
**CONSUMER PROTECTIONS IN THE NATIONAL
ENERGY MARKET – THE NEED FOR
COMPREHENSIVE ENERGY-SPECIFIC CONSUMER
PROTECTIONS**



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FOREWORD

This paper was developed with assistance of a steering committee, with members drawn from the Consumer Utilities Advocacy Centre, the Public Interest Advocacy Centre, the Australian Council of Social Service, and the Centre for Consumer and Credit Law, Griffith University.

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ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACIF	Australian Communications Industry Forum (now called Communications Alliance)
ACMA	Australian Communications and Media Authority
AER	Australian Energy Regulator
ASIC	Australian Securities and Investment Commission
BFSO	Banking and Financial Services Ombudsman
CAV	Consumer Affairs Victoria
CSR	Corporate Social Responsibility
ECTC	Electricity Customer Transfer Code (Victoria)
ERAA	Energy Retailers Association of Australia
ERC	Energy Retail Code (Victoria)
EWOV	Energy and Water Ombudsman Victoria
FTA	<i>Fair Trading Acts</i>
Marketing Code	Code of Conduct for Marketing Retail Energy (Victoria)
MCE	Ministerial Council on Energy
MoU	Memorandum of Understanding
NEL	National Electricity Law
NEM	National Electricity Market
NGL	National Gas Law
NRS	National Relay Service
SCO	Standing Committee of Officials
SCOCA	Standing Committee of Officials on Consumer Affairs
TCCPS Act	<i>Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)</i>
TIO	Telecommunications Industry Ombudsman
TPA	<i>Trade Practices Act 1974 (Cth)</i>
USO	Universal Service Obligation

EXECUTIVE SUMMARY

- Energy-specific consumer protections complement generalist consumer protections under the *Trade Practices Act 1974* (Cth) (**TPA**) and state *Fair Trading Acts* (**FTAs**), and do not duplicate those protections.
- Energy-specific consumer protections contribute the efficient operation of a competitive energy market for the long-term interests of consumers.
- Generalist consumer protections do not provide regulation with respect to:
 - standard contract terms and conditions, for example, in relation to billing and statements of account; payment and collection; and dispute-resolution;
 - ensuring access to supply, protection against disconnection and retailer obligations in relation to dealing with utility debts and the financial hardship of energy consumers; and
 - various matters related to the marketing of essential services, including information provision and appropriate contractual consent protections.
- Energy consumer protections in the above areas are needed to ensure that:
 - consumers have continued access to energy supply and are not disconnected on the basis of an incapacity to pay; and
 - consumers can effectively participate in energy markets to ensure that competitive and efficient outcomes ensue.
- Other sectors have a range of robust industry-specific consumer protections contained in legislation, industry codes and through position statements of industry ombudsman schemes, which contribute to the effective operation of competitive markets in those sectors.
- The proposal to place energy-specific consumer protections in the National Electricity and Gas Rules warrants further consideration, but the proposal must ensure that:
 - energy-specific consumer protections are comprehensive and are in the long-term interests of consumers;
 - the process for updating and amending consumer protections is speedy and flexible enough to respond to changing market circumstances;
 - there is robust monitoring and enforcement by an independent regulator (the **AER**); and
 - there are adequate dispute resolution processes for small-end consumers.

A. BACKGROUND AND OVERVIEW

A.1 Background

In late 2005, the MCE SCO released a consultation paper prepared by NERA Economic Consulting and Gilbert + Tobin on the national framework for energy distribution and retail regulation.¹ This paper proposed a retail energy consumer protection framework which would reduce compliance burden on energy suppliers, simplify the regulatory environment for energy suppliers, help energy suppliers comply with the regulatory obligations and reduce costs for energy suppliers". The paper stated:

With limited exceptions ...“the use of other forms of regulatory instruments (such as Codes, licences, mandatory Guidelines, and Regulations) to apply regulatory obligations would be discontinued thus simplifying the regulatory environment that is currently characterised by a myriad of instruments of different types applying to Australian energy retailers and distributors”.²

Unsurprisingly, industry groups strongly supported this proposal. For example, in its submission to the above consultation paper, the Energy Retailers' Association of Australia (**ERAA**) stated:

The ERAA supports the driving principle, that where effective competition exists that no energy specific regulation of Market Contracts should be needed. The ERAA is of the view that the consumer protection issues, including cooling-off periods and disclosure of contractual information, should be dealt with through general consumer protection law. Further regulation of these issues merely generates additional impediments to moving from a regulated market to effective competition”.³

This paper provides an overview of current consumer protections applying to the provision of energy to small-end residential users, as well as reviewing sector-specific consumer protections in other sectors. It concludes that:

- the removal of energy specific consumer protection from the framework of energy regulation will have disastrous consequences for energy consumers and the operation of an efficient energy market, and
- such consumer protections are necessary not only to adequately protect consumers, but to facilitate the achievement of the NEM objective.

The NEM objective, provided for in section 9 of the *National Electricity Law* (**NEL**) states:

The national electricity market objective is to promote efficient investment in, and efficient operation and use of, electricity services **for the long term interests of consumers of electricity** with respect to the price, quality, reliability and security of supply for electricity and the reliability, safety and security of the national electricity system”“(emphasis added).

A very similar objective is proposed for the soon-to-be legislated National Gas Law (**NGL**).

¹ NERA Economic Consulting and Gilbert + Tobin, *Public Consultation on a National Framework for Energy Distribution and Retail Regulation*, May 2005, available at

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=E7AF348F-DC00-2DD9-577D034CDB676D12>.

² As above, at 8.

³ Energy Retailers Association of Australia, Submission to the Public Consultation on a National Framework for Energy Distribution and Retail Regulation, January 2006, available at:

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=D56F484C-CE76-3670-A23A1795B55B2B0E>.

Generalist consumer protections are acknowledged as an essential prerequisite for the efficient functioning of a deregulated market economy. The TPA and jurisdictional FTAs do this by promoting efficient markets and fair-trading practices, and thereby seeking to maximise consumer welfare. However, in some industries, further sector-specific consumer protections are required. The reasons for sector-specific consumer protections include:

- the fact that the service relates to an essential service or public good;
- the level of maturity of the particular market;
- the level of competition of the particular market.

This paper acknowledges that there are currently numerous jurisdictional consumer protection instruments, and that harmonisation of these can lead to efficiencies and create certainty for market participants, as well as bring about material outcomes for consumers. Such harmonisation of itself will deliver enormous benefits to businesses in the form of reduced compliance costs. These benefits should encourage a best practice model to be adopted.

Importantly, this paper also demonstrates that consumer protection policy contributes to the operation of efficient markets, rather than impinging upon them, as is implied by the MCE SCO consultation paper. Consumer protection policy (and social policy) should work in tandem with economic and competition policy to protect and enhance consumer welfare. As noted by Ian McAuley, consumer welfare does not involve some trade off of economic objectives; rather it is a central objective of economic policy”.⁴ The wholesale removal of energy-specific consumer protections counters the long term interests of consumers and may seriously impinge the effectiveness of competition to bring about consumer benefit in energy markets, as well as the efficient provision of an essential service.

This paper therefore argues that continued energy-specific consumer protections are necessary for the achievement of the NEM objective, that is the promotion of the long-term interests of consumers. Furthermore, it argues that consumers buoyed by strong protections play a fundamental role in ensuring that markets operate efficiently and competitively.

A.2 Overview

The remainder of this paper is as follows:

- Part B provides an overview of the current generalist consumer protections contained in the TPA and jurisdictional FTAs. This section of the paper will highlight a number of areas where current consumer protections in the TPA and FTAs are lacking, which compromises the effectiveness of competition and the operation of efficient markets.
- Part C provides an overview of energy-specific consumer protections. Due to limitations of time and space, this section necessarily focuses on protections that exist in Victoria, and suggests that these protections contribute to the operation of an efficient energy market in Victoria and to the effectiveness of competition. However, the Comparison Document compares energy-specific consumer protections from all NEM jurisdictions, and is a companion to this paper.⁵
- Part D details sector-specific consumer protections in two comparable industries –“financial services and telecommunications. This discussion demonstrates how sector-specific consumer protections contribute to consumer benefit as well as the efficient operation of markets.

⁴ Ian McAuley, *Roundtable on demand-side economics for consumer policy: summary report*, Organisation for Economic Cooperation and Development, Doc No DSTI/CP/(2006)3/FINAL, April 2006, p 18.

⁵ Consumer Action Law Centre will release the Comparison Document, a document comparing consumer protections across NEM jurisdictions and identifying best-practice, early in 2007.

- Part E discusses in more details how consumers and consumer protections contribute to the operation of efficient and competitive markets.

B. GENERAL CONSUMER PROTECTIONS APPLYING TO THE PROVISION OF ENERGY SERVICES

B.1 TPA and FTAs

Consumer protections that exist in the TPA and jurisdictional FTAs⁶ may be grouped as follows:

- protections against unfair practices;
- product safety and information;
- conditions and warranties in consumer transactions;
- protections in respect of off-business premises sales; and
- protections against unfair contract terms.

While this list does not represent every consumer protection that exists in the TPA and FTAs, it provides a good overview of general consumer protections that apply to the provision of the sale of energy (and, of course, other goods and services). For brevity, the following discussion focuses on the consumer protections found in the TPA and the Victorian FTA.

