



**Victorian Council of Social Service  
Submission**

**Public Consultation  
on a National Framework  
for Energy Distribution  
and Retail Regulation**

**January 2006**

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# 1 Introduction

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As the peak body of the social and community services sector in Victoria, the Victorian Council of Social Service (VCOSS) works to ensure that all Victorians have access to a fair share of the community's resources and services, through advocating for the development of a sustainable, fair and equitable society with a focus on the needs of low-income and disadvantaged Victorians.

VCOSS members reflect a wide diversity of the Victorian community, ranging from large charities and sector peak organisations, to small community services, advocacy groups and individuals engaged in social policy debates.

VCOSS is committed to the principles of equity and justice, and acknowledges we live in a society where people are interdependent. VCOSS respects the land we live in and recognises the Indigenous custodians of the country. VCOSS is committed to reconciling all injustices with Indigenous Australians.

VCOSS's vision is one where social well being is a national priority, and:

- ensures everyone has access to and a fair share of the community's resources and services;
- involves all people as equals, without discrimination; and
- values and encourages people's participation in decision making about their own lives and their community.

The **VCOSS Energy Campaign Steering Committee** was formed early-2004 to support VCOSS policy and advocacy in the area of utilities. It is chaired by VCOSS and comprises representatives from the following organisations: Chronic Illness Alliance; Consumer Law Centre Victoria; Energy Action Group; Environment Victoria; Financial & Consumer Rights Council; Good Shepherd Youth & Family Services; Institute for Social Research, Swinburne University of Technology; Melbourne Citymission; St Vincent De Paul Society Victoria; Tenants Union of Victoria; The Salvation Army; Uniting Church Australia – Victoria & Tasmania.

The timing and short timeframe of this consultation process has precluded any more than limited involvement of Steering Committee members in the development of this submission<sup>1</sup>. However it is framed by the Steering Committee's guiding principles:

- Energy and water are essential services to which there must be access and maintenance of service provision. Energy and water are essential to social participation and adequate standards of living as recognised in international Human Rights standards accepted by Australian governments.
- There must be universal price and service standards.
- The role of government is to set and maintain public policy on energy/water provision. This includes forming policy and legislating to improve environmental outcomes and to ensure social protection.
- Energy policy should include demand-side energy efficiency and renewable energy measures that provide beneficial social outcomes and do not enhance the greenhouse effect.

VCOSS appreciates the opportunity to respond to the *Public Consultation on a National Framework for Energy Distribution and Retail Regulation* prepared by NERA Economic Consulting and Gilbert + Tobin

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<sup>1</sup> This submission was prepared by the Victorian Council of Social Service (VCOSS) in consultation with and with contributions by Irina Cattalini (Western Australian Council of Social Service), Gavin Dufty (St Vincent de Paul Society Victoria), Rosalyn Williams (South Australian Council of Social Service), Kath Mclean (Tasmanian Council of Social Service), Marie Stivala-Andrews (Kildonan Child & Family Services), Gerard Brody and Karen Chalmers-Scott (Consumer Law Centre of Victoria), and May Mauseth Johnston (Consumer Utilities Advocacy Centre). It was also well informed by the Consumer Roundtable hosted by the Consumer Law Centre of Victoria and the Consumer Utilities Advocacy Centre and the held in Melbourne in November 2005. However this paper represents the views of VCOSS and does not necessarily represent the views of the contributors listed above.

(hereafter the *NERA/G+T Paper*). This submission begins with some general comments concerning the development of a national framework for energy regulation. This is followed by a discussion of the principles underlying the *NERA/G+T Paper* and those informing VCOSS's framework for energy regulation. Subsequently a selection of issues raised in the *NERA/G+T Paper* is examined. Finally, concerns with the consultation process are noted.

Additionally, VCOSS endorses and supports submissions lodged by the Western Australian Council of Social Service, the Tasmanian Council of Social Service, and the Consumer Law Centre of Victoria.

Given the broad scope of the *NERA/G+T Paper* and the limited timeframe in which to respond, we have only addressed selected elements of the paper, corresponding to our most overriding concerns. Absence of comment on any section of the paper should not be taken as support for or opposition to the points raised by NERA/G+T, their policy criteria or their recommended approaches.

## 2 Regulation in the national energy market

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This submission must be understood in the broader context of VCOSS's opposition to the overall framework for national energy regulation as has been presented. However we recognise the necessity for a high degree of regulatory consistency across jurisdictions in a national market — in the interests of both facilitating the operation of energy businesses across state boundaries and achieving equity for energy consumers in different states — and are supportive of a comprehensive national framework that is jurisdictionally responsive, has the capacity to safeguard consumer interests (ensuring affordable and appropriate access to energy for all consumers and incorporating robust consumer protections), and addresses environmental sustainability. We do not believe the current model meets these criteria.

