



15 September 2008

Essential Services Commission
2nd floor, 35 Spring St
Melbourne VIC 3000

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

Submission to the Review of Energy Regulatory Instruments

ESC Draft Decision

The following represents the views of the Consumer Utilities Advocacy Centre and Consumer Action Law Centre.

We welcome the opportunity to comment on the Essential Services Commission's (ESC) Review of Energy Regulatory Instruments – Draft Decision (August 2008).

We believe the exact wording used in the ESC's regulatory instruments can have significant impact on the interpretation and outcomes for consumers. Therefore, we reserve the right to provide comments on drafting of changes. We will not support any changes until we have seen the proposed wording of the amended codes and guidelines.

Following are our comments and recommendations relating to proposed amendments to the Energy Retail Code (the **Code**), the Marketing Code of Conduct (the **Marketing Code**) and Credit Assessment Guideline in the Draft Decision.

Energy Retail Code

Clause 4.2 (o) Information

We support the inclusion of the name of the distribution company together with the fault-line number. We believe the last bill is an important information source for customers and providing the name of the relevant distribution business together with a fault number can assist customers during outages.

Clause 5.3(b) Use of bill smoothing arrangements

We strongly oppose the ESC's recommendation to allow for a 12 month readjustment period. As presented in previous ESC reviews, research has demonstrated that large and unexpected bills can cause

significant hardship and actually trigger a series of payment difficulties.¹ Thus, we do not believe retailers' product development should take priority over ensuring that consumers do not experience high and unexpected energy bills. This is especially so considering that bill smoothing arrangements are products particularly attractive to consumers on low and/or fixed incomes.

Clause 6.2(c) Undercharging

Due to the same potential hardship issues as outlined above, we do not support this amendment. Retailers continue to experience billing problems² and we expect billing errors to increase again with the roll out of Advanced Metering Infrastructure. Furthermore, this 9 months variation only adds another level of complexity rather than streamlining and simplifying the regulation. From a consumer point of view it is relatively easy to ascertain whether the undercharging occurred due to customers' actions/inactions or whether it was the fault of the suppliers. However, it is impossible for a customer to verify whether it was the fault of the retailer or the distribution business. We believe this is an issue for the network businesses and the retailers to solve and customers should retain their protection from unexpected and high bills due to undercharging. Furthermore, the ESC should ensure that the industry (both retailers and distribution businesses) have an incentive to minimise undercharging.

7.2 (b) Payment methods (direct debit)

The proposal to amend the Code to allow direct debit agreements to be created verbally was first proposed by the ESC in March 2007. At that time, we provided our support for the proposal on the basis that it accords with the manner in which the majority of consumers commonly deal with energy retailers. However, in a submission to the ESC, we outlined a number of concerns with the way direct debit agreements are used by retailers.³ In particular, we outlined concerns that direct debits were often obtained without explicit informed consent and that terms and conditions of direct debit agreements were broad, effectively providing authority to a retailer to debit a customer's account at any time for any amount. In our view, such terms are in breach of the Code. In our submission, we stated that ESC must first ensure that the Code is being complied with, and that other concerns about direct debits are dealt with, before proceeding with the proposed amendments. It is our understanding that the ESC has not yet performed an audit of retailer's direct debit agreements. Considering this, our submission has not changed and we believe that the ESC should examine how direct debits operate in the context of the Review.

Clause 12.2 Requirements for installment plans

In principle we agree there are other obligations in the Code dealing with this matter, however the relevant Clause 11.2 would need to be amended as it currently only relates to where the retailer and the customer cannot agree on a payment plan, or the retailer believes the customer has repeated payment difficulties. Our concern is that by simply repealing Clause 12.2 fewer customers that would benefit from this information may not actually receive it. As such, Clause 11.2 would need to state that customers asking for an installment plan must receive information about financial counsellors and energy efficiency advice in order to repeal Clause 12.2.

