

24 August 2015

By email: energygovrev@industry.gov.au

Review of Governance Arrangements for Australian Energy Markets
Energy Division
Department of Industry and Science
GPO Box 9839
Canberra ACT 2601

Dear Secretariat

**Submission to Review of Governance Arrangements for Australian Energy Markets
Draft Paper**

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide input to the Review of Governance Arrangements for Australian Energy Markets Draft Paper (the **Draft Paper**).

We support a number of the recommendations in the Draft Paper, however we remain concerned that the recommendations only tinker with market governance arrangements rather than deliver fundamental reform that will prioritise the interests of consumers in the functioning of the energy market.

Consumer Action is an independent, not-for-profit, consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for vulnerable and disadvantaged consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

It is clear that the energy market is advancing at a rate that exceeds the scope of the current energy consumer protection framework. Clients are presenting with energy problems that no longer fit neatly into, nor can be resolved by, the protections provided by the Energy Retail Code in Victoria, or the National Energy Customer Framework (NECF). Instead, we are assisting consumers with a range of complex energy problems that extend into other aspects of the economy and a broader framework of protections, ie the Australian Consumer Law or the ASIC Act.

We view this as the transition from an energy market that has primarily comprised an energy flow, of electrons, from energy businesses to consumers, as passive recipients; into a more dynamic market, where the energy flows both ways. Trade is less focused on electrons and more focused on energy services, which are reflected in the way consumers relationship with technology evolves, and subsequently the changing value of energy. The energy market is extending beyond the National

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Energy Market (NEM), into something broader. With this in mind, we consider that current governance arrangements cannot meet the 'long term interests of consumers'.

Consumer Action receives approximately 16,000 calls a year from low-income and disadvantaged Victorians needing financial counselling to assist them with access and affordability in a range of markets. We also receive approximately 5,000 calls a year from consumers needing legal advice in the consumption of competitive products and services. We are therefore experts in what constitutes 'good consumer outcomes', which we perceive are necessary to facilitate a fair market.

We define good consumer outcomes as:

- Safe and fair products and services
- Useable information which is simple, clear and consistent
- Easy and equitable access to products and services
- Efficiency benefitting consumers
- Clear dispute resolution processes.

Within the context of governance arrangements for the energy market, we define good consumer outcomes as ensuring:

- That the objectives of each regulatory body are clear, with specific reference to a uniform understanding of 'long term interests of consumers';
- The market frameworks provide flexible and adaptable regulation in response to emerging products and services;
- Consumer protections are fair and consistent across industry segments, to ensure consumers receive the same outcomes regardless of product or service;
- A detailed understanding of natural differences in consumer markets based upon jurisdictional circumstances (ie where markets are more complex and evolved versus those markets with minimal competition and no technological diversity);
- Effective and responsive compliance and enforcement;
- Regulatory bodies with Boards constructed to:
 - o promote the diversity of the markets they regulate (including, consumers); and
 - o ensure appropriate accountability mechanisms (the appointment of a consumer commissioner/board member which encourages accountability to the objective of 'long term interests of consumers').
- Clear policy direction that recognises the role of regulators to promote competition as well as consumer protections;
- Regulatory processes that clearly balance the views of stakeholders, with key consideration of the clarified objective of 'long term interests of consumers'.

The key recommendations made by the Governance Review Panel (the **Panel**) will not fundamentally reform governance arrangements to promote consumer interests in the context of the emerging energy services market. Significantly, we consider that analysis conducted by the Panel has not fully considered governance arrangements through the lens of the consumer experience.

The 'long term interests of consumers'

To achieve the 'good consumer outcomes' we have identified above, it is essential that consumers are recognised as key players within the market. This can more fully be achieved through a clear and uniform interpretation of 'long term interests of consumers'.