### 2.1 Regulation must safeguard consumer interests

Energy regulation should fulfil a number of functions: facilitate retail competition, ensure the safety and reliability of energy supply, encourage the development and proliferation of alternative energy sources, and — most importantly — ensure the secure provision of affordable energy for all consumers in a transparently fair and appropriate energy marketplace. In the move to national regulation, any proposed changes to the way energy markets are currently regulated in each jurisdiction must be preceded by a comprehensive assessment to ensure that there will be no disadvantage to consumers.

The framework presented in the *NERA/G+T Paper* actively seeks to reduce the imposition of regulation on energy retailers and distributors but gives only scant regard to consumer interests. It makes broad, recurring statements about the perceived shortcomings of existing jurisdictional regulatory régimes, but provides little rationale or detail in support of these statements. The suggestion that its proposed regulatory framework represents best practice is unjustified, and certainly flawed for consumers.

The framework assumes that 'effective competition' and 'effective choice' delivers the greatest benefit to consumers, but this has never been demonstrated in any Australian jurisdiction. Indeed, an examination of fully contestable retail energy markets around the world demonstrates that even where maximum competition exists, robust regulatory interventions are needed to protect consumer interests<sup>2</sup>.

On balance, VCOSS believes that the *NERA/G+T Paper* is skewed in favour of the interests of industry over consumers. There is a lack of analysis of consumer interests. The suggestion that reduced regulation will improve competition and consumer benefit has not been justified.

### 2.2 The need for jurisdictionally responsive regulation

We note with concern that while the national framework as presented overwhelmingly cites benefits to industry and the facilitation of streamlined competition as its guiding principles, the arguments for jurisdictional responsiveness are based on the interests of households and other small consumers. This has not allayed our fears that the current move to national regulation is premised on industry benefit and does not consider consumer benefit, let alone consumer protection. **A key aim of energy industry regulation should be to protect vulnerable consumers and to ensure access to essential energy for all people.** Looking from a consumer protection perspective, there are a number of compelling reasons for energy regulation to be jurisdictionally responsive.

#### 2.2.1 Regulation must respond to regional conditions

Effective regulation must respond to local conditions, including:

- population distribution, income levels, employment patterns, and other demographic factors;
- the availability of alternative energy sources and fuel substitutability;

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<sup>2</sup> D Bowman, D Coghill & G Hodge (2004) *Protecting Utility Consumers From Market Failure*, Monash University, Melbourne

- climatic and geographic conditions; and
- issues of access, especially including the degree of equity between metropolitan, regional, rural and remote areas.

For example, in some states the lack of availability of natural gas means consumers are almost totally reliant on electricity for all energy needs; and climatic variations lead to greater reliance on air conditioning and heating in some states, having a direct impact on consumption and cost. Effective consumer protection regulations must respond to these factors. It is difficult to envisage a 'one-size-fits-all' centralised regulatory régime that adequately addresses these issues.

### **2.2.2 Regulation must consider local industry characteristics**

The energy markets in different states are at widely different stages of development. Some states, such as Victoria, have attained full retail competition (FRC) with numerous privately-owned energy businesses. Others have only partial competition or none at all; some are still state-owned and monopolistic.

In Victoria the evolution of the energy industry from a state-owned monopoly to its current state was accompanied by an evolution of rules and regulations premised on ensuring consumer access and maintaining appropriate consumer protections. This was only possible because the jurisdictional base of both the shaping of the energy market and the framing of regulation enabled a coordinated approach, and the pacing of change permitted such incremental adjustments. The framework as presented will not appropriately respond to the degree of variance between jurisdictions that will exist for some time yet

### **2.2.3 Consumer and local advocates need input into regulators and legislators**

In states — such as Victoria — with relatively mature energy markets and comprehensive regulation and consumer protections the existence of working relationships between consumer advocates and relevant government and regulator staff has been crucial. Advocates and community agencies are uniquely placed to identify the underlying factors of both acute and chronic disadvantage and locate them in the policy framework. The relationship that exists between them and state government departments and authorities continues to be a key element of policy development and refinement. The relative strength of Victoria's energy regulation framework, for example, is in no small way attributable to the work of consumer advocates engaging vigorously with the Department of Infrastructure, Members of Parliament, and the Essential Services Commission. This vital dynamic must be recognised and proactively accounted for in a national framework.