Protections against unfair practices include:

- the prohibition against misleading and deceptive conduct;⁷
- the prohibition against unconscionable conduct;⁸
- prohibitions against false representations;⁹
- the prohibition against harassment and coercion;¹⁰ and
- unsolicited offers, pyramid selling and the like.¹¹

Product safety and information regulations are contained in Division 1A of the Part V of the TPA and Part 3 of the Victorian FTA and deal with:

- the publication of warning notices by the government in relation to goods under investigation as being potentially dangerous;
- banning of goods which do not comply with prescribed product safety standards;
- banning of unsafe goods;
- compliance with consumer product information standards;
- compulsory recall of unsafe goods; and
- notification to the government of voluntary recalls.

Conditions and warranties in consumer transactions are contained in Division 2 of Part V of the TPA and Part 2A of the Victorian FTA. These provisions imply certain non-excludable conditions and warranties into all consumer contracts. In relation to goods, warranties and conditions are as follows:

- a warranty¹² and condition¹³ as to title;
- a warranty for quiet enjoyment;¹⁴
- a warranty¹⁵ and condition¹⁶ that goods are free from encumbrance;

⁶ *Fair Trading Act 1999* (Vic); *Fair Trading Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Fair Trading Act 1999* (Qld); *Fair Trading Act 1987* (SA); *Fair Trading Act 1990* (Tas); *Fair Trading Act 1987* (WA).

⁷ s 52, TPA; s 9, FTA (Vic).

⁸ ss 51AAB-51AC, TPA; ss 7-8A, FTA (Vic).

⁹ s 53-53A, TPA; s 12-3, FTA (Vic).

¹⁰ s 60, TPA; s 21, FTA (Vic).

¹¹ s 63A-65 and Div 1AAA of Pt V, TPA; s22-26, FTA (Vic).

¹² s 69(1)(a), TPA.

¹³ s 32G(1)(a), FTA (Vic).

¹⁴ s 69(1)(b), TPA, s 32G(1)(c), FTA (Vic);

¹⁵ s 69(1)(c), TPA.

¹⁶ s 32G(1)(b), FTA (Vic).

- a condition that goods supplied by description will correspond with that description;¹⁷
- a condition that where the specific purpose of the goods is made known, the goods are fit for that purpose;¹⁸
- a condition that goods supplied by sample will correspond with that sample;¹⁹ and
- a condition that goods are of merchantable quality.²⁰

For the purposes of the TPA and the Victorian *Fair Trading Act 1999*, gas and electricity are considered goods.²¹ Where a breach of any of the above conditions or warranties occurs, the action to be instituted by the consumer is an action for breach of contract, not an action for breach of the legislation.

Off-business premises sales are primarily regulated through state FTAs rather than the TPA. The Victorian *Fair Trading Act 1999* includes specific regulation of three types of off-business premises sales relevant to the sale of energy:

- contact sales agreements (door-to-door sales);²²
- telephone marketing agreements;²³ and
- non-contact sales agreements (distance selling, such as at shopping centres or internet sales).²⁴

These provisions impose obligations as to the provision of cooling-off periods, the limitation of marketing hours and the supply of documentation. For example, a 10 day cooling off period applies to contact sales agreements and telephone marketing agreements. This period is extended where consumers are not provided with complete contractual documentation, including a notice advising of a consumer's right to cancel a contract and a notice which may be used to cancel the contract. Explicit informed consent is required for telephone marketing agreements.

Victoria is the only jurisdiction to legislate with respect to **unfair terms in consumer contracts**. The relevant provisions are contained in Part 2B of the Victorian *Fair Trading Act 1999*. The Victorian provisions make void:

- terms in consumer contracts that are found to be unfair; and
- terms in standard form consumer contracts that are prescribed to be unfair.

A term in a consumer contract will be considered unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance to the parties' rights and obligations arising under the contract to the detriment of the consumer.²⁵

The Standing Committee of Officials on Consumer Affairs (**SCOCA**) released a discussion paper on unfair contract terms in 2004²⁶ and a regulatory impact statement was scheduled to be submitted to the Ministerial Council on Consumer Affairs (**MCCA**) by December 2005. Despite this, there have been no further moves to institute national unfair contract terms legislation.

¹⁷ s 70, TPA, s 32H, FTA (Vic).

¹⁸ s 71, TPA; s 32IA, FTA (Vic).

¹⁹ s 72, TPA;

²⁰ s 32I, FTA (Vic).

²¹ s 4, TPA; s 3, FTA (Vic).

²² Div 2 of Part 4 of FTA (Vic).

²³ Div 2A of Part 4 of FTA (Vic).

²⁴ Div 3 of Part 4 of FTA (Vic).

²⁵ s 32W, FTA.

²⁶ See:

<http://www.fairtrading.qld.gov.au/oft/oftweb.nsf/web+pages/CD456F7C38F523684A256E240014EF7C?OpenDocument&L1=Publications/>

B.2 Generalist consumer protections – not adequate protection for essential services

The above consumer protections, while extensive, do not provide sufficient protection to cover the intricacies of particular industry sectors, especially essential services. Parts C and D of this paper detail particular industry-specific consumer protections applicable to the energy, financial services and telecommunication industries. This discussion will demonstrate the gaps in the above consumer protection framework with respect to the provision of essential services, which has not undergone any comprehensive review since its inception. Further, there are inconsistencies between the state and territory FTAs, such as in relation to the rules regulating off-business premises sales. Harmonised industry-specific consumer protections can enable business to reduce compliance costs.

B.3 Dispute resolution

The adequacy of consumer protections does not only rely upon the existence of the law. It also relies upon the existence of effective monitoring and enforcement of consumer protections, as well as effective dispute resolution procedures. Various jurisdictions have created low-cost small claims tribunals to deal with disputes in relation to consumer protection regulation. In Victoria, the Victorian Civil and Administrative Tribunal (**VCAT**) has jurisdiction in relation to complaints under the FTA.

VCAT has a very broad jurisdiction to hear and determine consumer and trader disputes²⁷ and can make wide-ranging orders.²⁷ It also has broad powers to make any orders it considers fair where the dispute relates to the supply of goods ordinarily used for personal, household or domestic purposes.²⁸ Despite this, it generally conducts proceedings in an adversarial fashion and it has no power to address systemic problems. Consumer Affairs Victoria (**CAV**) also has power to undertake conciliation and mediation in respect of consumer and trader disputes. However, its policy is to refer disputes relating to energy to the Energy and Water Ombudsman Victoria (**EWOV**).²⁹

EWOV is an industry specific dispute resolution scheme set up to resolve consumer disputes in relation to energy and water providers. EWOV is one of a number such industry consumer complaints bodies which commonly make reference to consumer protections. Importantly, such bodies often prepare their own policy positions or statements, which become significant in their conciliation processes and/or final decision-making. In many cases, these policy positions become important consumer protections, specific to particular industry practices. The discussion in Part D highlights some of these industry specific consumer protections in relation to the Telecommunications Industry Ombudsman (**TIO**) and the Banking and Financial Services Ombudsman (**BFSO**).

EWOV and similar models also have the advantage that, because they are funded by industry, they deliver a price signal where businesses fail to comply with the regulatory framework. By charging fees when consumers make complaints to Ombudsman schemes, businesses are incentivised²⁹ to comply with consumer protections.

B.3 Monitoring and enforcement

Monitoring and enforcement of the TPA is undertaken by the ACCC, while monitoring and enforcement of the state FTAs is undertaken by various jurisdictional fair trading agencies. In Victoria, this is undertaken by CAV.

²⁷ s 108, FTA (Vic).

²⁸ s 109, FTA (Vic).

²⁹ Consumer Affairs Victoria, *Conciliation Policy*, August 2004.

While fair trading agencies monitor general fair trading legislation, it is commonplace for industry regulators to regulate consumer protections relevant to their industries. For example, the Australian Securities and Investments Commission (**ASIC**) regulates consumer protections that apply to the financial services sector (see Part D for further discussion).

With respect to energy, there are a range of jurisdictional energy regulators.³⁰ State and territory energy regulators will transfer their powers with respect to retail and distribution matters (except retail price regulation) to the new Australian Energy Regulator (**AER**) and the Australian Energy Market Commission (**AEMC**) from 1 January 2008.³¹ The AEMC will make the National Energy and Gas Rules (the **Rules**), while the AER will enforce the Rules.

Fair trading agencies generally have memoranda of understanding (**MoU**) with energy regulators. These MoUs enable information sharing and joint regulation of energy industries for the benefit of consumers. The specialist knowledge of regulators in the energy sector can be fundamental to effective monitoring and enforcement of generalist consumer protections.

³⁰ Essential Services Commission Victoria (**ESCV**), Essential Services Commission of South Australia (**ESCoSA**), Independent Pricing and Regulatory Tribunal –NSW (**IPART**), Energy Regulatory Authority –WA (**ERA**), Energy Regulator of Tasmania (**ERT**).

³¹ *Australian Energy Market Agreement*, cl 14.