The 'long term interests of consumers' can not accurately be represented in a market that places shareholder and business interests over and above those of its end users. A renewed focus is necessary to determine how the "the market is optimised" to ensure end users are able to actively and fairly participate in energy markets, in particular in the emerging market with its range of new technologies and services.

Indeed, the Panel identify that much of this review hinges on the 'long term interests of consumers',¹ and acknowledges that reform is necessary to clarify what this means to different parts of the market. However disappointingly, the Panel has failed deliver a firm recommendation to achieve this. The Panel has suggested that 'there may be merit in making this more explicit'² and that an 'expanded explanation might help address any existing misunderstandings'³ however goes to no length to define what this may involve. A clear recommendation that is visible to policy makers, regulators, industry and consumers alike, that recognises the importance of the 'long term interests of consumers' in an emerging market, is essential to an outcome that delivers good consumer outcomes. On this basis we consider it essential the Panel review its recommendations to include specific guidance to institutions operating under the NEO that will delivery good consumer outcomes, as we have outlined above.

COAG Energy Council

We are supportive of the Panel's recommendations outlined in Chapter Two of the Draft Report, specifically in relation to improving the strategic direction of the COAG Energy Council (the **COAG EC**) and the Standing Committee of Officials (SCO) processes. We consider enhanced transparency and accountability, strategic policy making and oversight of implementation of the reform agenda, will improve the way in which energy policy evolves in the Australian market.

Nationally consistent frameworks or fragmentation

We support the Panel's approach to overcome fragmentation within national frameworks with its proposed 'necessity criteria' (Recommendation Chapter 2, no.8). However, we consider that even with this criterion, jurisdictions will derogate where consumer protection outcomes are at risk—this in itself will be seen as a 'necessity'.

Consumer Action has long been involved in the development of the National Energy Customer Framework (the **NECF**), and has witnessed the 'on again/off again' approach of the Victorian government resulting in the current derogation. While other jurisdictions have minor derogations, the ongoing development of Victorian specific consumer protections, in response to market outcomes and consumer needs, indicates a potential longer term derogation. This highlights the need for baseline consumer protection frameworks, at their inception and in ongoing development, to be 'best practice', to facilitate nationally consistent outcomes.

As raised in our submission to the Issues Paper, we are concerned that COAG EC currently pursues energy market reform with a 'lowest common denominator approach'. While the nature of jurisdictional differences in the development of national policy can be complex, it is essential it adequately

¹ Prof Vertigan, Prof Yarrow, Mr Morton, *Review of Governance Arrangements for Australian Energy Markets-Draft Report July 2015*, Pg 58

² Ibid Pg 13

³ Ibid

acknowledges the varying levels of market maturity with the goal of enabling market outcomes that meet the needs of the most mature market, not the least mature.

The lowest common denominator approach may be an attempt to seek consensus. However, it is leaving consumers in some markets exposed to poor market outcomes. In the case of the NECF, it resulted in a framework that, while it advanced the protections of consumers in some jurisdictions, did not meet the needs of Victorian consumers at its completion—because it proposed a diminution of current protections.

The success of a nationally consistent framework therefore, can not solely be overcome by necessity criteria, but needs to look further, to the strategic approach of the COAG EC in energy market reform.

The Australian Energy Market Commission (AEMC)

We disagree with the Panel's recommendation to retain the AEMC as status quo, without including additional recommendations to enhance its obligations to deliver good consumer outcomes.

We are concerned that the Panel has not sufficiently heard consumer views on the limitations to the AEMC's approach—it is unclear to us whether this is because views were outnumbered, or the Panel did not consider these to be significant. We submitted a confidential draft of our 'Fix It' report, an evaluation of our experience initiating a rule change under the National Energy Retail Rules to the Panel following our submission to the Issues Paper. We will forward the Secretariat a final and public version for your consideration with our submission to the Draft Paper, in the coming weeks.