### **2.2.4 Community service obligations are directly related to the cost impacts of regulation on consumers**

Community service obligations (CSOs) such as concessions and 'good corporate citizenship' are intimately connected with elements of regulation that influence tariffs and consumption. For example, significant energy price increases (such as the 25% electricity price rise over 2003-04 in South Australia following deregulation) would cause funding blow-outs where concessions are based on a proportion of eligible consumers' energy bills, and devalue concessions paid at a flat rate.

When Victorian water tariffs were radically restructured in 2004, concessions were adjusted in concert to ensure that both the funding implications of water concessions were contained, and access to an adequate water supply was maintained for vulnerable households. This was only possible because concession structures, tariff structures, price controls, and demand management policy instruments were all adjustable at the jurisdictional level. The current national framework breaks this nexus with unacceptable consequences.

### **2.2.5 State and territory governments must deliver energy policy in whole-of-government strategies**

The Victorian Government's *A Fairer Victoria* strategy is an example of an innovative social policy framework that uses joined-up approaches to address core issues of social inequity and disadvantage. By improving the way government departments work together and improving the fit between discrete policy areas that in practice are interrelated, real possibilities for mediating social disadvantage and precariousness emerge. But strategies such as this require an appropriate degree of jurisdictional movement in the shape and structure of relevant policy. Centralised national regulation of the energy industry without appropriate jurisdictional powers constrains the ability of state and territory governments to address fuel poverty in a substantive way.

### 3 Underlying principles

The outcomes of any regulatory framework ultimately reflect the principles that underlie it. Analysis of the *NERA/G+T Paper* suggest it is founded on principles considerably at variance with those VCOSS considers essential to the delivery of energy policy. It is of great concern to us that the proposed framework's principles preclude the achievement of what should be a core aim of energy regulation: to protect vulnerable consumers and to ensure access to essential energy for all people.

#### 3.1 Principles underlying the proposed framework

The principles underlying the proposed framework of the *NERA/G+T Paper* focus on making regulation as simple and efficient as possible in order to minimise compliance costs for businesses, with the implication that minimal regulation facilitates competition and thus maximises consumer benefit. These principles are largely asserted without any analysis or evidence as to their validity; nowhere has it been demonstrated that Australian energy markets have the capacity to benefit and indeed protect consumers without the support of comprehensive consumer protection regulation.

In our analysis, the core principles of the *NERA/G+T* framework include the following erroneous assumptions.

##### 3.1.1 The benefits of regulation must outweigh the costs

The *NERA/G+T Paper* makes frequent reference to the costs of regulation, and the need to ensure that costs do not outweigh benefits. It states repeatedly: "*the scope of regulation should be sufficient to ensure small end-customers are treated "fairly" but should not be so wide or prescriptive as to impose regulatory costs which exceed benefits,*"<sup>3</sup> and "*in some cases the scope and degree of prescriptive regulation is so wide and deep that the costs of regulation may exceed the benefits.*"<sup>4</sup> (Interestingly, these assertions only appear in the section of the *NERA/G+T Paper* that deals with consumer protection.)

Statements such as these are problematic because there are no concrete examples of where, in fact, these anomalies occur; neither is there any attempt to assess the value of the benefits, either financially, socially, or environmentally. They imply that monetary costs to businesses somehow outweigh or are more important than costs to consumers, and convey a sense that consumer interests are undervalued.

Regulation should, above all, be *effective*. The cost of regulation is an obligation of governments and businesses that profit from the market. While costs should obviously be kept as low as is practicable, to avoid undue costs being passed on to consumers, the existence of some cost burden is inevitable. Such general statements are unhelpful and indeed counter-productive without a comprehensive cost-benefit analysis that appropriately accounts for consumer and public benefits.

##### 3.1.2 Regulatory functions must devolve to generic instruments where possible

VCOSS completely opposes the assertion that "*the imposition of energy specific consumer protection regulation should not duplicate other regulations of general application across the economy (Trade Practices Act, Fair Trading and Door-to-Door Sales legislation) unless the generic regulation is demonstrated to be insufficient.*"<sup>5</sup>

Duplication, while not always desirable, is sometimes the lesser of two evils. In the case of regulating an essential service like energy, it is imperative that comprehensive, targeted regulation exists specifically to protect the interests of energy consumers, regardless of whether or not some elements of those protections exist elsewhere in generic legislation. An industry-specific consumer protection code pulls together both generic and specific protections into the one piece of regulation, ensuring that consumers who lack the

<sup>3</sup> NERA Consulting and Gilbert + Tobin (2005) *Public Consultation on a National Framework for Energy Distribution and Retail Regulation*, pp. 46, 54, 57, 60.

<sup>4</sup> *Ibid.* pp. 54, 57, 60.

