11 September 2013

By email: SCER@ret.gov.au

Manager, SCER Secretariat
Department of Resources, Energy and Tourism
GPO Box 1564
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Dear Sir/Madam

Submission to the Review of Enforcement Regimes under National Energy Laws—Draft Report

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Standing Committee of Energy and Resources (SCER's) *Draft Report on the Review of Enforcement Regimes under National Energy Laws* (the **Draft Report**).

A regulatory scheme with well-designed rules will be ineffective in addressing industry or market-wide problems if there are limitations in its enforcement regime. Effective enforcement by regulators, and third parties, is thus an essential part of an effective regulatory and consumer protection framework. In participating in the development of the National Energy Customer Framework, Consumer Action consistently highlighted the enforcement regime was lacking for consumers and thus we welcome this review.

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.

Best practice in enforcement regimes

To ensure that the outcomes of this review align with the principles outlined in the Draft Report, we believe additional consideration is necessary as to what amounts to best practice in contemporary enforcement and regulatory practice.

While we welcome the analysis provided at section 3.6 of the Draft Report, and the key best practice themes identified, we consider caution must be taken particularly in relation to the 'layered approach'. We are concerned that promotion of a linear approach to using enforcement tools is not the best way to secure consumer protection. For example, in our experience

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regulators can tend to use ‘education and persuasion’, and only if that doesn’t work move to the next layer. Further, confronted with the reality that they do not have enough resources to respond to each and every breach of the law, regulators can sometimes not take action in relation to a particular breach due to a concern to be fair to all businesses. This sort of approach can significantly limit a regulator’s effectiveness.

In our view, a more practical and effective approach is a more strategic 'campaign approach' to enforcement. This approach recognises the limitations facing regulators in relation to access to resources, particularly in response to potentially prolific breaches of consumer protection law. This approach looks at an issue more holistically, including business and consumer educational initiatives combined with targeted enforcement. The Australian Competition and Consumer Commission has used this approach effectively, for example, in relation to unsolicited door-to-door selling. When identifying concerns in the marketplace, it takes an active approach, including publishing industry research, public statements about regulatory concerns, strongly worded warnings, guides for businesses and consumers, direct liaison with non-compliant businesses, investigations as well as more intrusive, enforcement actions.

We also refer the reviewers to other sources of good practice models in regulatory enforcement. In 2008, CHOICE published a framework encompassing 8 principles of good enforcement and regulatory practice.[1] This framework aligns with the views of academic Krpan, who examined good practice enforcement for the Environmental Protection Authority of Victoria.[2] Specifically, their models focus upon the 'effectiveness and accountability’ of enforcement agencies, as well as transparency and engagement with stakeholders. A discussion of these frameworks, together with the more traditional regulatory pyramid of Ayres and Braithwaite,[3] can be found in our recently published report, *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators* (copy attached).

Administrative enforcement action and statutory compliance orders/remedial directions

In our view, the addition of new statutory compliance orders or remedial directions should only be necessary in instances where infringement notices and/or administrative action is insufficient.

To be sufficient, regulators should be required to report publicly on their use of administrative enforcement actions and imposition of infringement notices in a timely and transparent way. We are aware that some consumer regulators feel that public reporting of the use of these tools is not appropriate as it is somehow “unfair” to businesses where a finding of misconduct by a court has not been found, or that publicity will lessen the ability of the regulator to obtain cooperation from a business. We dispute these concerns, and believe that such less intrusive regulatory action is only likely to have a wider impact across the industry—surely a key objective of any enforcement action—if there is public reporting about it.

[1] CHOICE, *Good Practice in Consumer Protection Enforcement*, December 2008, available at: http://www.choice.com.au/consumer-action/past-campaigns/consumer-protection/consumer-protection-enforcement.aspx.
[2] Stan Krpan, Compliance and Enforcement Review: Overview of key themes and recommendations for EPA Victoria, available at: http://www.epa.vic.gov.au/our-work/publications/publication/2011/february/1367.
[3] Ayres I and Braithwaite J (1992) Responsive Regulation: Transcending the Deregulation Debate, Oxford University Press, New York

Further, we are concerned that the addition of these powers may make it less likely that the energy regulator will take more intrusive action, as it may want to 'try' these tools first.