We consider that the AEMC are unable to effectively represent consumer interests and good consumer outcomes in the current context. Specifically based on;

- the AEMC's reliance on traditional economic theory and 'rational choice' over more evidence-based understanding of consumer behaviour. This means that the AEMC is unlikely to actively intervene in the market when consumer detriment is identified. Instead, they are likely to rely on responses that shift the onus to consumers such as increased information, and a push for enhanced consumer engagement. This approach has failed in modern, complex consumer markets.
- the AEMC's role undertaking reviews into effectiveness of competition. The AEMC is committed to its findings that retail markets are displaying effective competition, however this is problematic in terms of good consumer outcomes, for it becomes difficult for the AEMC to later take the view that competition in the market can be ineffective. For example, in relation to the issue of potential price-baiting practices in our retail rule change, the AEMC argued⁴ that price-baiting could not be a problem because price-baiting can only occur in markets where competition is ineffective. The AEMC's review into effectiveness of competition in 2014 found that competition was effective.⁵ Such a finding perhaps inhibits the AEMC from making any rule change which argues that competition is ineffective or could be made more effective.

⁴ It did not inquire as to whether these practices were occurring due to 'insufficient information gathering powers'.

⁵ AEMC, 2014, *2014 Retail Competition Review*, available <http://www.aemc.gov.au/Markets-Reviews-Advice/2014-Retail-Competition-Review>

- the AEMC has a limited understanding of consumer experience. A failure to understand the issues facing consumers, within the current environment, which differ largely based upon the level of market maturity in each jurisdiction, means that a 'one size fits all' regulatory approach is attempted, but will not fit. The AEMC is unlikely to undertake any reform to address these failures. This contributes further to the derogations from the NECF as jurisdictions will move to increase consumer protections where market failures are identified, particularly in the context of an emerging market. We point to the failure of the AEMC to effectively respond to the regulatory failure we presented in our rule change proposal outlined in 'Fix It', and the Victorian Government's subsequent commitment to address this issue through Victorian consumer protections.⁶
- the way evidence is considered by the AEMC. This particularly concerns the practice where the evidence-burden sits with the rule-change applicant rather than the decision-maker. The AEMC does not consider its role to investigate the market and any potential market issues. As such, it is unable to respond effectively to those issues raised by stakeholders. A substantial component of the rule change application we made to the AEMC for 'Fix it', was its economic analysis. This work drew on insights from behavioural economics to explain consumer behaviour. The analysis contained in AEMC's draft and final determinations, however, suggests that it would place most emphasis on 'traditional' economic analysis, and less emphasis on lessons from behavioural economics. For example, the AEMC's determinations suggests that it believes that outcomes such as 'maximum choice' and 'lowest price' are more important to effective competition than transparency, simplicity and consumer confidence. This is perhaps based in 'traditional' economic theory, with a strong preference for market-based solutions: establish the necessary conditions for suppliers to compete, and efficiency that satisfies consumer preferences will result. At least in the context of this rule change, the AEMC were less convinced by consumers' experience, nor theoretical frameworks stemming from behavioural economics, which explains consumer biases and imperfect decision-making.
- the limited information gathering powers of the AEMC. This issue has presented itself in a number of processes we have been engaged in including our rule change proposal⁷. Of importance to note is the issue of retail margins, identified in the 2014 Competition Review, which could not be further investigated, based upon the limited information gathering powers of the AEMC. For a regulator to be able to fully understand and respond to the market, it needs to have access to the information to form a clear view of market operations.
- the lack of accountability measures at the AEMC that apply to other regulators and market institutions. Unlike regulatory determinations of the AER, determinations of the AEMC are not subject to merits review or parliamentary oversight. Merits review allows a person affected by a decision to have that decision reviewed by a separate decision-maker. The review considers the merits of the initial decision and decides whether or not a correct and preferable decision