<sup>5</sup> *Ibid.* pp. 43–4.

capacity to pursue their rights under complex, generic legislation are still protected. On balance, it is more important for regulation to ensure that consumers are capable of protecting their own interests, than to eliminate appropriate regulations simply to avoid duplication.

### 3.1.3 Minimal regulation maximises consumer benefit

The belief that an unfettered market maximises competition and thus consumer benefit remains unfounded. Rather, numerous studies have indicated that competitive markets in essential services tend to exclude certain classes of consumers in the absence of regulatory interventions<sup>6</sup>.

Victoria's Essential Services Commission (ESC), concluded in 2004 that despite two years of full retail contestability (FRC), the market was not effective for around 60 per cent of small consumers<sup>7</sup>. International experience shows that highly competitive markets in telecommunications and banking, as well as energy, require robust regulatory interventions to protect smaller customers from market exclusion<sup>8</sup>.

## 3.2 Principles underlying the VCOSS framework

VCOSS attended the Consumer Roundtable in Melbourne in November 2005, at which a number of consumer representative organisations met to discuss the *NERA/G+T Paper*. At that meeting, a list of principles for consumer protection was generated. These principles align with the VCOSS Energy Campaign Steering Committee's principles and guide our advocacy for consumer protection and benefit.

### 3.2.1 Energy is an essential service

Energy, especially electricity, is essential in sustaining life and basic health through the creation of heating (both space heating and water heating) and refrigeration (of food and other goods). It is also essential in enabling a basic standard of living and participation within the broader society, through powering lighting, cooking appliances, and information and telecommunications technologies such as televisions, radios, telephones and access to the Internet and the World Wide Web. In rural and regional areas without a reticulated water supply, it is also often required to pump water to meet basic hygiene and sanitation requirements. Victoria's Essential Services Commission (ESC) recognised the essentialness of electricity for both private utility and public benefit during its *Review of the Effectiveness of Retail Competition in Gas and Electricity* when it asserted that "customers have a basic need for continuous electric service and society has an interest in preventing unnecessary risks to household health and safety that could be caused by significant interruptions in the supply of electricity"<sup>9</sup>. Similarly, when the Victorian Government revised the *Electricity Industry Act 2000* in 2004, the Minister for Energy Industries and Resources stated "It cannot be stressed enough that gas and electricity are essential services, not just commodities"<sup>10</sup>.

### 3.2.2 Universal access must be facilitated, regardless of capacity to pay

Consequently, universal access to safe, reliable, affordable energy must continue to underpin energy market reforms. Consumers must never be denied access to energy on the basis of their financial hardship or vulnerability characteristics.

Of all States and territories, Victoria has the lowest levels of utility-related hardship; nevertheless, in 1998-99 14.7 per cent of Victorian households experienced 'utility stress' — the inability to pay at least one bill due to

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<sup>6</sup> Bowman, Coghill & Hodge (2004) *op. cit.*

<sup>7</sup> ESC (2004) *Final Report to Minister — Special Investigation: Review of Effectiveness of Retail Competition and Consumer Safety Net in Gas and Electricity*, cited in Consumer Law Centre of Victoria (2006) *Submission on Public Consultation on a National Framework for Energy Distribution and Retail Regulation*.

<sup>8</sup> Bowman, Coghill & Hodge (2004) *op. cit.*

<sup>9</sup> US Department of Energy, p. 25, cited in ESC (2004) *Review of the Effectiveness of Retail Competition in Gas and Electricity — Public Draft Report*, p. 103.

<sup>10</sup> Minister for Energy Industries & Resources (2004), Media Release, *Major Energy Reforms Protect Consumers*, 5 November 2004.

insufficient money<sup>11</sup>. Seventy per cent of households suffering financial hardship also suffered utility stress. At the same time, most households who suffered utility stress (almost 60 per cent) were not otherwise experiencing financial hardship<sup>12</sup>. This indicates that access to energy is not only an issue for impoverished or disadvantaged households: *all* households need adequate consumer protections and safety nets to ensure ongoing supply of essential energy.

Consumer protection and the delivery of consumer benefits must therefore be explicit objectives for energy regulators. Energy regulation must be transparent, vigilant, proactive, well-resourced, vested with appropriate powers and publicly accountable. Energy regulation will benefit from strong, sustained consumer and public interest advocacy.

### **3.2.3 Full retail competition does not benefit a significant number of small consumers**

As noted above, even an energy market generally considered effective will never be effective for a significant number of consumers. In addition to the many facets of exclusion experienced by classes of consumers in competitive markets, the poor substitutability of energy, together with its lack of demand elasticity — especially among lower income groups — constrains the ability of consumers to respond to market signals<sup>13</sup>. The direct participation of informed consumers is crucial to the development of an effective competitive energy market. A robust consumer protection framework is fundamental to energy market effectiveness. Consumer protections currently available to energy customers in the NEM jurisdictions must not be diluted.