C. ENERGY SPECIFIC CONSUMER PROTECTIONS

C.1 Introduction

The following discussion of energy-specific consumer protections demonstrates how energy-specific consumer protections complement the generalist protections outlined in Part B, recognising that the provision of energy is an essential service requiring specific protections. There are a number of instruments which provide for energy-specific consumer protections. Rather than detail every energy-specific consumer protection, the following discussion focuses on protections applying to consumers in Victoria, including:

- Energy Retail Code;³²
- Code of Conduct for Marketing of Retail Energy;³³
- Electricity Customer Transfer Code;³⁴
- Guideline on Explicit Informed Consent;³⁵
- Guidelines on Credit Assessment;³⁶
- Guideline on Product Disclosure;³⁷
- Wrongful disconnection payment legislation;³⁸
- Hardship policies legislation;³⁹ and
- LPG Retail Code.⁴⁰

For a comprehensive outline of energy-specific consumer protections that apply in the various jurisdictions, please see the comparison document.

C.2 Energy Retail Code

The Energy Retail Code (**ERC**) specifies minimum retail standards for gas and electricity customers consuming less than 160 MWh/year and gas customers consuming less than 10Tj/year.

The ERC contains consumer protections in relation to billing and the collection cycle of energy retailers. These protections are not provided for in generalist consumer protection legislation and provide for a certain, regular service by retailers for the benefit of consumers. For example, the ERC provides:

- that retailers must bill customers at least every 3 months for electricity and at least every 2 months for gas;⁴¹
- that bills must include specified information, including whether the bill is based on actual or estimated usage, a summary of payment methods and arrangements, the availability of concessions and graphs of usage;⁴²

³² ESC, *Energy Retail Code*, v 2 (February 2006), available at: <http://www.esc.vic.gov.au/NR/exeres/087F5E65-5A5D-4EC4-8CDC-CF4C847B92AC.htm> (**ERC**).

³³ ESC, *Code of Conduct for Marketing Retail Energy in Victoria*, (October 2004), available at: <http://www.esc.vic.gov.au/public/Energy/Regulation+and+Compliance/Codes+and+Guidelines/Marketing+Code+of+Conduct/Marketing+Code+of+Conduct.htm> (**Marketing Code of Conduct**).

³⁴ ESC, *Electricity Customer Transfer Code* (April 2004), available at: <http://www.esc.vic.gov.au/NR/exeres/5E0C1BE0-0D15-4F75-9253-8AF35FF34579.htm> (**ECTC**).

³⁵ ESC, *Guideline No 10 – Confidentiality and Informed Consent: Electricity and Gas*, (May 2002), available at: <http://www.esc.vic.gov.au/NR/exeres/1482EA2E-19C4-4B42-B719-550647AEA140.htm>.

³⁶ ESC, *Electricity Guideline No 4 – Credit Assessment*, (April 2002), available at: <http://www.esc.vic.gov.au/NR/exeres/9C9BA30C-675C-4E93-9DAC-BE0CB5BB6666.htm>.

³⁷ ESC, *Guideline No 19: Energy Product Disclosure*, issue 2 (December 2005) available at: <http://www.esc.vic.gov.au/NR/exeres/412480E0-054F-40C4-BEBC-5CB29F4BA55A.htm>

³⁸ *Electricity Industry Act 2000*, s 40B; *Gas Industry Act 2001*, s 48A.

³⁹ *Electricity Industry Act 2000*, Div 6; *Gas Industry Act 2001*, Div 4A.

⁴⁰ Australian Liquefied Petroleum Gas Association Ltd, *Victorian LPG Retail Code* (December 2005), available at: <http://www.doi.vic.gov.au/DOI/Internet/Energy.nsf/AllDocs/03C0C2FE8460D174CA2570490017B918?OpenDocument> (**LPG Retail Code**).

⁴¹ ERC, clause 3.2.

- that meters must be read at least once every 12 months and provisions relating to estimated bills and bill smoothing;⁴³
- a limit of 9 months on back-billing where undercharging results from a failure of a retailer's billing system;⁴⁴
- that the due date for payment must be not less than 12 days from the date of the bill;⁴⁵ and
- that there are to be a range of payment methods (by person, mail or direct debit).⁴⁶

In relation to payment methods, clause 7.2(b) of the ERC was inserted to clarify that consumers could cancel direct debits through either the relevant financial institution or the retailer. Prior to this, there was some confusion about how cancellations of direct debits are processed, with both retailers and financial institutions often suggesting the responsibility for cancellation lay with the other.⁴⁷ The re-drafted Banking Code of Practice now clarifies that financial institutions must process direct debit cancellations promptly.⁴⁸ The generalist consumer protection laws are silent on the issue.

The ERC also allows flexibility for retailers and consumers to vary terms by agreement. For example, there are a number of terms and conditions in the ERC that the parties can agree not to apply, where the consumer has provided explicit informed consent.⁴⁹

Importantly, the ERC provides specific protection for low-income and vulnerable consumers. Recognising that the provision of energy is an essential service, in its draft decision on the ERC, the ESC stated that the Code is:

*structured with a view to mitigating and adverse impacts ...“on low-income and vulnerable consumers”.*⁵⁰

Clauses 11, 12 and 13 are the primary clauses of the ERC that provide for retailer obligations in relation to payment difficulties, instalment plans and disconnection. These clauses provide the basis for an effective and respectful framework for energy retailers to deal with energy consumers experiencing financial hardship.

- Clause 11 requires retailers to offer customers experiencing payment difficulties a payment plan that is in accordance with their capacity to pay, provide details of concessions, offer energy efficiency information and advice about the availability of an independent financial counsellor.
- Clause 12 sets out further requirements with respect to instalment plans.
- Clause 13 provides that a retailer can only disconnect a customer for failure to make payments if it has sent a reminder notice and disconnection warning, and the failure does not relate to a first instalment plan.⁵¹

Generalist consumer protections do not incorporate protections for consumers in hardship. Nevertheless, such protections are fundamental to the effective operation of markets for essential services. The Victorian Committee of Inquiry into Energy Hardship noted the importance of the

⁴² ERC, clause 4.

⁴³ ERC, clause 5.

⁴⁴ ERC, clause 6.2

⁴⁵ ERC, clause 7.1.

⁴⁶ ERC, clause 7.2.

⁴⁷ See BFSO Bulletin 39.

⁴⁸ Australian Bankers' Association, *Code of Banking Practice*, August 2003.

⁴⁹ ERC, clause 19.1. Appendix 1 of the ERC lists the terms and conditions that can be amended by agreement.

⁵⁰ ESC, *Draft Decision – “A review of Electricity and Gas Retail Codes* (January 2004) p 4, available at:

http://www.esc.vic.gov.au/NR/rdonlyres/002C4BFA-915B-487F-87E2-4080ADEF8845/0/FinalDraftDecision_January_04_Public.pdf.

⁵¹ Note that this is a summary only and that there are other obligations on both retailers and consumers imposed by these clauses.

ERC as a key protective mechanism”“for those experiencing hardship.⁵² Indeed, the Committee recommended that the ESC strengthen its monitoring of retailer compliance and adherence to the ERC.

Finally, the ERC provides that retailers must handle complaints in accordance with the Australian Standard on Complaints Handling, and must include the phone number of the EWOV on any disconnection warning.⁵³ While membership of EWOV is a licence condition, the obligation for retailers to deal with complaints effectively and provide information about EWOV is not included in general consumer protections. This notification requirement has proved extremely effective in bringing EWOV to consumers”“attention at a time they are most likely to need it. The application of such a requirement in other industries is under consideration.

C.3 Code of Conduct for Marketing Retail Energy in Victoria

The Code of Conduct for Marketing Retail Electricity was implemented in May 2002 with the introduction of full retail contestability into the Victorian electricity market. In the decision of the ESC to implement the original Marketing Code, the ESC states:

This Code of Conduct for Marketing Retail Electricity aims to ensure high standards are met in the marketing of electricity to consumers of less than 160MW hours per year.

The Code reflects the responsibility of retailers to all consumers that is crucial to maintaining and enhancing confidence in the retail electricity industry. It aims to ensure that all retailers are bound by the same standards.

*The Code reinforces key provisions of the Victorian Fair Trading Act 1999 and the Trade Practice Act 1974, specifically those provisions covering misleading and deceptive behaviour and unconscionable conduct. **Further, it supplements these legislative requirements by addressing such matters as contact hours, disclosure of information, informed consent to enter contracts, and training and auditing.***

Recognising the importance of flexibility, the Code is designed to remain a live”“ document, subject to continuous improvement through consultation with electricity retailers, government, relevant regulatory authorities and consumer organisations. The principles of transparency, integrity and inclusiveness that underpinned the development of the Code will inform future improvements (emphasis added).⁵⁴

The Code was reviewed in 2004 and became known as the Code of Conduct for Marketing Retail Energy (the **Marketing Code**) (covering the marketing of both electricity and gas).

There has been some criticism that the Marketing Code duplicates consumer protection provisions in the FTA. However, rather than duplicating the FTA, as stated by the ESC, it reinforces and extends provisions of generalist consumer protection legislation. It should also be noted here that the FTA marketing provisions outlined in Part B above are more robust than provisions in other jurisdictions (for example, by specifically regulating telephone marketing agreements).

The Marketing Code also helps articulate the application of some of those general protections to the energy sector. By doing so, the ESC is able to monitor the marketing of energy contracts and

⁵² Committee of Inquiry into the Financial Hardship of Energy Consumers, *Main Report*, September 2005.

⁵³ ERC, clause 28.