Infringement notices

Consumer Action supports the findings of the reviewers in relation to the infringement notice regime. We agree that the infringement notices can allow for timely and effective enforcement action.

Civil proceedings, compensation and *cy pres* orders

Consumer Action strongly supports Recommendation 1 of the Draft Report, in particular, the proposal for adverse publicity orders to be made by a court. This aligns with the Australian Consumer Law and would provide additional powers to the regulator to require businesses to put advertisements in papers and/or on websites. Our assessment and interaction with consumers suggests that this has been effective in bringing consumer attention to regulatory misconduct.

We also strongly support Recommendation 2 which proposes that the energy regulator can seek compensation orders to benefit anyone who has suffered loss or damage as a result of the law. This would enable the regulator to obtain refunds for consumers affected by breaches of consumer protection laws outside representative action that names all affected consumers.

We believe refunds for consumers are an appropriate remedy for breach of consumer protection laws where there are a large number of consumers affected and the loss to each is relatively small. Unfortunately, it is becoming more common for a business to be found to be involved in wrongdoing yet being able to retain profits obtained due to that wrongdoing. While regulators are able to seek civil penalties, there is not necessarily any assessment as to whether penalty levels outweigh returns for the particular company, nor any concern about redress for affected consumers.

It is our view that wherever practical consumers should be able to recover moneys outlaid as a result of unlawful trade practices on the part of the trader. In many circumstances, while they have suffered quantifiable and significant losses individual consumers are not able to initiate legal proceedings to recover their losses (due to the cost of legal representation, and the fact that frequently the amount of harm suffered by consumers as individuals will be too small to warrant legal proceedings).

Class action proceedings can do little to assist many individual consumers. Even where small consumers can join class action proceedings to recover losses, their ability to do so will often depend upon the commercial decisions of litigation funders. Due to the significant cost risks involved, independent consumer legal services like Consumer Action cannot easily launch representative proceedings on behalf of consumers at large.

It is recognised that in some instances it will be possible to quantify consumer loss generally but impossible to individualise that loss to particular consumers. In this circumstance there may be more appropriate mechanisms than simply directing funds to consolidated revenue, such as *cy pres* orders or settlements.

Cy pres is a legal doctrine, meaning literally “as near as possible”, and in effect it enables compensation to be aggregated and refunded to a cause that relates to the needs of the affected consumers generally. In this way, compensation is achieved without requiring inefficient processes to identify and refund every affected consumer. Instead under the doctrine of *cy pres* it is possible to compensate consumers at large by ensuring the businesses paying a fine into a fund—precedence exists in the very establishment of Consumer Action's predecessor, the Consumer Law Centre Victoria.

Civil proceeding orders available to the energy regulator should be expanded to allow it to seek compensation for consumers by way of *cy pres* orders or settlements. When consumers have suffered loss as a result of market failure, and that loss cannot be apportioned back to those consumers individually, it is appropriate that the money is directed to a purpose that serves the interests of consumers. Such powers should not be limited to educational initiatives but rather a wide suite of options could be available including research, provision to organisations that aggregate and represent the interests of consumers or litigation funding for public interest matters. This research representation and advocacy ought to lead to fairer marketplaces which ultimately should lead to fewer consumers suffering loss in the first place.

Private enforcement

Currently the National Energy Consumer Framework (**NECF**) unreasonably restricts the ability of consumers, other energy businesses or other third parties to take legal action for a breach of a NECF provision. It provides that third parties may only bring civil legal proceedings in respect of a breach of a *conduct provision*. However, as noted in the Draft Report, there are no conduct provisions provided for in this framework. This is manifestly unreasonable in that it prevents consumers from seeking any form of civil redress for a breach of the laws that are supposed to protect them, if they suffer harm as a consequence of an illegal breach of those laws.

The Draft Report suggests that consumers are likely to have rights under contract, and thus the conduct provisions regime may be unnecessary. While consumers do have direct contractual rights against energy firms in accordance with the regulatory framework that prescribes contract terms and conditions, not all aspects of the NECF relate to consumer contracts. For example, provisions related to disclosure of information, energy marketing and customer hardship are designed to regulate retailer behaviour without necessarily imparting contractual rights.