⁶ Lily D'Ambrosio, Minister for Industry, Minister for Energy and Resources, New Regulations to Give Families Certainty, Media Release, 1 May 2015 <https://4a5b508b5f92124e39ff-cdd8d0b92a93a9c1ab1bc91ad6c9bfdb.ssl.cf4.rackcdn.com/2015/05/150501-New-Energy-Regulations-To-Give-Families-Certainty.pdf>

⁷ Retailer Price Variations in Market Retail Contracts, <http://www.aemc.gov.au/Rule-Changes/Retailer-Price-Variations-in-Market-Retail-Contrac>

should be made. It has become quite common for determinations of the AER to be challenged and overturned via merits review. Decisions of the AEMC are subject to judicial review. Judicial review is a far narrower form of review compared to merits review, considering only the lawfulness of the decision-making not the substantive decision. It considers matters such as whether the decision-maker took into account all relevant information, excluded irrelevant matters, and reached a conclusion that, on the weight of the evidence, is reasonable in the circumstances. Given the AEMC is effectively making delegated legislation, it is nonsensical that parliaments do not have direct oversight.

Given the Panel has recommended the AEMC provide strategic advice to the COAG EC and SCO (Recommendation Chapter 3, no. 1), we consider these issues to be a major concern. If the AEMC is not in a position to provide advice to SCO or the COAG EC about the consumer experience across different markets of the NEM, how will strategic policy ensure that consumer views and experiences are sufficiently considered in policy development? We are experiencing a strategic policy deficit now, unless the scope of AEMC responsibility is addressed and refined, we consider this will remain unchanged for consumers.

Further, in relation to the Panel's recommendations:

- We disagree with the AEMC being required to sign off on AER guidelines (Recommendation Chapter 3, no. 10), as this may undermine the independence of AER processes. Further, as discussed above, we consider the AEMC has less (and limited) understanding of consumers, compared to the AER, and this is critical in relation to regulatory changes that relate to the retail market. Failure to fully understand consumers and retail markets could lead the AEMC to overrule decisions made by the AER.
- We support an expedited rule change process (Recommendation Chapter 3, no. 7). Our experience with our rule change proposal meant that by the time of the final decision other market failures were presenting themselves, and as a result of broader campaigning around the rule change, industry started to shift from fixed term contracts with unilaterally variable prices.
- We do not support the enhanced 'gateway test' or ability for the AEMC to terminate rule changes mid-process (Recommendation Chapter 3, no. 4). These mechanisms would serve as additional barriers to consumer participation when consumer initiated rule changes are essential to ensuring a dynamic and responsive market.
- We support the three yearly review to identify key strategic priorities and challenges as an input into COAG EC's policy agenda (Recommendation Chapter 3, no. 5), subject to the comments we have made in this submission in relation to the AEMC's limited expertise in consumer markets.

The Panel will need to ensure that the AEMC is sufficiently able to provide good consumer outcomes as an outcome of this Review process.

The Australian Energy Regulator (AER)

We disagree with the Panel's recommendation to separate the AER from the ACCC (Recommendation Chapter 4, no. 1). The Panel has focused its recommendation on pricing and access arrangements, excluding any apparent consideration of the AER's role in retail markets. We consider that the Panel has more fully analysed the AER by focusing on its role in monopoly markets,

the AER's primary task can be summarised as regulating network access (prices and standards⁸)

with little, if any focus on its pivotal role in regulating retail markets in South Australia, New South Wales, Queensland and Tasmania. Subsequently the Panel has made its recommendation without understanding what the implications of this will be on consumers.

Energy underpins people's health and wellbeing, and increasingly their communication and transportation. It is essential that consistent obligations to supply and protect consumers are provided across all suppliers and distributors of energy, *regardless of their source of energy supply*. Only if these obligations are consistent across the market can consumers be certain of their rights. At minimum, until energy consumer protections frameworks are developed to accommodate market changes, transparent working relationships between the AER and the ACCC are vital.