Clause 20 Variation requirements customer's agreement

We agree with the recommendation to redraft but we reserve our support of the amendments until we have seen the actual rewording of the Clause. We also note that the amendments must comply with Part 2B of the *Fair Trading Act 1999* (Vic) (**FTA**) relating to unfair contract terms. We are particularly

¹ Jindara Community Programs, *Submission to Essential Services Commission on Draft Energy Retail Code – High Customer Bills*, September 2003.

² See for example EWOV Resolution, Issue No 25, May 2008, p 5

³ Consumer Action Law Centre, *Submission to Essential Services Commission - Proposed amendments to the Direct Debit provisions of the Energy Retail Code*, April 2007.

concerned about the allowing of unilateral variation clauses, which can cause significant detriment to consumers and are manifestly unfair.

Marketing Code

We are concerned about the ESC's use of the term 'simplify' throughout the section referring to the Marketing Code in the appendix of the Draft Decision. We seek clarification from the ESC in regards to what 'simplify' means in this context.

We believe there is merit in ensuring that the Marketing Code restates and reflects the requirements in the FTA, as it would enable the ease of all marketing requirements placed on retailers to be stated in one single document.

Clause 5.3 Telephone contact

The ESC argues that it is usual business practice that a marketing representative informs the potential customer about who he/she is representing. We are not under the impression that this is usual business practice and strongly recommend that the ESC investigate this claim in order to demonstrate that this actually occurs. In our view, the disclosure of the market representative's field agency improves transparency and the customers' understanding of the transaction process – including who benefits from a customer's acceptance of an offer. In the absence of evidence we strongly recommend that the fourth sub-bullet point of bullet point 2 is retained.

Clause 6.2 Conduct

We do not support the repeal of the conduct provision. We also note that the Ministerial Council on Energy's Standing Committee of Officials has recommended the inclusion of a provision relating to the conduct of retailers in its recent position paper on the National Energy Customer Framework.⁴ The recommendation is that marketers must, and retailers must ensure that marketers comply with all applicable Commonwealth and State and Territory laws in relation to:

- (a) misleading, deceptive or unconscionable conduct;
- (b) undue pressure, harassment or coercion; and
- (c) the quality, form and content of marketing information.

Marketers also must have, and retailers must ensure that marketers have, adequate product knowledge. Adequate product knowledge covers knowledge of matters such as tariffs, billing procedures and the availability of rebates and concessions. We strongly support such a requirement.

Clause 6.3 Contract information

We do not believe the FTA adequately covers the issue of pre-contractual information to repeal bullet-points 2 to 4. The FTA does not require this information for all contracts. For example, for contact sales agreements (door-to-door sales), certain information is required to be provided on the agreement, but there is no requirements as to what information is required to be provided before a consumer signs this agreement.⁵ For telephone marketing agreements, the FTA requires a supplier to 'clearly, fully and adequately disclose all matters', but is not clear about what precise information should be given pre-contractually.⁶ A primary benefit of listing precisely what information has to be provided pre-contractually is in the context of resolving disputes – a clear list of required disclosures can overcome disputes about whether all relevant matters have been disclosed.

⁴ Recommendation 3.5.

⁵ Section 61, FTA.

⁶ Section 67D(4)(b), FTA.

Clause 7.4 Sales to minors and 'authorised' consumers

We query why the ESC believes this obligation is more appropriately placed in the ESC's Compliance Policy Statement. There must be a direct obligation on retailers to only conduct transactions with authorised consumers, and we believe Clause 7.4 of the Marketing Code produces the current obligation.

Credit Assessment Guideline

Clause 6.2 Reporting of defaults to a credit reporting agency

We strongly object to the repeal of Clause 6.2 in the Credit Assessment Guideline, as the *Privacy Act 1988* (Cth) does not prevent retailers from reporting defaults in circumstances where: the customer has made a complaint about the bill; or where the retailer has agreed to an installment plan; or on defaults where the customer has applied for an Utility Relief Grant. These are important consumer protection issues, as a customer must have the ability to query a bill or access hardship assistance measures without the threat of being registered with a credit reporting agency.

If you wish to discuss any matters raised in this submission, please contact May Johnston, CUAC, on 9639 7600 or Gerard Brody, Consumer Action, on 9670 5088.

Yours sincerely

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