We note Recommendation 3 states that principles should be adopted to determine if a particular regulatory provision should designated as a conduct provision. While we support a principled approach, we believe that all provisions that relate to consumer protection should be so designated. In our view, the principles identified—that a contravention is likely to have a direct and foreseeable detrimental effect on end users, and the purpose of the provision is to confer a right or benefit (or prevent harm)—applies to consumer protection provisions. At the very least, all regulatory provisions that do not give right to a consumer contractual right that can be easily enforced should be designated as conduct provisions.

We are also concerned that the review considers that the payment of compensation under the small compensation claims regime in Part 7 of the National Energy Retail Law to be sufficient for consumers in relation to claims against distributors for events such as voltage variation. Our

understanding is that not every jurisdiction has chosen to adopt this regime and certainly should Victoria seek to adopt the NECF and this regime, it would be inferior to the small claims regime currently operating.

Finally, we believe the regime is not complete without enabling consumers to band together as part of a representative or class action. While there is an opportunity for consumers to utilise the services of an ombudsman scheme, they can also face rational barriers to pursuing matters individually though the ombudsman scheme including the time and cost of doing so (which if the harm is small, might be economically rational not to pursue). If the same loss is incurred by tens or hundreds of thousands of consumers, there will be rational reason to pursue it together. Further, while ombudsman can and do identify systemic market issues and negotiate redress, it is our experience that ombudsman schemes are not well placed to test the law where it is uncertain—indeed most ombudsman schemes require such cases to be heard by a court. Additionally, matters might be outside the terms of reference of an ombudsman scheme even if it is a justifiable dispute. For example, in relation to bank penalty fees, the banking industry ombudsman (now the Financial Ombudsman Service) did not accept complaints as it considered that a dispute about the amount of a fee was outside its terms of reference, although the consumer submission was that the fees were contractual penalties, which is of course a matter that can be considered by a court. Indeed, it is only through the current class action that this issue was able to be tested.

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 to undertake more enforcement actions, because there will be no other alternatives for ensuring compliance. Further, private enforcement, including through representative action, can actually stimulate competition among enforcement methods, thereby improving efficiencies of each.

Civil penalty regime

In relation to who should seek civil penalties, we largely support the conclusions that regulators are best placed to seek the imposition of a civil penalty by a court. However we note, that under national credit laws, for limited provisions around disclosure, consumers can seek a civil penalty (where redress may not be an option) and we believe that this should increasingly be accepted as an alternative within the private enforcement regime.

We strongly support Recommendation 5 that proposes to increase civil penalties to $1 million for bodies corporate and $200,000 for natural persons, but propose that these civil penalty levels should be adopted to all contraventions not only contraventions of a particular type. In our view, particularly in relation to contraventions of consumer protections, the emphasis needs to be on ensuring compliance, through higher penalties, so as to not make the penalty a “cost of doing business”.

Further, in relation to infringement notices, our view is that the penalty should align with what the Australian Competition and Consumer Commission is able to impose under the Australian Consumer Law, for the similar purpose of ensuring compliance.

Legal architecture, procedural matters and time limits

We support Recommendations 8 and 9. We believe that aligning the provisions providing for accessorial liability for corporate officers is likely to create efficiencies for business because it simplifies where office holders will be personally liable, particularly by making this uniform with the ACL and the Competition and Consumer Act.

We also support Recommendation 10 to provide AER with the power to compel the provision for evidence under oath. We agree that this would enable the AER to more effectively fulfil its investigation and enforcement functions.

We support a six year time limit for the bringing of civil proceedings. This is consistent with the typical time limit for bringing most general civil proceedings in Australia.

However, within this regime the time limit commences on the date on which the breach occurred. While this is generally appropriate in the general civil law context, we note that the six year time limit is generally expressed to run from the date on which the cause of action accrued, not the date the defendant engaged in the offending conduct.

Further, most limitation of actions statutes allow for the court to grant an extension of time to bring an action under special circumstances. We suggest that this power also be granted to the court under the national energy laws, for example in cases in which a regulated business has acted fraudulently to hide a breach.

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

Yours sincerely
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