⁵⁴ ESC, *Code of Conduct for Marketing Retail Electricity in Victoria –“Final Decision*, April 2002, available at: <http://www.esc.vic.gov.au/NR/rdonlyres/882B8E72-41A3-4051-9066-05B73E7BDAFA/0/MarketingRetailCodeApr02.pdf>.

not leave that task to CAV alone. The specialist knowledge of the regulator of the energy sector enables it to more easily identify problematic conduct in the market, in collaboration with CAV. Importantly, the Marketing Code also provides further protection over and above general protections in relation to the marketing of energy contracts. For example,

- clause 4, which addresses training, product and code knowledge of marketing representatives;
- parts of clause 5, relating to personal contact, telephone contact, the keeping of 'no contact lists', the keeping of records on personal visits and telephone contacts made by marketing representatives to consumers;
- the requirement of clause 6.1 that information required by the Code be provided to consumers in plain English and designed to be readily understood by consumers;
- parts of clause 7, in particular, sections about the consent audit process, record keeping and sales to minors and 'authorised' customers;
- clause 8, which provides for customers to be given a date from which the retailer will be responsible for the electricity and/or gas service to the supply address, and keeping the customer informed when this will take some time;
- clause 9, which addresses misrepresentation by retailers that they are conducting market research to encourage consumers into contracts; the requirement for retailers to establish and abide by marketing principles that comply with the National Privacy Principles and any regulatory guideline on privacy; and
- clause 10, which deals with the requirements for retailers' internal dispute resolution and available external dispute resolution.

The Energy and Water Ombudsman NSW (**EWON**) has reported increased complaints about retail competition, from 8% in 2004 to 10% in 2005.⁵⁵ EWON also reports 17% of its cases to be in relation to retail competition.⁵⁶ Retail competition includes marketing conduct and errors in transferring accounts. Given that marketing complaints are relatively high, even with marketing codes of conduct, continued regulatory oversight of marketing and sector-specific regulation is required.

C.4 Electricity Customer Transfer Code

The Electricity Customer Transfer Code (**ECTC**) was first instituted in 2002 to facilitate and regulate aspects of the processes by which consumers change their electricity retailer. An amended ECTC was implemented in July 2004. The ECTC operates in conjunction with the CATS retail transfer procedures which operate under the National Electricity Rules (the **Rules**).

While the ECTC does not provide specific consumer protections in itself, it operates to enable other consumer protections, in particular, the operation of the cooling-off protections.

As outlined above, the Victorian *Fair Trading Act 1999*, the ERC and the Marketing Code all include references to the requirement for cooling off periods for off-business premises (ie contact, non-contact and telemarketing) sales agreements. However, all of these instruments are silent as to what action, if any, a retailer may take in relation to the sale prior to the expiry of the cooling off period. To facilitate better operation of a consumer's cooling off rights, the ECTC provides that the effective transfer of a consumer's account to a new retailer cannot occur before the cooling-off period has expired. Clause 4.1 of the ECTC provides that a proposed transfer to a new retailer must be initiated by the proposed new retailer as soon as practicable after the expiry of the cooling-off period (if any) applicable to the contract between the consumer and the new retailer". In this regard, it acts as an important energy specific regulatory document, protecting the interests of consumers.

⁵⁵ EWON, *EWONews*, issue 11&12 (June 2005) and issue 13 (March 2006).

⁵⁶ EWON, *Resolution 22*, (1 January 2006 – 30 June 2006).

In 2005, the ESC proposed to amend clause 4.1 of the ECTC as part of its End-to-End Project. The following case studies are taken from the CLCV's submission to the ESC in relation to this proposal, which support the retention of the provision as it appears that without the prohibition, traders will attempt to circumvent the cooling-off period by taking action within the period so as to reduce the likelihood of it being utilised.

Security Alarms

FAI Security Alarms was the subject of investigations by consumer protection authorities and class action litigation by the private legal profession.

Discovered documents disclosed that the company had instructed sales staff to provide the required cooling off notice but to pressure customers to agree to the installation of the alarm within the 10 day cooling off period to reduce the risk of cancellation of the contract.

In this case, the trader encouraged action to be taken prior to the expiry of the cooling off period in the belief that it would reduce the likelihood that the customer would exercise their right to cancel the contract, and thereby circumvent the protections of the FTA.

Second Hand Motor Vehicles

The Victorian Government amended the *Motor Car Traders Act 1986 (Vic)* (**MCTA**) in 1986 to introduce a three day cooling off period after the sale of a second hand motor vehicle.

Industry successfully argued that where a customer required the immediate delivery of the motor vehicle, the customer should be entitled to waive the cooling off period. However, CAV was concerned that unethical motor car traders would insist that customers sign a waiver even when there was no requirement for immediate delivery of the vehicle.

Section 43 (2) of the MCTA was drafted specifically to prevent such behaviour. The section was worded to ensure that a waiver would only be effective if the customer signed the document immediately before accepting delivery of the car.”

This is a clear indication that traders and service providers will take action prior to the expiry of the cooling off period in the belief that such action will reduce the likelihood that a customer will cancel the contract.

Energy Contracts

The proposal to amend clause 4.1 of the ECTC may well have the effect of diminishing the capacity of the customer to take advantage of the cooling off period even if the retailer is not acting unethically.

A customer may contact a retailer by telephone to advise of an intention to cancel the contract only to be told, too late, the transfer has been initiated” or the transfer has already been lodged with NEMMCO”.

As the history of use and abuse of cooling off periods in consumer protection legislation demonstrates, the proposal would have significantly impinged on the right of the customer to cancel an energy contract.

In response to CLCV's submission, the ESC determined not to proceed with its proposal to amend the ECTC.⁵⁷ This demonstrates how energy-specific regulation is necessary to ensure that consumer protections operate effectively.

C.5 Guideline on Explicit Informed Consent

Clause 19 of the ERC provides that the explicit informed consent of a customer is required before a retailer can transfer a customer.⁵⁸ This requirement recognises that dealing with written contracts, particularly for many vulnerable and disadvantaged consumers, is not an everyday occurrence. Indeed, as consumers have not in the past had to sign energy contracts (ie, they have had deemed contracts"which provide all consumers with the same rights and obligations), this requirement attempts to ensure that consumers have a genuine understanding of the contract they have entered into.

The ESC has created *Guideline No 10 – "Confidentiality and Informed Consent*, which details what is meant by explicit informed consent. Essentially, the requirement is that the consent be:

- explicit –"that is, it must be opt-in"consent⁵⁹ and it must be verifiable and auditable (in writing signed by the customer or recorded by electronic communication)⁶⁰;
- informed –"that is, the retailer must have fully and adequately disclosed all matters relevant to the consent, in plain English;⁶¹ and
- competent –"that is, the person giving consent must have competence and legal capacity to do so.⁶²

Not every consumer contract requires explicit informed consent. Under general consumer protection legislation in Victoria, only telephone marketing agreements require there to be explicit informed consent.⁶³ Furthermore, there is no specific requirement for explicit informed consent in the FTA to be opt-in"consent. The specific requirement of explicit informed consent in energy contracts recognises that energy is a special"product, and consumers require specific protection in engaging with the market.

C.6 Guidelines on Credit Assessment

While the supply of energy is not generally perceived to be a credit product (that is, it is not generally regulated by consumer credit legislation or protections), utilities may be considered credit providers on the basis that a substantial part of the business involves the provision of loans". Under the *Privacy Act 1988* (Cth), the concept of loan" is defined to include a contract under which a person is permitted to defer payment of a debt, or to incur a debt and defer its payment. The provision of energy bills after the consumption of energy, and the deferring of payment until the bill's due date, therefore, may be considered a loan"according to this definition.

In Victoria, the ESC has created *Electricity Industry Guideline Number 4* and *Gas Industry Guideline No 10 on Credit Assessment* (the **Credit Assessment Guidelines**). The Credit Assessment Guidelines form part of the consumer protection framework by regulating when energy retailers can list defaults on consumers"credit reports and the circumstances in which a retailer can demand a refundable advances or security deposits. Regulation of credit reporting procedures is important in the context of full retail competition, where consumers can transfer

⁵⁷ ESC, *End-to-End Project – "Final Decision*, June 2006, available at:

http://www.esc.vic.gov.au/NR/rdonlyres/EE09A98A-36AF-48B0-8184-473CEE274663/0/E2E_FinalDecisionMay06.pdf.

⁵⁸ See also clause 7.1 of the Marketing Code.

⁵⁹ *Guideline No 10 – "Confidentiality and Informed Consent*, cl 5.1.

⁶⁰ *Guideline No 10 – "Confidentiality and Informed Consent*, cl 5.2.

⁶¹ *Guideline No 10 – "Confidentiality and Informed Consent*, cl 5.3.

