



28 February 2014

By email: scer@industry.gov.au

SCER Secretariat Manager
Department of Industry
GPO Box 1564
Canberra ACT 2601

Dear Sir/Madam

Final Report on the Review of Enforcement Regimes under the National Energy Laws

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Final Report from Allens and NERA Economic Consultants on the Review of Enforcement Regimes under the National Energy Laws (the **Enforcement Review**).

Consumer Action had the opportunity to meet with representatives of Allens and NERA Economic Consultants during the preparation of their report, and also provided a submission to the Draft Report. This is a very important consultation—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. 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 and the final report.

We support many of the findings and recommendations of the Final Report. However, we submit:

- that the powers of the regulator should be expanded as proposed by the Final Report, but that the power to award compensation be extended to making *cy pres* orders;
- the private enforcement should be available for all provisions of the National Energy Customer Framework, not just those that give rise to contractual remedies (including disclosure of information, energy marketing and customer hardship provisions);
- that the maximum level of civil penalties should be increased for all contraventions of National Energy Rules and Laws.

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

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reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Powers of the regulator

Consumer Action strongly supports expansion of the range of orders that can be made by a Court to include:

- community service orders;
- probation orders;
- adverse publicity orders; and
- orders requiring the payment of compensation to a person who has suffered loss or damage as a result of the breach.

We especially support the fourth type of order, and suggest that it be expanded to allow for *cy pres* settlements.

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.

Some regulators are increasing the use of similar awards through negotiated enforceable undertakings.¹ We submit that there would be a stronger basis for a regulator to achieve these outcomes should there be a particular head of enforcement power in energy laws.

Private enforcement

Consumer Action broadly supports a principled approach to deciding which provisions of the National Energy Laws and Rules should be designated conduct provisions, in accordance with the Final Report's recommendation three. However, we submit that there should be an additional principle to that identified by Allens and NERA Consultants.

Noting that currently there are no provision in the National Energy Customer Framework (**NECF**) that are designated as conduct provisions, we submit that provisions of the framework that do not give rise to a contractual remedy should be designated conduct provisions. For example, provisions related to disclosure of information, energy marketing and customer hardship are designed to regulate retailer behaviour without necessarily imparting contractual rights.

Consumer Action's experience is that there has been widespread non-compliance with similar provisions under state energy laws. For example, consumers regularly complain that marketers do not provide required information to customers before the formation of a contract (as is required by rules 61-64 of the National Energy Retail Rules). Further, it is our experience that retailers can breach the requirements relating to payment plans and having regard to a consumer's capacity to pay, as required by rule 72. While the regulator is able to enforce these provisions, should there be a breach a consumer does not 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. Given this, we think there is a strong case for having a wider set of provisions

¹ See, eg, ASIC, *Media Release—Unlicensed rental companies enter into enforceable undertaking with ASIC*, negotiated \$250,000 to be payable to two community legal centres, see: <http://asic.gov.au/asic/asic.nsf/byheadline/14-021MR+Unlicensed+rental+companies+enter+into+enforceable+undertaking+with+ASIC?openDocument> ; ASIC, *Media release— ASIC accepts enforceable undertaking from National Australia Bank*, negotiated \$2m to go towards financial literacy initiatives, see: <http://asic.gov.au/asic/asic.nsf/byheadline/13-365MR+ASIC+accepts+enforceable+undertaking+from+National+Australia+Bank?openDocument>.

designated as conduct provisions enabling private enforcement, either individually or jointly through class actions.

There are precedents for this approach in other areas of consumer protection. For example, Part 6 of the National Credit Code² lists a number of provisions (primarily related to disclosure requirements for credit contracting) for which penalties may be sought should the provision be breached. Not only the regulator, but a party to a contract or a guarantor, has standing to seek imposition of a penalty. The payments are “penalties” because they are punitive, not compensatory, in nature. Accordingly, Part 6 does not require that any loss be suffered by a debtor before a penalty is applied. However, unlike most penalties, they may be paid to an individual (that is, the debtor under the credit contract), rather than the state.

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. Further, private enforcement, including through representative action, can actually stimulate competition among enforcement methods, thereby improving efficiencies of each.

Civil penalties

Consumer Action strongly supports the Final Report’s finding that civil penalty rates are currently set a level that will not be a sufficient deterrent to contraventions of the National Energy Laws and Rules.

The Final Report suggests that higher civil penalties (of \$1 million for bodies corporate and \$200,000 for individuals) should only apply for contraventions that satisfy certain principles, including: the size of any possible economic benefit or detriment that could be caused by a breach of the provision; the importance of the provision to the operation of the electricity or gas system; the importance of the provision for the achievement of the objectives of the National Energy Laws; and the difficulty in investigation and enforcement of breaches of the provision. We submit that these higher penalties should apply to all contraventions under the National Energy Laws and Rules, and don’t accept that there is a case for graduated penalties.

Under the Australian Consumer Law, contraventions of the unfair practices provisions (which deal with consumer protection) give rise to penalties of \$1.1 million for bodies corporate and \$220,000 for natural persons. Similar levels exist under national credit laws. Consumer Action submits that there should be a consistent approach to the level of penalties for contravention of consumer protection laws across industries.

We support the Final Report’s finding in relation to the penalty level for infringement notices, but note that these could be also made consistent with the approach taken under the Australian Consumer Law. We also support the recommendation that the maximum penalty for rebidding offences be set by reference to a multiple of three times the gains derived from a contravention.

² The National Credit Code is Schedule 1 to the *National Consumer Credit Protection Act 2010* (Cth).

Finally, we submit that there should be a mechanism through which maximum penalties can be indexed over time so as not to lose their value.

Legal architecture and procedural matters

Consumer Action supports the recommendations relating to updating and aligning corporate liability provisions with other similar regimes, and for the AER to have the power to compel the provision of evidence under oath.

Please contact us on 03 9670 5088 or at gerard@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