard to their respective roles in relation to each regulated industry will:
- (a) consult with the other in the performance of any function that has or is likely to have material implications for the other;
 - (b) ensure that such consultation occurs as early as practicable in the parties' regulatory, advisory or decision making processes;
 - (c) on request, provide the other with timely advice on regulatory matters for which it is responsible;
 - (d) provide the other with timely relevant information on industries or industry issues for which both parties have some responsibility;
 - (e) promptly inform the other of any material changes to its role or to the regulatory arrangements it administers;

- (f) exchange details of annual work programs to the extent that they are relevant to the role of the other;
- (g) provide the other with advance notice of its intention to undertake a major review or activity that will or may have material implications for the other;
- (h) identify opportunities to coordinate strategic planning and undertake knowledge sharing initiatives to optimise mutual understanding of roles and strategic directions;
- (i) identify relevant project officers to allow for the coordination of particular regulatory projects; and
- (j) publish this memorandum on its website.

6. How the parties will manage their relationship and resolve disputes

- 6.1 Each party will ensure that, at all times while this memorandum is in force, one of its staff members is designated and known to the other as its contact officer for the purposes of this memorandum.
- 6.2 At the date of this memorandum, the contact officer for the Commission is the Senior Regulatory Manager, Energy, and the contact officer for CAV is the Manager, Planning and Monitoring. Each party will give notice of any change to its contact officer in writing to the other, promptly after the change is made.
- 6.3 Each party will ensure that its contact officer:
 - (a) makes themselves (or an alternate) available at all relevant times to address any questions, concerns or disputes arising out of the operation of this memorandum which are raised by either party;
 - (b) instigates periodic (and in any event not less than three yearly) reviews of this memorandum directed, in particular, to the potential for improvement in its terms or operation and to the effect (if any) of regulatory change on its terms, operation or utility; and
 - (c) arranges (in conjunction with the other's contact officer) such meetings of appropriate staff of the parties as and when necessary or desirable to facilitate the efficient and effective operation of this memorandum and including, in any event, a meeting of the Chairperson and the Director no less frequently than annually.
- 6.4 If there is a dispute between the parties as to the terms or operation of this memorandum, each party will ensure that its contact officer endeavours in good faith to resolve that dispute with the other's contact officer. If, however, a contact officer gives notice to the other party's contact officer of the view that the dispute is unlikely to be resolved by discussions between the contact officers, then each party's contact officer must promptly:
 - (a) brief the Chairperson or Director (or a nominee of the party's Chairperson or Director) of details of the relevant dispute; and
 - (b) arrange with the other's contact officer for a meeting of the Chairperson and the Director (or their respective nominees), with the objective of settling the dispute amicably.


7. Use and disclosure of information

- 7.1 The capacity of a party to use or disclose information, or take information into account, is or may be (depending on the nature or source of the information) restricted by law.
- 7.2 If a party discloses information to the other party under this memorandum, the disclosing party may place restrictions on the recipient's use or disclosure of that information, being restrictions it believes in good faith are necessary for compliance with binding restrictions on disclosure. A party receiving information will observe any such restriction noting, however, that this requirement does not limit:
- (a) any other legal obligation of a party relating to the disclosure or use of information; and
 - (b) any right of a party concerning information obtained otherwise than under this memorandum.

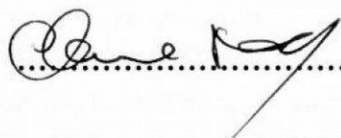
EXECUTED AS A MEMORANDUM:

THE COMMON SEAL of the **ESSENTIAL SERVICES COMMISSION** was affixed pursuant to the authority of the Commission on the *31st* day of *August* 2010




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Dr Ron Ben-David
Chairperson

SIGNED BY THE DIRECTOR OF CONSUMER AFFAIRS VICTORIA)
on the *16th* day of *July* 2010)


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APPENDIX

MARKET CONDUCT COMPLAINTS IN ENERGY MARKETS – NOTIFICATION AND INVESTIGATION PROTOCOL BETWEEN THE COMMISSION AND CAV

1. Background

- 1.1 The appendix details the agreed procedures between the Commission and CAV for market conduct complaints from energy consumers.
- 1.2 It constitutes a protocol between the Commission and CAV for investigation of market conduct complaints against licensed Victorian energy retailers (licensed retailers) for possible contraventions of their statutory obligations.
- 1.3 The protocol should be read in conjunction with any protocol agreed to between the Commission, CAV and the Energy and Water Ombudsman Victoria (“EWOV”).

2. Assessment of complaints

- 2.1 While generally, consumers who contact CAV or the Commission about a licensed electricity or gas retailer will be referred to the EWOV, enquiries or complaints received by CAV which relate to the Fair Trading Act and are of significance will be retained and managed by CAV. CAV will also accept enquiries and may conciliate complaints where the trader is an independent intermediary, for example an energy broker.

3. Ongoing Communications

- 3.1 **CAV to Commission** – CAV will promptly notify the Commission about:
 - (a) any proposed enforcement action against a licensed retailer.
 - (b) any other material matter which CAV believes is relevant to the Commission in the context of the objectives and purposes of this memorandum.
- 3.2 **Commission to CAV** – The Commission will promptly notify CAV about:
 - (a) any matter that may warrant immediate investigation or enforcement action under the FTA.
 - (b) any other matter which the Commission believes is relevant to the CAV’s objectives and involves market conduct issues extending beyond energy industries.

3.3 Regular meetings

To assist in the efficient regulation of the sector, the Commission and CAV will meet regularly to enable:

- the Commission to share with CAV the trader-specific issues it has investigated in the previous period, to inform CAV of systemic and trader-specific conduct relevant to CAV's focus on market conduct in regard to the FTA;
- CAV to share with the Commission compliance and enforcement activities underway with traders in the sector, and completed in the previous period..

The timing of these regular meetings will be based on the receipt of regular reports from EWOV to the Commission and CAV.

4. Co-ordination of investigation and enforcement action

- 4.1 Where both CAV and the Commission have been notified about market conduct of licensed retailers which involves potential contraventions of the FTA and Commission-administered legislation, CAV and the Commission will confer to enable a coordinated course of action in investigating that conduct, where applicable.

In deciding upon a co-ordinated course of action the parties will be guided by the following objectives:

- To achieve the best outcome for the affected customers;
- To ensure that the licensed retailers comply with and respect applicable laws;
- To achieve the most timely, cost efficient and sustainable outcome possible; and
- To avoid duplication of investigatory process and effort.

- 4.2 If appropriate in the circumstances, CAV and the Commission will co-operate in joint investigations. If requested, the parties will provide advice on their respective statutory and regulatory frameworks to assist others in any investigation being undertaken.
- 4.3 The parties will keep each other informed of the progress, proposed actions or concluded actions of or arising from an investigation, into alleged market misconduct by licensed retailers.