⁶² *Guideline No 10 – "Confidentiality and Informed Consent*, cl 5.4

⁶³ Note the slight differences in definition of explicit informed consent under the Guideline and the FTA: see, ESC, *Reviews of Electricity and Gas Retail Codes (Energy Retail Code) – "Final Decision*, May 2004, Appendix 4.

retailers without paying outstanding debts, exposing consumers to the risk of default if their account is not paid.⁶⁴

The Credit Assessment Guidelines provide that customers can only be required to provide a refundable advance, or can be listed with credit reporting agencies if they have a 'relevant default'. A 'relevant default' is defined as:

- a failure by the consumer within the last five years to pay a bill for the consumer's water, electricity or gas consumption where the payment is at least 60 days overdue;⁶⁵
- a failure by the consumer to give the retailer notice of their vacation of their premises or a forwarding address for at least 10 days;⁶⁶
- a court judgment within the past five years;⁶⁷
- bankruptcy within the last seven years,⁶⁸ and/or
- a second dishonoured cheque provided by the consumer in payment of a bill for the consumer's water, electricity or gas.⁶⁹

Other factors prevent a retailer from requiring a refundable advance or listing a consumer with a credit reporting agency. For example, a consumer cannot be assessed as having an unsatisfactory credit rating:

- where a customer has made a complaint about the debt in good faith and it has not been resolved, or
- where a customer has asked a retailer to review an electricity bill to which the debt relates;⁷⁰ or
- where a retailer has not undertaken an assessment of a customer's capacity to pay and offer an instalment arrangement in accordance with clause 11.2 of the ERC;⁷¹ or
- where a customer has applied for a Utility Relief Grant and a decision on the application has not been made.⁷²

The Credit Assessment Guidelines also states that there is a monetary minimum amount of debt that a consumer must have before a retailer either makes a default listing on a credit report or disconnects supply (although this amount is not made public).

Without the protection of the Credit Assessment Guidelines, retailers may use listed defaults unrelated to utility provision to request refundable advances, thereby impinging upon consumers' access to an energy supply. They may also list a default where a consumer has a genuine grievance, or is in the process of applying for a utility relief grant; such defaults can have an unfair impact upon consumers by limiting their access to credit on fair and affordable terms.

C.7 Guideline on Product Disclosure

The provision of information to consumers is fundamental to the operation of efficient and competitive markets. It is widely acknowledged that information asymmetry results in market failure, to the detriment of consumers. It is for this reason that the product safety requirements of Part V of the TPA include certain product information requirements. The TPA and FTAs do not, however, contain product disclosure requirements nor would it be practicable for them to do so. In more complex markets, sector-specific information requirements become necessary to ensure

⁶⁴ The Customer Transfer Code provides that retailers can only object to transfers if customers have outstanding debts of an amount greater than \$200.

⁶⁵ Credit Assessment Guideline, cl 2.2(a).

⁶⁶ Credit Assessment Guideline, cl 2.2(b).

⁶⁷ Credit Assessment Guideline, cl 2.2(c).

⁶⁸ Credit Assessment Guideline, cl 2.2(d).

⁶⁹ Credit Assessment Guideline, cl 2.2(e).

⁷⁰ Credit Assessment Guideline, cl 3.2(a) and 6.3(a).

⁷¹ Credit Assessment Guideline, cl 3.2(c) and 6.3(c).

⁷² Credit Assessment Guideline, cl 3.2(c).

consumers understand product choices and make informed decisions. Such requirements become important consumer protections necessary to enable consumers to benefit from market competition.

In the Victorian energy market, the ESC has created *Guideline 19 Energy Product Disclosure* (the **Product Disclosure Guideline**). The Product Disclosure Guideline implements obligations created by section 36A of the *Electricity Industry Act 2000* (Vic) and section 43A of the *Gas Industry Act 2001* (Vic). Those provisions create a statutory obligation to publish tariffs and terms and conditions of sale on the internet. The Product Disclosure Guideline specifies the minimum requirements in relation to:

- (a) the process to be established by a specified retailer to enable customers to access relevant published information;⁷³ and
- (b) the details and format for the publication of energy product information statements.⁷⁴

The Product Disclosure Guideline also creates similar obligations for certain written information (including all fees and charges and the term of the contract) to be provided by retailers to small retail customers in an 'offer summary'.⁷⁵ The obligation to provide product information in a standard format allows consumers to easily compare market offers, thereby ensuring that consumers can participate more easily in the competitive market.

C.8 Wrongful disconnection payment

In late 2004, the Victorian parliament passed the *Energy Legislation (Amendment) Act 2004*, making a number of important changes to the *Electricity Industry Act 2000* and the *Gas Industry Act 2001*. One of the more important changes was the insertion of a new section 40B into the *Electricity Industry Act* and section 48A into the *Gas Industry Act*, both of which provide for a new licence condition imposing an obligation on retailers to make "wrongful disconnection payments" to customers in certain circumstances. This new obligation, which came into force on 8 December 2004, makes a payment obligatory if the retailer "wrongly" disconnects the supply of electricity or gas to the premises of a "relevant customer" after failing to comply with the terms and conditions of the contract specifying the circumstances in which the supply of electricity or gas to those premises may be disconnected (that is, if the retailer breaches the ERC).

The amount of the payment is currently \$250 for each whole day that supply is disconnected (with a pro rata amount payable for any part of a day disconnected) and must be paid as soon as practicable after reconnection of supply, either directly to the customer or by way of a rebate on the customer's bill.

The new provisions also make clear that the payment does not affect any other rights that customers may have, for example to seek compensation for loss suffered as a result of being wrongfully disconnected. This suggests that the payments are intended not only to compensate consumers who have been wrongfully disconnected but to encourage retailer compliance with their obligations.

The wrongful disconnection payment can also be seen to provide consumers with a remedy when the consumer protections in the ERC are not complied with. Without this protection, disconnected consumers may have difficulty arguing that they had suffered loss as a result of being wrongfully disconnected.

⁷³ Product Disclosure Guideline, cl 2.1.

⁷⁴ Product Disclosure Guideline, cl 2.4 and 2.5.

⁷⁵ Product Disclosure Guideline, cl 3.

The ESC has released an *Operating Procedure – “Compensation for Wrongful Termination (the Operating Procedure)* which gives guidance to assist in the interpretation of the ERC and sets out how EWOV and ESC will deal with complaints relating to a wrongful termination. The Operating Procedure has provided certainty to retailers and consumers in determining when the ERC has been breached, and has encouraged retailers to review and improve disconnection processes to ensure the ERC is complied with.

The existence of the wrongful disconnection payment has resulted in a significant reduction in disconnection complaints at EWOV. EWOV reports that electricity cases about actual disconnection are down 77% from the second half of 2004 and gas cases are down 73%.⁷⁶ Such significant reductions demonstrate the success of the wrongful disconnection payment in bringing about increased compliance by retailers with their obligations under the ERC.

C.9 Hardship policies legislation

On 31 August 2006, the Victorian Parliament passed the *Energy Legislation (Hardship, Metering and Other Matters) Act 2006*. This legislation was the result of the Victorian Committee of Inquiry into Energy Hardship which reported to Government in December 2005. The new legislation amends the *Electricity Industry Act* and the *Gas Industry Act* by requiring energy retailers to have hardship policies that are approved by the Minister for Energy and the Essential Services Commission of Victoria. Hardship policies must include the provision of:

- flexible payment options for payment of energy bills;
- provision for the auditing of a domestic customer's energy usage (whether wholly or partly at the expense of the retailer);
- flexible options for the purchase or supply of replacement electrical equipment, and
- processes for the early response by both retailers and domestic customers to electricity bill payment difficulties.⁷⁷

The legislation also requires that consumers be shielded from disconnection for non-payment while they are part of an approved hardship program.⁷⁸ This protection ensures that retailers do not disconnect consumers in circumstances where the consumer has an incapacity or is unable to pay.

These amendments were made after lengthy consultation with industry, regulators, community groups and consumer advocates. The requirement for hardship policies recognises that the management of cases of energy consumer hardship is primarily the responsibility of energy retailers, but that the government and consumers have a role to play.⁷⁹ The fact that retailers are providing an essential service requires them to assist management of the utility debts of customers in hardship.⁸⁰

As noted in Part D, there are hardship provisions in other industry-specific legislation and codes, including the Uniform Consumer Credit Code and the Banking and General Insurance Codes of Practice. No such provisions appear in the TPA or FTAs.

C.10 LPG Retail Code

Unlike the regulation outlined above which has been created by the ESC, the LPG Retail Code is a voluntary industry code developed in collaboration with consumer advocates, EWOV and the

⁷⁶ EWOV, *Resolution 21* (1 July 2005 – 31 December 2006), p 11.

⁷⁷ *Electricity Industry Act*, s 43(2)(a); *Gas Industry Act*, s 48G(2)(a).

⁷⁸ *Electricity Industry Act*, s 46A; *Gas Industry Act*, s 48K.

⁷⁹ Victorian Government, *Policy Statement on Energy Hardship*, June 2006..

⁸⁰ Elissa Freeman, 'Financial Hardship and the Social Responsibility of Energy Retailers', *Electricity Issues: Interstate Perspectives on full retail competition for residential consumers*, Centre for Consumer and Credit Law, Griffith University, 2006.

Victorian Government. The LPG Retail Code is designed to protect the interests of domestic consumers by prescribing minimum standard service levels that LPG retailers should meet when selling LPG (otherwise known as bottled gas).⁸¹ For many consumers who do not have access to reticulated natural gas, the provision of LPG is an essential service, used primarily for heating and cooking. As the ESC does not have regulatory oversight of the sale of LPG in Victoria, the LPG Retail Code provides sector-specific consumer protection regarding the terms of service delivery for LPG retailers.

