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Lodged via email electricity@pc.gov.au

Productivity Commission
Locked Bag 2 Collins Street East
Melbourne VIC 8003

Dear Commissioners

Electricity Network Regulatory Frameworks—Productivity Commission Draft Report

We welcome the opportunity to respond to the Productivity Commission's (the **Commission**) Draft Report on Electricity Network Regulatory Frameworks (the **Draft Report**).

We have found the Commission's review of the Electricity Network Regulatory Frameworks to have been a welcome assessment of how the market is working and we believe that many of the recommendations would serve to advance the interests of consumers in the market, should they be adopted and implemented effectively.

We note, however, that the scope of the Draft Report is much broader than that of the Issues Paper. This has presented a challenge in terms of adequately responding to each of the Draft Report's recommendations. As a result, we have limited our comments in this submission to issues relating to consumer engagement, demand management and the institutional governance arrangements.

In our submission to the Issues Paper,ⁱ we outlined in detail our support for benchmarking a useful addition to current regulatory price setting mechanisms. Given this, we are supportive of the Commission's recommendations for the regulator to use benchmarking as a diagnostic tool in responding to business cost forecasts, and for all datasets relating to benchmarking to be made publicly available. Such public information can ensure consumers and consumer groups are informed about the relative performance of network businesses.

As an addendum to this submission, we have recently released the report, "*A Policy Trilemma; Creating an Affordable, Secure and Sustainable Energy Market*". This report makes key recommendations for policy and regulatory reform that will best serve the long term interests of consumers. We urge the Commission to consider these recommendations in its final report, in lieu of a more detailed submission by Consumer Action at this time.

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About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal assistance, litigation services and financial counselling to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. 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.

A focus on consumers

We strongly support the Commission's recommendation for an industry-funded representative energy consumer body with the expertise to be an effective participant in policy and regulatory processes.

Along with key energy consumer and social service groups,ⁱⁱ we have proposed the establishment of a national energy consumer body, Energy Consumers Australia Ltd (**ECA**). Significant work has been undertaken to develop a proposal that will meet the needs of Australian consumers, as well as government and regulatory bodies. An effective, well-resourced national energy consumer advocacy body can operate to ensure consumer interests are central to decision-making by governments, regulators, and energy businesses. Working closely with existing advocacy and community agencies to leverage existing skills, knowledge and experience, a new body focused on national key priorities can contribute to more responsible, effective, sustainable and fair energy markets. As outlined in the business plan, the objects of ECA are to:

- advance the interests of Australian residential and small business energy consumers, including vulnerable groups, through national advocacy;
- promote secure access to affordable, reliable, safe, and environmentally sustainable energy services for all consumers;
- develop and amplify a strong, coordinated voice for Australian consumers, through collaborative work with organisations engaging in energy advocacy, and to represent and advocate on behalf of Australian consumers to Government, regulators and the energy industry;
- facilitate access and disseminate information and tools to consumers, consumer and welfare organisations;
- identify and redress systemic disadvantage and market failure, to promote a fair energy market, recognising that energy is an essential service which contributes to wellbeing and the ability to participate in the economic and social mainstream, and recognising the important correlation between social and energy policy; and
- undertake research on and advocate on behalf of energy consumers on energy law and regulatory reform.

Critically, the business plan proposes that ECA would work collaboratively with the existing network of funded consumer energy advocates and projects, rather than replacing existing resources directed to energy consumer advocacy. This recognises the critical contribution of jurisdictional and sectoral advocates to often complex processes, and the benefits that can be gained through coordination of strategic projects and advocacy.

This aspect of the proposal runs counter to the Commission's recommendation that a new consumer representative body should subsume the role of the existing Consumer Advocacy Panel. This model proposed in the business plan is to allow at least full two years of collaborative work between the new national centre and existing state/territory advocacy bodies, with a view to an independent review of national consumer advocacy arrangements during its third year of operation. Two years will allow for proper consideration of how future arrangements might best be structured given there is ongoing uncertainty about future national regulation including the National Energy Customer Framework (**NECF**).

A copy of the ECA business plan is attached to this submission.

Demand management

We are concerned with the ongoing need for expensive network augmentation to meet peak demand and what this is costing consumers and, as such, we are supportive of a range of demand management initiatives to reduce this. We acknowledge the Commission's recommended range of complementary reforms to address this, including, removal of retail price regulation and the phased introduction of smart meters, accompanied by time-based or time of use (**TOU**) pricing for critical peak periods. We also acknowledge direct load control options as playing a role.