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<sup>11</sup> Committee for Melbourne (2004) *Utility Debt Spiral Project Report*, Committee for Melbourne, Melbourne, November 2004.

<sup>12</sup> *Ibid.*

<sup>13</sup> M Langmore & G Dufty (2004) *Domestic Electricity Demand Elasticities: issues for the Victorian Energy Market*, St Vincent de Paul Society, Victoria.

## 4 Principle issues of concern

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### 4.1 Consumer protection

The Consumer Protection framework proposed in the *NERA/G+T Paper* does not contain enough detail on how the regulation will serve the interests of consumers. VCOSS has a number of specific concerns including:

- The absence of consumer protection as a key objective of the regulation. Regulation should ensure that energy supply is safe, reliable and affordable for all;
- The failure to acknowledge the value and importance of energy specific consumer protection regulation, despite perceived similarities in generic legislative protections;
- The need for a comprehensive understanding of customer vulnerability in the market, and a flexible safety net for protecting vulnerable consumers;
- The need to specifically ensure classes of customer are not excluded from the market;
- The problematic suggestion that regulatory costs should always be outweighed by their benefits, where they benefits have not been adequately valued; and
- The need for effective, independent state based external dispute resolution mechanisms.

VCOSS recommends that the Victorian Energy Retail Code, as the most comprehensive in Australia, be considered a benchmark delineating an appropriate minimum consumer protection framework.

#### 4.1.1 The objectives of regulation

The *NERA/G+T Paper* continually asserts three key objectives of energy regulation: improving transparency, lessening duplication; and reducing compliance costs. It says very little about the important objective of protecting consumers, and delivering safe, reliable and affordable energy at an affordable cost. Surely this is a fundamental role for any regulation.

*Transparency*, while essential, is only one aspect of good regulation – it must also be consultative, effective and fulfil its objectives. Transparency alone does not demonstrate good practice regulation.

*Duplication*, is not generally desirable but must be balanced against other imperatives, such as consumer protection. We deal with this issue more fully in section 3.1.2 above.

*Reduced compliance costs* should only be sought where it can be comprehensively demonstrated that it does not come at the cost of consumer protection.

On the other hand, international experience clearly shows that the more contestable energy markets become, the more crucial comprehensive, enforceable consumer protection legislation becomes.<sup>14</sup> The lack of concern with consumer protection in the proposed framework is a serious flaw.

#### 4.1.2 Regulation for vulnerable consumers

The *NERA/G+T Paper* conveys a poor understanding of vulnerability in relation to energy consumers, simply defining vulnerable consumers are those with “consumption less than 10 TJ or 160 MWh.” This is overly simplistic and demonstrates a failure to understand the concept of vulnerability at all. The range of factors that can contribute to a person being considered a vulnerable consumer is broad, and fluctuates. Indicators of vulnerability can include:

- eligibility for concessions;
- experience of financial hardship (short- or long-term);
- difficulty with the English language;

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<sup>14</sup> Bowman, Coghill & Hodge (2004) *op. cit.*

- large households;
- high energy consumption costs due to inefficient appliances and/or housing stock;
- considerable billing arrears due to ongoing and unresolved retailer billing errors or practices;
- people living with physical, psychiatric or intellectual disability, which affects their capacity to negotiate payments, enter contracts or requires particular consumption;
- living in a rural or remote location.

Since people move in and out of financial hardship, vulnerability can be a temporary or permanent state. It is therefore essential that a flexible approach is taken to assessing vulnerability. The concept of consumer vulnerability, in its broadest sense, should be explicitly recognised in any proposed national regulatory framework.

Additionally, because all consumers are at risk of experiencing vulnerability at one point or another, it is imperative that consumer protection measures apply to all consumers, not just 'vulnerable' ones (as suggested by the *NERA/G+T Paper*). While such regulation is clearly more important for those customers most at risk of disconnection, there must be equal protection for all customers.

Appropriate measures should include;

- Clearly outlined procedures for connection, disconnection and reconnection;
- Adequate notice of an impending disconnection;
- Prohibition on disconnection solely due to consumer incapacity to pay;
- Requirement for consumers in financial difficulty to be offered feasible, affordable payment options, including payment and repayment plans; and
- Penalties for wrongful disconnection, including compensation payments.