The LPG Retail Code provides for rules in the following areas:

- entering into contracts;⁸²
- delivery of LPG;⁸³
- receipts, invoices, statements of account and payment;⁸⁴
- ownership and risk in LPG;⁸⁵
- credit management;⁸⁶ and
- stopping of deliveries;⁸⁷ and
- termination of contracts.⁸⁸

It also establishes a Code Governance Body, which will review changes to the Code, receive voluntary undertakings and withdrawals from retailers and manage promotion of compliance with the code;⁸⁹

There are a range of important consumer protections delivered to LPG customers through the LPG Retail Code that are not available under general consumer protection law. For example:

- If the contract states the retailer must deliver LPG to the customer's site, this must be done as soon as is practicable.⁹⁰ This protection ensures that customers are given access to LPG as quickly as possible; for the provision of an essential service, this requirement is fundamental.
- If an LPG retailer has undercharged or not charged the customer, the LPG retailer may only recover the amount undercharged in the 9 months previous.⁹¹ This equates a LPG customer's rights to that of a reticulated gas consumer under the ERC.
- If a customer is experiencing payment difficulties, the LPG retailer must offer; an instalment plan or other payment arrangement; details on available concessions; information about the efficient use of LPG appliances; and the availability of independent financial counselling.⁹² These provisions assist consumers in hardship stay connected to an essential service.

Importantly, the LPG Retail Code provides that LPG retailers must establish a complaints handling procedure that is documented and in accordance with the relevant Australian Standard on Complaints Handling.⁹³ Furthermore, a signatory LPG retailer must be a member of EWOV.⁹⁴ EWOV can provide free, accessible and speedy dispute resolution to consumers.

⁸¹ LPG Retail Code, cl 1.2.

⁸² LPG Retail Code, Pt 2.

⁸³ LPG Retail Code, Pt 3.

⁸⁴ LPG Retail Code, Pt 4.

⁸⁵ LPG Retail Code, Pt 5.

⁸⁶ LPG Retail Code, Pt 6.

⁸⁷ LPG Retail Code, Pt 7.

⁸⁸ LPG Retail Code, Pt 8.

⁸⁹ LPG Retail Code, cl 2.2.

⁹⁰ LPG Retail Code, cl 6.

⁹¹ LPG Retail Code, cl 10.2.

⁹² LPG Retail Code, cl 15.1.

⁹³ LPG Retail Code, cl 21.

⁹⁴ LPG Retail Code, cl 21.4.

C.11 Energy-specific regulation: contributing to the NEM objective and effective competition

As outlined in the introduction, the new national laws regulating electricity and gas have the following objective:

...“ to promote efficient investment in, and efficient operation and use of electricity/natural gas services for the long term-interests of consumers of electricity/natural gas with respect to the price, quality, safety, reliability and security of supply of electricity/natural gas”.

This is a similar objective to that which the ESC has considered when introducing the above regulation.⁹⁵ As the objective is to promote the long term interest of consumers”, the primary test for regulation should be for its potential to deliver consumer benefit, that is, to secure a quality of supply commensurate with price and consumer preferences. Consumer preferences dictate that the provision of energy must be delivered with certain protections relating to contractual terms and marketing as well as effective enforcement. The regulations outlined above contribute to consumer benefit.

The regulations outlined above also contribute to consumers effectively engaging in the competitive market for the provision of energy services. By addressing market failures, such as information asymmetry, energy-specific consumer protections enable consumers to make informed choices. Such choices benefit not only consumer outcomes, but the state of competition. Further, the administrative nature of the ESC regulations allows greater flexibility than consumer protections in legislation. Such flexibility allows protection to respond to the changing state of the market.

⁹⁵ The ESC’s primary objective, as described in s 8(1) of the ESC Act, is to protect the long-term interests of Victorian consumers with regard to the price, quality and reliability of essential services”. The ESC Act also contains a number of facilitating objectives in s 8(2).

D. CONSUMER PROTECTIONS APPLICABLE TO THE FINANCIAL SERVICES AND THE TELECOMMUNICATIONS INDUSTRIES

D.1 Introduction

The energy sector is not the only sector that has sector specific consumer protections. Many other industry sectors, particularly those which deliver essential services, have sector-specific consumer protection regimes that augment generalist consumer protection law. The following discussion examines some of the particular consumer protections that apply to the financial services and telecommunications industries.

The sources of industry specific consumer protections are varied –“protections can be found in legislation, subordinate regulation, and industry codes as well as in policy positions of independent industry dispute resolution schemes. Nevertheless, the protections and related oversight and enforcement mechanisms are clearly aimed to deliver consumer benefit and enable consumers to participate effectively in competitive markets.

D.2 The Financial Services Sector

D.2.1 Background

The primary difficulty associated with making an assessment of the consumer protections applicable to the financial services sector is that the sector is enormously broad, and difficult to precisely define. In broad terms the *Corporations Act 2001* (Cth) (the **Corporations Act**) defines a ‘financial service’“to include the provision of products by which a person makes an investment, manages financial risk, or makes non-cash payments.”⁹⁶ The Australian Bankers’ Association suggests that the primary providers of financial services in Australia are banks, other registered financial corporations such as finance companies, and entities providing managed funds,⁹⁷ but the scope of the sector in technical definition, and in consumer understanding, is much broader.

D.2.2 The Industry and Consumer Protection

In 1997, the Commonwealth Treasury’s ‘Wallis Report’“into the Financial System stated that

*specialised regulation is required to ensure that market participants act with integrity and that consumers are protected. The financial system warrants specialised regulation due to the complexity of financial products, the adverse consequences of breaching financial promises and the need for low-cost means to resolve disputes.”*⁹⁸

Financial services specific regulation and consumer protection are found in a range of documents, including the *Banking Act 1959* (Cth), the *Insurance Contracts Act 1984* (Cth), and the *Uniform Consumer Credit Code*. The financial services licensing regime under the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth), administered by ASIC, provides the most extensive regulation of the sector. Licences granted under the provisions of the *Corporations Act* require that licensees make available to retail clients an internal dispute procedure, and access to an appropriate external dispute resolution scheme.⁹⁹ External dispute

⁹⁶ See sections 763A and 766A of the *Corporations Act*

⁹⁷ See Australian Bankers Association fact sheet ‘Financial Services Sector –“an overview’’, available at www.bankers.asn.au

⁹⁸ Available at <http://fsi.treasury.gov.au/content/default.asp>

⁹⁹ Section 912A *Corporations Act*; ASIC Policy Statement 165

resolution schemes are accessible mediums in which consumers can enforce many of the industry specific consumer protections. External dispute resolution schemes approved by ASIC include the:

- Banking and Financial Services Ombudsman;
- Credit Ombudsman Service Ltd;
- Credit Union Dispute Resolution Centre;
- Financial Industry Complaints Service Ltd;
- Insurance Brokers Disputes Ltd;
- Insurance Ombudsman Service Ltd; and
- Financial Co-operative Dispute Resolution Scheme.

A number of important consumer protections are also found in industry codes, which are approved by ASIC.

D.2.3 The Code of Banking Practice

Establishment and function

The Code of Banking Practice is a voluntary code of conduct developed by the Australian Bankers' Association. Where relevant, it is one of the matters taken into account by the BFSO in determining disputes. Additionally, consumers may make complaints about alleged breaches of the Code to the Code Compliance Monitoring Committee, which may make findings in relation to an allegation of breach.¹⁰⁰

Particular consumer protections provided by the Code

Some of the significant consumer protections provided by the Code of Banking Practice relate to disclosure to consumers by signatories of terms and conditions of accounts,¹⁰¹ statements of account,¹⁰² assessment of capacity to repay credit,¹⁰³ and the provision of guarantees.¹⁰⁴

The Code Compliance Monitoring Committee, in addition to investigating individual complaints, in July 2005 instituted an inquiry into compliance with clause 25.2 of the Code.¹⁰⁵ That clause provides that signatories will attempt to assist consumers overcome financial difficulties with any credit facilities, for example, by developing a repayment plan. This demonstrates the capacity of the Code, unlike general consumer protection instruments and court proceedings, to expose systemic sources of consumer detriment.

D.2.4 The EFT Code of Conduct

Establishment and function

The Electronic Funds Transfer (**EFT**) Code of Conduct is a voluntary code, to which all major account-holding institutions, and many 'stored value providers', are signatories.

¹⁰⁰ Clause 34, Code of Banking Practice

¹⁰¹ Clauses 10 and 18, Code of Banking Practice

¹⁰² Clause 24, Code of Banking Practice

¹⁰³ Clause 25, Code of Banking Practice

¹⁰⁴ Clause 28, Code of Banking Practice

¹⁰⁵ The Code Compliance Monitoring Committee 2006 Annual Report, available at http://bankcodecompliance.org/docs/CCMC_2004-6_AR.pdf, p.8

Particular consumer protections provided by the Code

The consumer protections provided by the EFT Code of Conduct are focussed on disclosure and record-keeping requirements,¹⁰⁶ privacy,¹⁰⁷ and liability for unauthorised transactions.¹⁰⁸ In respect of the latter, the Code of Conduct limits account holder liability in respect of unauthorised transactions caused by the fault of the financial service provider, where the transactions occur after notification by the consumer of the potential for unauthorised access to accounts, and where it is clear that the account holder is not liable for loss caused. This effectively fixes financial institutions with liability without the consumer being required to adduce evidence of fault, where general consumer protections would generally require that there be some positive proof of liability.

The EFT Code of Conduct provides for the internal investigation of disputes by signatories to the Code.¹⁰⁹ Additionally, ASIC monitors the compliance of businesses in the financial services sector with the EFT Code of Conduct.