However, we urge caution in over-reliance on one particular approach. In our view, there is no silver bullet to reducing peak demand and, further, there are significant risks in each of the approaches that must be carefully considered.

Effective competition and removal of retail price regulation

We are concerned with statements that Victoria's experience with competition post retail price deregulation indicates that this should be a goal for all jurisdictions. As outlined below, there are several aspects of competition in energy markets in Victoria which are not effective. We urge the Commission to further assess the Victorian energy market to determine whether this is actually working for consumers, before it makes its final recommendations.

In our view, for the market to be effectively competitive, evidence must show that consumers have the confidence and capacity to better manage electricity use and costs. Without such evidence, and given the extent of consumer confusion evident in complaints to our centre, we are not convinced that consumers remain more than passive participants in a complex market.

In our experience, even if consumers are interested in managing their electricity usage and costs, there are significant problems caused by complexity, consumer behavioural influences, and market power that operate to reduce a consumer's desire and ability to engage. These include:

- First, most marketing in energy sales is through door-to-door sales. In our view, door-to-door sales do not support competition, and in fact stifles it. Competition can occur when a consumer reviews a range of products, considers their features and costs and makes an informed decision about what is right for them. At the doorstep, a consumer has no chance to consider other products or their own electricity consumption patterns, and is

unlikely to be able to compare the offer with their current plan. Door-to-door sales do not promote informed decisions—rather it encourages ill-considered, rash purchases where consumers might end up paying more for electricity.

- Second, for those that do try and shop around, marketing can be at best confusing and at worst misleading. Energy retailers commonly market based on percentage savings, which raises the question—a saving from what? The saving is generally from that energy retailer's standard rate, and most consumers aren't likely to be on that rate. There is a further problem for low and fixed income households—many discounts come with fine print that often includes a requirement to pay on time. For the consumer who finds this hard to manage, the discount evaporates.
- Third, once a consumer chooses a new energy deal, there is nothing stopping a retailer increasing the price throughout the contract. Terms of fixed term contracts commonly provide retailers with the ability to pass on cost increases, which can make household budgeting difficult and any savings very short lived.

In our view, these sorts of retail practices make it less likely that consumers will engage in the energy market, as the costs and time of doing so may not be recovered where there is poor marketing, or where deals can quickly change.

Quite simply, without a detailed understanding of how or if consumers engage with the energy market, evidence of effective competition can not truly be established, nor can it be manufactured through structural reforms.

We encourage the Commission to, in its final report, provide guidance on establishing clear evidence for assessing whether competition is effective in retail energy markets. Switching rates should not be a proxy for effective competition; good market outcomes should relate to efficiency as well as increased consumer welfare. We also recommend that the Final Report should examine certain retail market practices that inhibit consumer engagement in the market..

Phased introduction of Smart Meters accompanied by time based pricing

While we recognise that there is some peak demand that may be reduced by providing price signals such as TOU pricing, we do not believe there is enough peak load that can easily be reduced through load shifting to justify an approach that is costly (implementation of smart meters) and carries a risk of potential social harm from under-consumption and turning off essential appliances.

Rather, Consumer Action recommends the Commission focus on solutions that are less dependable on consumer behaviour and less blunt than TOU price signals. We strongly believe direct load control must be considered for appliances such as air conditioners and pool pumps and note that this does not rely on the implementation of smart meters (though we acknowledge there is a cost attached to rolling out DLC programs as well). As referred to below, we believe the evidence for 'bankable' benefits for such programs is strong. TOU solutions, on the other hand, rely on theoretically constructed elasticity of demand calculations (and the results of short term pilots) showing that consumers respond to price signals, in order to realise the benefits. DLC technology is therefore more likely to actually pass a cost-benefit case.