#### **4.1.3 Exclusion and the obligation to supply**

Disadvantage occurs where individuals and families are denied access to, or are excluded from participating within social and economic life at a level consistent with community norms. Without appropriate regulation, competitive energy markets can compound disadvantage through the operation of various forms of exclusion:

- Access exclusion: the restriction of access through the process of organizational risk management.
- Condition exclusion: where the conditions attached to products and services serve to prevent access.
- Price exclusion: where some people can only gain access at prices that are unreasonable or act to exclude.
- Market exclusion: excluding through products and services not being offered to certain classes of consumers;
- Self exclusion: where some people decide not to apply because they believe they will be refused.

Consequently, the obligation to supply is a fundamental feature of most existing jurisdictions and essential to ensure access for all. The proposal contained in the *NERA/G+T Paper* for the obligation to supply being delivered via distribution companies is, in our view, untenable. The structure of the energy market is such that small consumers access energy via retailers. Distribution companies are simply not equipped or accustomed to deal directly with large numbers of small consumers. In a national competitive market *all* retailers should have an obligation to supply energy with standard terms and conditions so they are competing on an equal footing.

#### 4.1.4 Regulatory Costs

The *NERA/G+T Paper* makes frequent reference to the costs of regulation, and the need to ensure that costs do not outweigh benefits. It states repeatedly: “the scope of regulation should be sufficient to ensure small end-customers are treated “fairly” but should not be so wide or prescriptive as to impose regulatory costs which exceed benefits,”<sup>15</sup> and “in some cases the scope and degree of prescriptive regulation is so wide and deep that the costs of regulation may exceed the benefits.”<sup>16</sup>

Statements such as these are problematic because there are no concrete examples of where, in fact, these anomalies occur; neither is there any attempt to assess the value of the benefits, either financially, socially, or environmentally. They imply that monetary costs to businesses somehow outweigh or are more important than costs to consumers, and convey a sense that consumer interests are undervalued.

Regulation should, above all, be *effective*. The cost of regulation is an obligation of governments and businesses that profit from the market. While costs should obviously be kept as low as is practicable, to avoid undue costs being passed on to consumers, the existence of some cost burden is inevitable. Such general statements are unhelpful and indeed counter-productive without a comprehensive cost–benefit analysis that appropriately accounts for consumer and public benefits.

#### 4.1.5 Dispute Resolution

The *NERA/G+T Paper* acknowledges the importance of customer dispute resolution schemes, especially for protecting vulnerable consumers. However, it provides very little detail on customer dispute resolution, and how it will be regulated nationally.

VCOSS supports maintaining external dispute resolution mechanisms in each state jurisdiction, with regular reporting to the national regulator. We suggest that mandated internal complaints handling mechanisms be required to meet the Australian Standards for Complaints Handling (AS4269-1995). Jurisdictional dispute resolution schemes should be modelled on a common base, which meets the National benchmarks for industry-based customer dispute resolution schemes set out by the Department of Industry, Science and Tourism in 1997. We commend the reporting practices of Energy and Water Ombudsman of Victoria (EWOV) as an appropriate model for the reporting requirements of jurisdictional dispute resolution schemes as in our view this represents national best practice.

### 4.2 Regional Issues

The interests of small regional communities and their difficulty in securing improvements to their energy supply, must be taken into account in the design of regulation. These communities often have insufficient load to make upgrades commercially viable, and usually lack the resources to negotiate network augmentations with a distributor.

Poor energy supply in rural and remote communities places real and immediate constraints on their capacity to expand local business or attract new investment. In some cases, local businesses are effectively subsidising a community’s supply, by either by having upgraded significant portions of the network, or being forced to install expensive solutions to ameliorate their usage on a poor line (in effect, subsidising poor supply).

Rural communities also face considerable regulatory impediments in accessing alternative sources of supply. Renewable embedded generation provides a viable means of securing better reliability and quality for a small community, as well as offering the community the opportunity to own the asset and so reduce its export of capital, and of course to reduce greenhouse gas emissions. However national and state regulations make the investigation of such alternatives incredibly and unreasonably difficult — through competition rules geared to the interests of large generators, information asymmetries and imbalance of negotiating power, and the degree of financial risk that must be borne by the community.

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<sup>15</sup> NERA Consulting and Gilbert + Tobin (2005) *op cit*, pp. 46, 54, 57, 60.

<sup>16</sup> *Ibid.* pp. 54, 57, 60.

The approach of the *NERA/G+T Paper* does not acknowledge the existence of such problems and risks entrenching rural market failure at a national level.