Complaints under the Code frequently have related to single transactions,¹¹⁰ which can reasonably be assumed to have frequently related to small amounts of money, demonstrating the value of a specialised alternative dispute resolution procedure, adapted to swiftly dealing with complaints of particular kinds. However, the ambit of such specialised procedures needs to be carefully tailored –“the Code does not cover direct debit transactions, rendering it less useful than it otherwise could be.

D.2.5 Industry-specific consumer protection in legislation

As stated above, many financial services-specific consumer protections are found in legislation, rather than industry codes. Many such protections were introduced under the *Financial Services Reform Act 2001* (Cth) which amended the Corporations Act. One such amendment introduced a ban on door-to-door sales of financial products and services.¹¹¹ This is proscriptive regulation, which recognises that, faced with a salesperson on their doorstep, people infrequently make rational, welfare maximising decisions, especially those most vulnerable consumers with limited financial experience. While general consumer protection statutes regulate door-to-door sales by prescribing certain information requirements and cooling-off periods, this approach recognises the immense detriment that can ensue where consumers face pressure to purchase financial products and services where the transaction has been unsolicited.

D.2.6 The Banking and Financial Services Ombudsman

Establishment and function

The Banking and Financial Services Ombudsman (**BFSO**) scheme is governed by a board representing both industry and consumer interests. The BFSO can consider disputes brought to its attention by individuals or small businesses, about acts or omissions of financial services providers relating to financial services, confidentiality or privacy.

Matters considered by the BFSO in dealing with a complaint are the applicable law, any relevant industry codes or guidelines, *good industry practice*, and *fairness in all the circumstances*.¹¹²

¹⁰⁶ See, for example, clauses 2, 4, 12 and 14 of the Electronic Funds Transfer Code of Conduct

¹⁰⁷ See, for example, clause 21 of the Electronic Funds Transfer Code of Conduct

¹⁰⁸ See, for example, clause 5 of the Electronic Funds Transfer Code of Conduct

¹⁰⁹ Clauses 10 and 19, Electronic Funds Transfer Code of Conduct

¹¹⁰ Compliance with the EFT Code of Conduct for the period April 2003 - March 2004, available at

[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/EFT_code_monitoring_report_december.pdf/\\$file/EFT_code_monitoring_report_december.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/EFT_code_monitoring_report_december.pdf/$file/EFT_code_monitoring_report_december.pdf), p.24.

¹¹¹ *Corporations Act 2001* (Cth), ss 992A and 992AA.

¹¹² Clause 7.1, BFSO Terms of Reference

Thus, the scope of the BFSO's enquiry into a consumer complaint is much broader than the enquiry which might be conducted by a court. The BFSO can recommend terms of settlement of a dispute between a financial services provider and a consumer and, if those terms are not accepted, award of a sum of money of up to \$250,000, and make orders relating to the provision of information and/or the protection of privacy.¹¹³

The BFSO is designed to be a more accessible, less formal means of resolving financial services disputes than the court system. It has flexible procedures, and is not required to adhere to the rules of evidence.¹¹⁴

The BFSO is under an obligation to actively promote its services to consumers.¹¹⁵ The BFSO also provides assistance with the lodgement of disputes by consumers.

Particular consumer protections provided by the Ombudsman

The BFSO releases regular bulletins which provide guidance on the way in which it will conciliate and determine disputes. In bulletins released in March 2005 and June 2006,¹¹⁶ the BFSO gives guidance to consumers and credit providers in relation to maladministration of credit card accounts, and in particular in relation to the extension of credit limits. These Bulletins demonstrate the usefulness of the BFSO as an industry-specific consumer protection mechanism. Not only do they show the BFSO's responsiveness to current issues in the sector, but they demonstrate that the BFSO provides more systematic guidance as to law and practice in the sector than either traditional litigious fora, or more general consumer protection mechanisms.

The BFSO's comments on maladministration of credit card accounts become quasi-consumer protections, in that it details how the BFSO will attempt to determine these types of disputes.

D.3 Telecommunications Industry

D.3.1 Introduction

Telecommunications are the carriage of communications, that is, between people and things, in the form of speech, data, text, visual images, signals or other forms, by means of guided and/or unguided electromagnetic energy.¹¹⁷ The telecommunications industry is defined to include:

- carriers;
- carriage service providers;
- suppliers of goods or services which are used in connection with carriage services;
- content suppliers which use carriage services;
- manufacturers or importers of customer equipment or customer cabling; and
- businesses who install, maintain, operate or provide access to a telecommunications network or a facility used to supply a carriage service.¹¹⁸

The social and economic importance of telecommunications necessitates industry specific consumer protections, so as to ensure access to essential services such as a standard telephone line and emergency service calls. Further industry specific consumer protections make certain that consumers with particular telecommunications needs, such as priority assistance or the National Relay Service, are protected from the vagaries of the competitive market.

¹¹³ Clauses 7.7 –7.14, BFSO Terms of Reference

¹¹⁴ Clause 6, BFSO Terms of Reference

¹¹⁵ Clause 11, BFSO Terms of Reference

¹¹⁶ BFSO Bulletins 45 and 50, available at <http://www.bfso.org.au/ABIOWeb/abioweb site.nsf>

¹¹⁷ Section 7, *Telecommunications Act 1997* (Cth)

¹¹⁸ Section 7, *Telecommunications Act 1997* (Cth)

D.3.2 The Industry and Consumer Protection

The *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the **TCPSS Act**) establishes the main consumer protections for consumers of telecommunications. These telecommunications specific safeguards are in addition to general safeguards conferred under the TPA, FTAs and customer rights under contract law.

Universal service regime

The TCPSS Act imposes the Universal Service Obligation (**USO**) on Telstra, as the only Universal Service Provider. The USO requires Telstra to ensure that standard telephone services, payphones, prescribed carriage services and digital data services are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business. Telstra is therefore obligated to provide a standard telephone service to every person in Australia on request. It is also required to supply, install and maintain payphones in Australia and to supply prescribed carriage services and digital data services on request.

National Relay Service

The TCPSS Act also provides for the National Relay Service (**NRS**), which provides persons who are deaf or who have a hearing and/or speech impairment with access to a standard telephone service on terms, and in circumstances that are comparable to the access other Australians have to a standard telephone service. The NRS is funded by a quarterly levy on eligible telecommunications carriers. The service is confidential and is provided at no additional cost to consumers.

Untimed local calls

The TCPSS Act states that if a carriage service provider charges a customer for local calls made using a standard telephone service supplied to the customer, the provider must give the customer an untimed local call option, that is local calls must be charged for on an untimed basis.

Customer Service Guarantee

The TCPSS Act empowers the ACMA to establish customer service performance standards for carriage service providers, termed the *Customer Service Guarantee*. If a service provider contravenes a performance standard, the carriage service provider is liable to pay damages to the customer for the contravention.

The *Customer Service Guarantee* specifies timeframes for the connection of specified services, the repair of faults and service difficulties and the attendance of appointments by service providers.

Emergency Calls

Under the TCPSS Act, ACMA can impose requirements on carriers, carriage service providers and emergency call persons with respect to emergency call services. The objective is that a carriage service provider who supplies a standard telephone service should provide each end-user of that standard telephone service with access, free of charge, to an emergency call service, unless the ACMA considers that it would be unreasonable for such access to be provided.

Priority assistance

As part of its carrier licence, Telstra is required to offer a Priority Assistance service to customers with a diagnosed life-threatening medical condition who are at risk of suffering a rapid, life-

threatening deterioration in their condition. The service is meant to maximise telephone service continuity for priority customers. Telstra is the only company required to provide a Priority Assistance Service.

Telstra's carrier license requires it to ensure eligible priority customers are given the highest level of service practically possible, to undertake a communications campaign to ensure eligible customers and doctors are informed of priority services; and provide specialised credit management processes for priority customers.

D.3.3 Australian Communications Industry Forum Codes

Establishment and function

The telecommunications industry is self-regulated. The Australian Communication Industry Forum (**ACIF**) is an industry owned, resourced and operated company, which was established in 1997 to implement and manage communications self-regulation within Australia. ACIF develops standards and codes to support competition and protect consumers¹¹⁹. ACIF Codes, once registered with ACMA are binding on their signatories. Code breaches can be referred to ACMA, but in reality ACMA does not readily take disciplinary action against telecommunication providers. ACIF has recently merged with the Service Providers Association Inc (**SPAN**), to form the Communications Alliance. It appears that the Communications Alliance may pursue more overt industry lobbying functions than ACIF.

Particular consumer protections provided by the ACIF Codes

There are a range of ACIF codes that provide protections to consumers, namely:

- credit management, which specifies requirements for suppliers' credit assessment of customers, the provision of credit control tools and the development and use of financial hardship policies.¹²⁰
- billing, which specifies minimum requirements for billing procedures and the provision of billing information to customers. The Code covers bill content, the timeliness and frequency of issue, terms of payment and credit.¹²¹
- complaint handling, which provides minimum standards on complaint handling procedures including complaint recording and customer information.¹²²
- customer transfer, which sets minimum standards to ensure all transfers of service that occur are authorised and verified.¹²³
- consumer contracts, which specifies the rules to determine when consumer contract terms may be considered unfair, having regard to both the unfairness of the terms and their intelligibility and accessibility.¹²⁴

These consumer protections complement the generalist consumer protections under the TPA and FTAs.

D.3.4 Regulatory oversight – ACMA

ACMA regulates the telecommunications industry. Its roles are to:

¹¹⁹ ACIF Operating Manual, clause 1.1.2.