NERA Economic Consulting published a major cost-benefit assessment of smart meters and DLC technology in 2008 (commissioned by the Ministerial Council on Energy Smart Meter Working Group). In relation to rolling out non-smart meter based DLC technology it found that:

- “[N]ationally, direct load control can deliver net benefits of between \$34 million and \$618 million;
- in Queensland a non-smart meter DLC rollout is estimated to provide positive net benefits in both the upper and lower end of the ranges considered;
 - in New South Wales a non-smart meter rollout has a positive net benefit in the upper bound and a marginal net cost in the lower bound. However, this reflects the winter peaking assumption in New South Wales, which results in DLC not leading to any network deferral. Under the summer peaking sensitivity a non-smart meter DLC rollout is estimated to provide positive net benefits in both the upper and lower bounds;
 - for Victoria, South Australia and Western Australia a non-smart meter DLC rollout is estimated to provide positive net benefits in the upper end of the ranges considered and to have either a zero or only marginal net benefit in the lower end of the range; and
 - for the Northern Territory, the Australian Capital Territory and Tasmania a DLC rollout is not expected to result in a positive net benefit, as result of the particular characteristics of load in these jurisdictions and the limited scope for network deferral.”ⁱⁱⁱ

For smaller loads relating to appliances such as dishwashers, washing machines and dryers, we believe educational campaigns can provide an effective and efficient alternative. Educational campaigns, calling on consumers to ‘do the right thing’ are a safe and inexpensive way to reduce consumption or shift load. These are simple messages to be conveyed: it is basically why households should aim to use dishwashers and washing machines after 10pm and how we would all benefit if we do. The recent Save Water Target 155 community campaign in Victoria was regarded as successful by the three metropolitan water retailers, who have stated that the campaign saved 60 billion litres of water.^{iv} Another component of domestic energy consumption that may benefit from being targeted through education campaigns is the cost of leaving appliances on stand-by.

Consumer Action is also concerned about the impact on households that cannot easily reduce their consumption at peak times. We believe the peak price would have to be significant in order to curb load and some households will therefore experience significant increases to their electricity bills. If TOU pricing is to be introduced, then we support that it not be mandatory and that consumers should have the option to have TOU as a pricing option, and the right to revert to a flat tariff if this is preferable. We note that this is the approach proposed by the Victorian Government.^v

We also note that if TOU is to be voluntary, there may be some consumers who would take up TOU offers and benefit without changing their consumption pattern. This will be to the detriment of other customers who may see an increase in their electricity bill because someone has to pay for the loss in revenue created by the ‘natural TOU profile’ households. If this was to occur, no significant savings would be achieved to pass through to consumers as households with a ‘natural TOU profile’ have not shifted any load or created any benefits in terms of network capacity or peak wholesale market prices. This issue was raised by the St Vincent de Paul Society’s study into smart meters and customer protections in 2010.^{vi}

Finally, we are concerned that unregulated TOU pricing is likely to contribute to increased complexity for residential energy consumers, thereby acting as a further impediment to active consumer engagement. Effective competition relies on consumers having the necessary information to be able to choose an electricity offer that suits their needs and on robust compliance with rules that require explicit informed consent to enter into energy market contracts. We consistently receive complaints from consumers that marketers ignore directions not to engage with them,^{vii} that key terms of contracts are not sufficiently explained prior to a sale (such as the right for a retailer to change the price throughout a fixed contract period), and that marketers target those that lack competence to understand what is being offered (such as the elderly or those from non-English speaking backgrounds).^{viii} We encourage the Commission to consider recommendations in its final report that align with the recommendation and findings of the attached *Policy Trilemma* report, which would serve to ensure “regulators must take an active approach to enforcement, in particular setting high industry expectations regarding compliance”.

Institutional governance arrangements

We strongly oppose any proposal to separate the Australian Energy Regulator (**AER**) from the Australian Competition & Consumer Commission (**ACCC**), and we think the Commission's analysis for proposing this change lacks rigour. For example, the Commission relies on an AER stakeholder survey as well as "largely confidential evidence" to determine there is poor trust and confidence in the AER. While the Commission doesn't state the make up of stakeholders surveyed to provide the evidence, it would be unsurprising to determine that the majority of such stakeholders are energy market participants. In our view, the views of firms regulated by the energy regulator should not be considered the primary evidence to make conclusions about the effectiveness of the AER. It is also disappointing that the Commission has made conclusions about the performance of AER without raising this issue in its Issues Paper, or seeking the views of consumer groups.