In reaching its recommendation for a stand alone AER, we believe the Panel has failed to consider:

- the compliance and enforcement role of the AER. We consider that the combined forces of the AER and the ACCC are more fully be able to identify and address retail energy market compliance issues and subsequently take enforcement action. The skills developed within the ACCC and the sharing of resources with the AER, have meant a higher level of expertise and experience across staff, and in the AER's general approach. For example, the ACCC has taken a keen interest in the energy market—most recently through court action against EnergyAustralia (and their telemarketer, Bright Choice Australia) in relation to poor telemarketing conduct. Its investigation was coordinated with the AER, which also instituted court action against this business relating to the bypassing of explicit informed consent laws to sign-up customers. Similarly, the ACCC's 'discounts off what' court actions against AGL and Origin (relating to the use of unclear discounts as a marketing tool) support AER goals around effective retail energy markets—clear marketing is essential to build consumer trust in a complex market.
- the value of the AER's physical presence in the jurisdictions it operates in, enabled by its relationship with the ACCC. While the Panel sees little benefit in 'cross organisational benefits'⁹, jurisdictional presence ensures local relationships with government stakeholders, industry and consumers, increasing the visibility of market issues specific in each jurisdiction. Separation from the ACCC will likely mean the AER will not be sufficiently resourced to maintain its presence in those jurisdictions.

⁸ Prof Vertigan, Prof Yarrow, Mr Morton, *Review of Governance Arrangements for Australian Energy Markets-Draft Report July 2015*, Pg 49

⁹ Ibid Pg 54

- the likelihood that the silo effect of industry specific regulations will be exacerbated. We consider that there is a heightened risk to consumers if energy consumer protections are regulated in isolation from broader consumer protections. Removing the ability of the AER to collaborate with the ACCC is likely to impact this further. At Consumer Action we are already seeing issues associated with consumer protections under two different frameworks with unlicensed/unauthorised parties providing various energy services to consumers. This has flow on effects for consumers, as those unlicensed/unauthorised parties are also not part of an energy ombudsman scheme. This situation is untenable for consumers in the face of increasingly complex energy solutions, and will be exacerbated should the AER be separated from the ACCC.

If the AER is separated from the ACCC, the following must be considered:

- How compliance and enforcement will be co-ordinated across monopoly and retail services. There is a considerable risk that energy specific retail protections will be forgotten in a body which is designed to have a focus on access and pricing only. Subsequently, it needs to be clear where the AER's retail functions will sit.
- As discussed above, the compliance and enforcement capability of the AER, the ongoing jurisdictional presence of the AER and whether the regulator will be sufficiently flexible and adaptable to meet consumer needs in an emerging market.

Board members

We agree with the Panel's recommendation to expand the number of commissioners/board members (Recommendation Chapter 6, no. 1), however we disagree with the proposed merits based approach to appointments (Recommendation Chapter 6, no. 3). It is essential that the Panel considers the role that a consumer specific commissioner can play in terms of accountability to consumer based objectives. Regulated businesses and their industry bodies are well resourced and can make representations in their interests across energy policy and regulation. Consumers are less able to do this, and rely on a dedicated channel within regulators, such as a specific representative, to raise concerns and identify solutions to systemic issues. Creation of a consumer specific member of governance bodies would remedy significant imbalance in stakeholder access, agency expertise and regulatory credibility

It essential to ensure that demand side interests are adequately represented in the operations across the energy sector, we consider that the COAG EC must appoint members with strong consumer expertise and an understanding of consumer protection, behaviour and decision-making to the boards of its regulatory bodies.

Thank you for the opportunity to comment on the Draft Paper. Please contact Janine Rayner on 03 8554 6943 if you have any questions.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, reading "Gerard Brody". The script is fluid and cursive, with the first name and last name clearly distinguishable.

Gerard Brody
Chief Executive Officer

A handwritten signature in black ink, reading "Janine Rayner". The script is elegant and cursive, with the first name and last name clearly distinguishable.

Janine Rayner
Senior Policy Officer