¹²⁰ ACIF C541:2006 Credit Management.

¹²¹ ACIF C542:2003 Billing.

¹²² ACIF C547:2004 Complaint Handling.

¹²³ ACIF C546:2005 Customer Transfer.

¹²⁴ ACIF C620:2005 Consumer Contracts.

- register industry codes when they are developed by bodies such as ACIF;
- call for the creation of codes on important matters if representative industry groups do not do it voluntarily; and
- make standards where codes are not forthcoming or codes on important matters fail.

ACMA promotes self-regulation in the telecommunications industry and in carrying out its roles above, gives priority to industry voluntarily developing and enforcing codes.

ACMA has the power to accept enforceable undertakings about matters concerning compliance with the *Telecommunications Act 1997* (the **Telecommunications Act**) and the TCPSS Act. ACMA may accept undertakings that a person will take specified action or refrain from taking specified action to comply with the Telecommunications Act or the TCPSS Act, or take action directed towards avoiding contravention in the future. These undertakings are enforceable by the Federal Court.

D.3.5 Dispute resolution – The Telecommunications Industry Ombudsman

Establishment and function

The Telecommunications Industry Ombudsman (**TIO**) was established in 1993 and its powers and role are detailed in the TCPSS Act.

The TCPSS Act requires that all companies that provide a standard telephone service to residences or small business, a public mobile telecommunications service; or a carriage service that enables end-users to access the internet must be a member of the TIO. Carriage service intermediaries who arrange for the supply of the above services must also be members of the scheme. All members must comply with the scheme.

The TIO scheme investigates, makes determinations and gives directions to relating to complaints about carriage services by end-users of those services. The service is free for end users or complainants.

As of 20 May 2006, the TIO also has power to investigate systemic problems within the telecommunications industry. Systemic problems are defined as a "a problem with or the failure of a system, process or practice of a Member that causes detriment (that is not trivial) to a significant number or a class of end-users of a carriage service".¹²⁵

If a systemic problem is found to exist, the TIO will recommend a resolution to the problem. The member is only compelled to implement the resolution if it agrees to the TIO's proposal. Where a resolution is not agreed or a Member fails to implement a resolution agreed to, the TIO may refer the matter to ACMA, the ACCC or such other statutory authority or industry body.

Particular consumer protections provided by the TIO

The TIO also publishes position statements that provide guidelines to consumers and industry about how the TIO will approach the investigation and resolution of particular types of complaints. The guidelines detail the sorts of documentation the TIO requires, the factors it considers in the course of its investigation, and its view as to what constitutes a fair and reasonable outcome in a particular set of circumstances. Position statements cover topics such as disconnection, contracts, credit management, customer service, and mobiles.

The TIO's position statement on overcommitment acts as an important consumer protection for consumers experiencing financial hardship. Where a consumer brings a complaint to the TIO

¹²⁵ Clause 5A.1, Telecommunications Industry Ombudsman Constitution, 2006.

about charges for telephone calls or Internet use which they claim have put them in a position of financial over-commitment, the TIO will consider investigating depending on the individual circumstances of the complaint.

In deciding whether or not to investigate, and in resolving such complaints, the TIO will consider the law, good industry practice and what is fair and reasonable in all the circumstances. In obtaining a fair and reasonable resolution to a complaint, the TIO may have regard to:

- the size of the debt;
- any demonstrated financial over-commitment by the customer or hardship to the customer as a result of enforcement of the debt;
- the usage and payment history of the customer;
- any vulnerability on the part of the customer or user of the service;
- whether the relevant call charges are the result of anomalous circumstances, e.g. a security alarm malfunction, as opposed to simply an increase in normal usage; and
- the existence and effectiveness of any systems or processes a provider uses to monitor the level of debt of any customer.

On this point, the TIO takes the view that it is not enough for a provider to simply have systems or processes in place to monitor the level of debt of any customer. Those systems and processes should be effective and reasonable. The TIO will also consider whether:

- once the provider became aware or ought reasonably to have become aware that the customer was incurring a disproportionate amount of debt, whether the provider took steps to minimise or limit the customer's access to credit or exposure to debt and, if so, the effectiveness of those steps;
- once the provider became aware or ought reasonably to have become aware that the customer was incurring a disproportionate amount of debt, whether the provider issued any advice or warning to the customer about the level of debt and, if so, the effectiveness of that advice or warning;
- the quality of any information given by the provider to its customer about ways to limit financial over-commitment on their part, e.g. exchange-based call barring. In addition, the TIO would also take into account how and when a provider had provided any such information to its customer;
- what steps a customer took, or ought reasonably have taken, to limit any financial over-commitment on their part, both before and after they became aware that they were incurring a disproportionate amount of debt;
- whether a customer has agreed to use alternative products/services that may be available in the market place to obviate debt; and
- in the case of premium rate services, the nature of the service and the manner in which it was marketed or promoted.

This position statement effectively regulates the ways in which telecommunications providers should deal with credit overcommitment. As the product provided involves credit, the position statement reasonably places obligations on the provider to deal with issues relating to overcommitment. These sort of obligations are not imposed by general consumer protection law.

D.4 Commentary on consumer protections in telecommunications sector and financial service sector

The industry-specific consumer protections outlined above are not replicated in the TPA, the state FTAs or under contract law. The protections above provide Australian consumers of telecommunications and financial services with important protections would be difficult to cover under general consumer protection laws. Further, they allow systemic problems in the industry to be raised and addressed.

E. INDUSTRY-SPECIFIC CONSUMER PROTECTIONS – FUNDAMENTAL TO THE OPERATION OF EFFICIENT MARKETS

Effective consumer protection regulation is an essential pre-requisite to the operation of markets. As stated by the Productivity Commission, “an effective functioning modern economy and society depends on regulation”.¹²⁶ Consumer protection regulation is designed to address market failures, the costs of which are usually borne by consumers. While regulations should exist to break down barriers on the supply side, so as to remove rent-seeking market structures, consumer protection regulations must also exist to enable consumers to participate in the market.

Industry-specific consumer protections complement generalist consumer protections in the TPA and state FTAs. As generalist consumer laws do not deal with the specifics of essential services, they do not regulate a range of areas that require protection to enable consumers to participate in the market. In particular, they do not regulate:

- particular terms and conditions of service delivery, so that consumers can benefit from a regular, certain service in terms of billing, collection and dispute resolution;
- matters relating to access and financial hardship –“consumers should not be denied access to essential services based on incapacity to pay for those services. Specific consumer protections are required to ensure consumers are able to maintain access to supply, and essential service providers take responsibility in managing utility debt and dealing with the financial hardship of their customers;
- various matters related to marketing, recognising that marketing of essential services requires further levels of prescription to that contained in generalist consumer protection laws, including information provision and consent provisions;
- low-cost, independent dispute resolution forums;
- the addressing of systemic issues in markets.

Effective consumer participation in the marketplace, enabled by the above protections, can also contribute to effective competition, and competitive outcomes. In this regard, it has been suggested that consumers activate competition and that one of the purposes of consumer protection law is to ensure they are in a position to do so.¹²⁷ Without the industry-specific protections therefore, competitive and efficient market outcomes for suppliers and consumers will not be achieved.

Industry-specific consumer protection regulation also attempts to harness reasonable supplier behaviour. While there is growing recognition of the importance of corporate social responsibility (CSR) principles,¹²⁸ it is not always possible to rely on unregulated or unenforceable CSR requirements to bring about reasonable supplier behaviour. Much of the industry-specific consumer protections provide for consumer-dealing principles, so that consumers are treated with respect and dignity when maintaining access to an essential service.

The role of enforcement by industry-specific regulators and industry dispute resolution schemes also support the consumer protections in achieving their objectives. The positions statements of the BFSO and the TIO provide examples of how dispute resolution schemes can create and enforce consumer protections where no generalist consumer protections exist. These bodies are able to identify and address systemic problems within their respective industries, which could not

¹²⁶ Productivity Commission, *Regulation and its Review: 2004-05*, Annual Report Series (2005), available at: <http://www.pc.gov.au/research/annrpt/reglnrev0405/reglnrev0405.pdf>

¹²⁷ Louise Sylvan, ‘Activating Competition: The consumer-competition interface’ (2004) 12 *Competition and Consumer Law Journal* 1.

¹²⁸ Parliamentary Joint Committee on Corporations and Financial Services, *Corporate responsibility: Managing risk and creating value* (June 2006)

be addressed if reliance was placed on consumers taking individual action under general consumer protection law.

The regulatory documents outlined in this paper, including ESC codes and guidelines, are rightly considered ‘living’ documents. That is, due to their administrative bases, they have the advantage of ease of updating to keep pace with the needs of a rapidly changing marketplace. The flexibility of industry-specific consumer protection to modify the arrangements as the need arises is one of their chief advantages. Rather than relying upon generalist consumer protection law to be updated (there has not been a review of Part V of the TPA since its introduction), flexible industry-specific protections can be introduced as the market requires them.

The MCE SCO consultation paper on the proposed retail and distribution framework in the national energy market proposed that any regulation providing obligations on market participants should be placed in the National Electricity and Gas Rules (the **Rules**). The rule-changing process by the AEMC is designed to be consultative, flexible and transparent. If so, there is scope for the Rules to include the robust consumer protections detailed in Part C of this Paper, and for the AER to take responsibility for monitoring and enforcement of them.