The Commission also refers to "errors" made in regulatory decision-making, but we agree that the rules relating to appeals have meant that "errors" have been determined not because of poor decision-making by the AER but because problems with the framework for appeals. This has been confirmed by the Expert Panel considering the appeals framework in its final report.^{ix}

In our view, there are significant benefits from existing arrangements, including:

- There are parallels in the work of the two regulators—both the ACCC and AER monitor monopoly markets, protect consumers from poor business practices, and promote competition, so having them work closely together means they can share market knowledge and draw on a great pool of experience.
- There are operational efficiencies in the AER and the ACCC sharing resources such as organisational synergies of purpose and the efficiency of sharing back office functions and staff (this includes cost savings, for example, existing arrangements mean not only sharing of staffing, but that the AER has offices in Adelaide, Brisbane, Canberra, Sydney and Melbourne).

- It is our view that regulators that focus narrowly on one industry are at significant risk of becoming 'captured' by industry interests. In our experience, stand alone energy regulators also have a poor record on enforcement. A broader view across different industries is likely to keep the regulator independent and focused on the interests it exists to serve—that of consumers.

We agree that more resourcing for the AER would be a good thing, but also what is needed is a strong focus on fixing the rules and regulations that inhibit the AER from making decisions in consumers' interests. The recent AEMC rule change on the economic regulation of networks seeks to achieve this.

In our view, a debate about regulatory structure is likely to distract from or delay other reforms that we consider to be critical to the success of the regime going forward. In our view a far preferable approach by the Commission in its final report would be to:

- recommend the necessary reforms to the energy market rules and the framework for AER decision-making;
- give the regulator a reasonable opportunity (and if need be additional resources) to work within the new framework; and
- schedule a review of the effectiveness of the reforms which could include a review of the effectiveness of the AER if that is still considered necessary and appropriate.

Please contact me on 03 9670 5088 or at janine@consumeraction.org.au if you would like to discuss these matters further/have any questions.

Yours sincerely

CONSUMER ACTION LAW CENTRE

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ⁱ Consumer Action, *Submission to Productivity Commission's Issues Paper—Inquiry on Electricity Network Regulation*, April 2012, available at: <http://consumeraction.org.au/wp-content/uploads/2012/04/Submission-to-PC-Inquiry-on-Electricity-Network-Regulation-April121.pdf>

ⁱⁱ The Business Plan has been auspiced by 5 lead consumer agencies: Alternative Technology Association; Australian Council of Social Service; Consumer Action Law Centre; Consumer Utilities Advocacy Centre; and the Public Interest Advocacy Centre. The Business Plan is based on content developed by a working group comprising Choice, Consumer Action Law Centre, Public Interest Advocacy Centre, Qld Council of Social Service, South Australian Council of Social Service, Total Environment Centre, Uniting Care Kildonan, and West Australian Council of Social Service.

ⁱⁱⁱ NERA Economic Consulting, *Cost Benefit Analysis of Smart Metering and Direct Load Control*, Overview Report for Consultation, 29 February 2008, p 202

^{iv} See, for example, The Age, *Retailers promoting axed Target 155 scheme*, 16 March 2011 at www.theage.com.au/environment/retailers-still-promoting-axed-target-155-scheme-20110315-1bw4b.html

^v Hon Michael O'Brien MP, *Media Release: Greater Pricing Choice for Victorian Energy Consumers*, 26 September 2016, available at: <http://www.premier.vic.gov.au/media-centre/media-releases/4977-greater-pricing-choice-for-victorian-energy-consumers.html>

^{vi} St Vincent de Paul Society, *New Meters, New Protections – A National Report on Customer Protections and Smart Meters* by May Mauseth Johnston, February 2010, p 33.

^{vii} Consumer Action, *Media Release: Do Not Knock Campaign lodges 100 complaints with ACCC*, June 2012, available at: <http://consumeraction.org.au/media-release-do-not-knock-campaign-lodges-100-door-to-door-selling-complaints-with-acc/>

^{viii} Footscray Community Legal Centre, *The African Consumer Experience of the Contestable Energy Market in the West of Melbourne*, March 2009, available at: <http://www.esc.vic.gov.au/getattachment/94c82335-8fc7-4d6d-ac11-5d213bca2dbd/African-experience-of-Melbourne-Energy-Market-Marc.pdf>

^{ix} Expert Panel, *Review of Limited Merits Review Regime: Final Stage Two Report*, available at: <http://www.scer.gov.au/workstreams/energy-market-reform/limited-merits-review/>.