### 4.3 Pricing

The proposed Price Regulation of Distribution does not contain enough detail on how the regulation will serve the interests of consumers. It is imperative that the following are incorporated:

- Protecting consumers from price shocks, including the scope of jurisdictional directives and pricing side constraints;
- Achieving horizontal equity, so that small users do not pay significantly different network prices based simply on their geographical location;
- Improving the transparency of the options for the 'form of regulation' and network prices under some of the proposed models;
- Explicitly removing the wide discretion given to distributors to potentially subsidise commercial customers at the expense of residential users and the deemed 'subsidy free' band of prices; and
- Articulating a clear goal of delivering consumer benefit and meeting the public interest when considering the costs and benefits of regulatory options.

#### 4.3.1 Scope of distribution price regulation

The *NERA/G+T Paper* suggests that the choice of form of regulation should be determined with regard to administrative costs and the promotion of competition. We contend that a public interest test with specific consumer benefit measures must also be included, and are gravely concerned that it has not been considered.

The *NERA/G+T Paper* asserts that a major goal of distribution pricing is to ensure certainty for the regulated businesses, but does not balance that against achieving benefit for consumers.

The *NERA/G+T Paper* would benefit from a clear description of how the Jurisdictional Directions will be applied with the implementation of the higher-level principles in the Law and in the Rules. It is vital that this is clarified in a way that is consistent with achieving horizontal price equity and preventing price shocks.

VCOSS is concerned that the *NERA/G+T Paper* fails to acknowledge the inherent problem of 'subsidy free' pricing where this is defined as the gap between 'marginal' and stand alone' costs of supply. The discretion proposed to be given to distribution entities for setting customer pricing is too wide. It is not acceptable that prices could be set so as to provide a subsidy of large, commercial energy users by residential consumers, but nothing in the framework would prevent this.

#### 4.3.2 Price cap regulation

The key elements of the proposed price cap regulations do not provide a comprehensive enough test of the costs and benefits of any proposal for the form of regulation.

The *NERA/G+T Paper* argues that the major goal of creating a national framework should be to establish certainty for the regulated businesses. While certainty is clearly beneficial in the market, there are strong grounds for protecting consumer interests explicitly.

More information needs to be made publicly available about the proposal to use CPI-X regulation, even though it is consistent with current practice in most jurisdictions, in order for consumers to understand what is being proposed. Public consultation is essential for adequately developing the Rules for guidance on the form of regulation. In principle, economic efficiency alone cannot be relied upon to deliver public interest outcomes. Accountability of the regulators in relation to this goal is also a vital concern for end-users.

We do support the suggestion (at page 22) that the Rules should allow the regulator to consider whether the network entities should consider 'appropriate alternatives to augmentation' which would include demand

management projects. Demand management has been demonstrated to deliver huge cost savings to both business and residential energy consumers, as well as significant environmental benefit.

### **4.3.3 Tariff setting**

It is crucial that consumers are protected in the translation of 'price caps' (including revenue caps) into actual customer prices. The suggestion that the regulatory criteria for rules on customer prices should rely on economic criteria alone is contrary to the objects of the National Electricity Law in relation to long-term consumer benefit. Clearly, this suggestion is flawed. A comprehensive public interest test must be applied.

The proposals of the *NERA/G+T Paper* are premised on market theory with the goal of protecting the regulated businesses as paramount, and risk compromising the interests of consumers.

Setting a 'subsidy free' band of pricing between 'stand alone' and marginal costs simplifies the burden of regulators, faced with information asymmetry and the considerable effort required to set distribution prices. However, in allowing considerable discretion for setting customer prices to the monopoly businesses, it sets up an environment where prices for customers can be set by criteria other than 'efficiency'. In these circumstances side constraints are crucial for protecting consumers and for ensuring the regulatory arrangements deliver appropriate outcomes for all stakeholders.

A broader approach to the criteria for setting tariffs is needed. This must include consumer protection to ensure that end-users do not face inappropriate prices. The avoidance of price shocks is an important consideration. So, too, is horizontal equity.

The MCE also needs to articulate whether the Rules will provide for jurisdictional directives. This is an issue because at present regulators in different jurisdictions have imposed different side constraints on distribution providers.

### **4.3.4 Regulation of price capped services**

The *NERA/G+T Paper* preferences "transparency and predictability for regulated businesses" in the process for determining price caps, and suggests that public consultation should be involved, "in order to provide transparency." VCOSS contends that the purpose of public consultation is much broader than achieving transparency.

Good public consultation ensures higher quality outcomes, due to the valuable input of end-users and their representatives in the market. The contribution of consumers ought to be recognised in its own right, not simply as a means of businesses informing the public for the purpose of transparency. This goes to the heart of community trust, and legitimate consultation ought to respect and value the contributions of consumers, and allow the opportunity for their input to effect change and influence outcomes.

