



22 October 2014

By email: energycouncil@industry.gov.au

COAG Energy Council Secretariat
GPO Box 9839
Canberra ACT 2601

Dear Sir/Madam

Discussion Paper on Key Recommendations arising from the Review of Enforcement Regimes under the National Energy Laws Final Report

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the abovementioned discussion paper. Consumer Action provided submissions both to the consultants that undertook the *Review of Enforcement Regimes under the National Energy Law* and to officials upon the completion of the final report.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Enforcement functions and powers of the regulator

Recommendation one

Consumer Action supports the expansion of the range of orders that can be made by a court on application by the Australian Energy Regulator (**AER**) to include community service orders, probation orders and adverse publicity orders. However, we believe that the biggest gap in the AER's enforcement toolbox relates to action that can be taken before court proceedings.

Until now, the AER has been able to resolve many alleged breaches of the energy retail laws and rules without drawing on statutory enforcement powers. Such action has included obtaining commitments from businesses to address a concern, or issuing compliance bulletins. However, administrative action will only be effective if there is also the prospect of further, more-formal enforcement action.

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Given that the AER has had the role of enforcing compliance with the retail law and rules for a short period, we encourage comparison with the enforcement powers of state regulators. In Victoria, the Essential Services Commission (**ESC**) has taken some administrative action in respect of widespread, systemic breaches of the Energy Retail Code. A number of administrative actions were listed in the ESC's most recent annual report, and include breaches relating to billing, marketing, disconnection, and early termination fees and affected many thousands of consumers.¹ Despite these actions, the figures from the Energy & Water Ombudsman (Victoria) annual report suggest that consumer complaints are increasing, and that the number of systemic issues is substantial—in 2014/15, complaints increased 10 per cent and there were 41 systemic issues identified.² This data suggests either that minimal administrative action is not resulting in better compliance or that there is no threat of more formal enforcement action that might encourage compliance.

Unlike the AER, the ESC does not have the power to issue infringement notices or obtain enforceable undertakings. Instead, it has the power to issue statutory compliance orders or civil penalties. These are similar to the AER's powers to obtain financial orders from a court. The fact that the ESC has not used such powers in the face of widespread and systemic misconduct suggests that the regulator believes them to be not proportionate to the relevant misconduct or breach. As stated by CHOICE in its wide-ranging review into good practice in regulatory enforcement,³ a sufficient range of enforcement options increases the capacity of a regulator to take appropriate enforcement action according to the resources available and the seriousness and/or prevalence of the breach. A broader range of possible court orders may encourage the regulator to take appropriate and proportionate action.

The additional suggested orders are flexible and may result in an enforcement outcome that is better equipped to the regulatory breach at hand. Unlike orders obtaining financial redress, community service orders and adverse publicity orders will have only limited direct costs on a business. However, they may be effective because in general businesses are vulnerable to activities that have a negative impact on their reputation and brand. Such orders also contribute to transparency and accountability in the market place.

That said, as noted above, it is our view that the biggest gap in relation to the AER's enforcement powers is not in relation to orders that the court can order, but in relation to actions the AER can take without taking a matter to court. While the issuing of infringement notices and obtaining of enforceable undertakings are welcome, we believe that, especially in relation to many of the non-contractual provisions of the National Energy Retail Rules (i.e. pre-contractual information, hardship and financial difficulty), that a more flexible approach may be warranted. This could include requiring the establishment of a compliance program or a training program within a business. We submit that the AER should have available a wider set of statutory powers that do not require it to go to court.

¹ Essential Services Commission, *Annual Report 2013-14*, available at: <http://www.esc.vic.gov.au/getattachment/7784ead9-4546-42f7-8a9a-d95a6b914f8e/ESC-Annual-Report-2013-14.pdf>

² Energy and Water Ombudsman (Victoria), *Annual Report 2013-14*, available at: http://ewov.com.au/data/assets/pdf_file/0016/13273/EWOV_2014_Annual_Report.pdf

³ CHOICE, *Good Practice in Consumer Protection Enforcement*, 2010, available at: <http://www.choice.com.au/consumer-action/past-campaigns/consumer-protection/consumer-protection-enforcement.aspx>

Recommendation two

Consumer Action believes that there should be regulatory change to allow the AER to obtain compensation or damages on behalf of small customers. In the discussion paper, it is suggested that there is some difference in the role of regulators and the purpose of regulators, implying that it may not be appropriate for the AER to have powers similar to that of consumer affairs regulators under section 239 of the Australian Consumer Law (**ACL**). That provision allows regulators to bring proceedings for compensation on behalf of non-party consumers who are in a class likely to have suffered loss or damage as a consequence of contravention by the respondent of the ACL.

In its report on Australia's Consumer Policy Framework, the Productivity Commission stated that there are strong grounds for regulators to be able to act on behalf of consumers,⁴ recognising that:

- the motivation for individuals to join a civil class action can be low if the individual stakes are small, even if the aggregate costs are large;
- collective private actions are based on private benefits to those involved, yet public policy is also interested in broader benefits that may not always be equivalent to those private benefits;⁵ and
- such a representative action may be a more efficient way of proceeding to the extent that it reduces the potentially excessive transaction costs of organising a private class action and any third-party financing arrangements.

Consumer Action does not see significant difference in the role of the AER and the role of consumer protection regulators such as the ACCC, particularly where it comes to consumer protection functions. Indeed, both the AER and the ACCC are established under the same legislation.⁶ The objectives in the national energy legislation guide the AER's work. These objectives refer to promoting efficient investment in, and efficient operation and use of, energy services for the long term interests of energy consumers with respect to price, quality, safety, reliability and security of supply. The ACCC's work is guided by the object of the *Competition and Consumer Act 2010* (Cth) which is directed at enhancing the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. Both organisations have a significant role in consumer protection, including through the promotion of competition and efficient regulation and markets. For these reasons, we submit that legislation should provide the AER with the ability to seek compensation or damages on behalf of consumers.

The discussion paper asks whether the AER could effectively implement this function within existing arrangements. One possibility relates to the AER's powers to obtain enforceable undertakings. The AER could consider the ability of obtaining redress for consumers as part of obtaining such an undertaking. While this would be welcome, we suspect that a business would

⁴ Productivity Commission, *Review of Australia's Consumer Policy Framework*, April 2008, available at: <http://www.pc.gov.au/projects/inquiry/consumer/docs/report>

⁵ Such a divergence in public and private interests can arise in several contexts, such as when a group of consumers suffering detriment is outside the class action. This can particularly affect disadvantaged consumers who are less likely to contribute to 'fighting funds' or become aware of private class actions.

⁶ *Competition and Consumer Act 2010* (Cth).

be unlikely to accept such an undertaking without the backing of a legislative mandate for the AER.

Private enforcement

Recommendation four

Consumer Action strongly supports the designation of key consumer protection provisions in the National Energy Retail Rules as conduct provisions which would enable private enforcement. This would include recommendations 4(e) relating to life support equipment rules, and recommendation 4(f) relating to pre-contractual obligations in the energy marketing rules. We submit that this should be extended to provisions in the rules relating to hardship and payment assistance. These are provisions that do not generally give consumers a contractual remedy.

While the regulator is able to enforce these provisions, should there be a breach a consumer does not generally have a right of private enforcement. While consumers can make a complaint to an energy ombudsman, this generally results in a negotiated resolution, rather than addressing systemic problems with energy retailers' systems and processes.

Without conduct provisions or the ability of consumers to pursue class actions, the energy regulator will necessarily be under greater pressure to engage in more, and more detailed, monitoring and reporting of retailer and distributor conduct as well as undertake more enforcement actions, because there are limited other alternatives for responding to systemic non-compliance.

Perhaps the key reason for allowing such private actions is, however, the deterrence impact that it may bring. Existing market behaviour suggests that there is insufficient deterrence for energy retailers in relation to key consumer protections, such as obligations to those consumers in financial difficulty. Our recent report, *Problems with Payment: How energy retailers can assist consumers having trouble paying bills*,⁷ and the Financial & Consumer Rights Council report, *Rank the Retailer*,⁸ suggest widespread and systemic breaches of key consumer protections. Existing resolution methods, including through ombudsman services, appear not to be producing systemic change. Given this, other methods such as the additional deterrence associated with private enforcement should be considered.

Civil penalty regime

Recommendations five and six

An increase in the level of penalties is likely to improve the efficient operation of the market, by providing improved incentives for compliant conduct. As the discussion paper itself notes, where market participants do not breach the requirements, additional penalties will not present any substantially increased regulatory burden. Any increased regulatory burden associated with a greater risk that may come with a higher penalty is justified in light of the risks to consumers and other market participants where they are left to deal to the consequences of non-compliance.

⁷ Consumer Action Law Centre, *Problems with Payment: How energy retailers can assist consumers having trouble paying bills*, July 2014, available at <http://consumeraction.org.au/report-problems-with-payment/>

⁸ Financial & Consumer Rights Council, *Rank the Retailer*, August 2014 http://www.fcrc.org.au/wp-content/uploads/2014/08/FCRC_RANK-THE-ENERGY-RETAILERS-REPORT_AUGUST-2014.pdf

Legal architecture and procedural matters

Recommendation 13

As noted in our previous submissions, we support the recommendation that the AER has the power to compel the provision of evidence under oath. Without such a power, regulatory investigations are likely to be more costly and lengthy as the regulator may not be able to obtain sufficient information from the right people. More intensive and delayed investigations not only has direct costs for the industry and regulator, but also has market wide costs should misconduct or breaches of energy laws continue un-remedied.

Please contact us on 03 9670 5088 or at info@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody
Chief Executive Officer