## **4.4 Information disclosure**

In order for national regulation to be effective, it is vital that the Australian Energy Regulator (AER) is able to collect adequate information in order to perform its role; and make all the information relevant to consumer protection and compliance, publicly available.

Businesses need to provide information in a timely manner to ensure the regulator is able to make well-informed decisions, and facilitate performance competition between businesses by publicly comparing them.

The powers that the AER will have to enforce compliance need to be articulated, and ought to include the power to audit the information it receives.

The AER should be required to consult on the content and format of information to be published, in a similar fashion to the consultation currently undertaken by state jurisdictions. Published information ought to include issues around pricing, consumer protection compliance, environmental and social considerations.

## 4.5 Business authorisation

The *NERA/G+T Paper* proposes the abolition of existing licensing régimes, with business authorisation requirements located in the National Electricity and Gas Laws (NEL/NGL) and accompanying rules. VCOSS opposes the abolition of the licensing framework, as licensing provides greater security to consumers by strengthening the capacity of regulators to ensure compliance.

A licensed regulatory framework delivers specific benefits and protections to consumers in a competitive market. State regulators currently have the responsibility and capacity to deliver that potential. The capacity to achieve better outcomes by abandoning the use of a licensing system is unproven. The *NERA/G+T Paper* provides no evidence to support their recommendation.

Although it is feasible that the protections in licence conditions could be incorporated into the NEL/NGL, we contend that it is unwise to abandon an established system that is working in Australia, and overseas, in favour of an untested, unproven model — especially when no convincing rationale can be given for the change.

Licensing has significant compliance advantages. When compliance with codes and regulations is a licence condition, the threat of licence removal is a powerful tool for regulators to enforce compliance. Abandoning the licensing system thus diminishes consumer protection through a weakening of enforcement mechanisms. Instead, regulators may have to rely on external enforcement (such as proving breaches in the courts), a more expensive and uncertain process that will inevitably be used only in the most serious cases.

There is no convincing evidence available that license systems have been or are barriers to entry nor that other approaches would deliver good compliance outcomes, including for codes for consumer protection, any more efficiently. There is thus no reason to depart from the license approach for a national energy market.

The recent FEMAG paper<sup>17</sup> provided a further, more compelling argument, for the maintenance of a licensing system. The paper notes that a license system can be much more responsive to changing market conditions resulting from economic, social and technological changes. Altering a license condition such as by way of revising a code with which the license requires compliance is much more readily done than getting changes to legislation. The *NERA/G+T Paper* has overlooked this fact — which is precisely the reason that the requirement for membership of EDR Schemes was made a licence condition. Moreover, if legislative change is difficult within a state jurisdiction, it may be nearly impossible within a national electricity framework made up of numerous state and territory governments.

No one would disagree that legislative instruments are generally more preferable than administrative instruments in delivering policy. However experience has proven that it is nearly impossible to ensure that legislation is responsive to market conditions. By way of example, there has been broad agreement at heads of government level that the uniform credit legislation has not been effective.

A recent consumer submission noted that “whatever issues are identified it continues to be the case that the nature of the uniform scheme (of legislation) means that amendment can be a difficult and cumbersome process. As a result the legislation is far less responsive than it needs to be, allowing consumers to be exposed to dangerous practices that have long been identified, and from which they might justifiably expect protection.”<sup>18</sup>

A number of jurisdictions require licensees to belong to EDR schemes as a licence condition. If the Framework Paper recommendation is accepted, then our expectation would be that EDR membership would become a legislative requirement. Anything less would be unacceptable.

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<sup>17</sup> Foundation for Effective Markets and Governance (2005) *Regulation and Consumer Benefit: Compliance in the National Energy Market*, Public Interest Advocacy Centre, Sydney.

<sup>18</sup> David Niven and Tim Gough for Consumer Credit Legal Service Inc (Vic), *The Operation of the Uniform Consumer Credit Code: Why is it failing consumers?* (August 2004)

## **4.6 Jurisdictional directions**

The role of Jurisdiction Directions in a national framework has been poorly developed in the *NERA/G+T Paper*. This area is absolutely critical for consumers, as it provides the key avenue for States and Territories to implement important protections (such as Community Service Obligations (CSOs) and pricing protections) as well as deliver energy policy as part of whole-of-government strategies.

We anticipate that CSOs and various price protections, including tariff equalisation policies, will continue to remain under state jurisdiction, at least for the early stages of the implementation of a national framework. It is essential that those protections, in jurisdictions where they do exist, are not lost.

A potential problem arises, however, for those states with less comprehensive and effective protections. Victoria's Energy Code, while not perfect, nevertheless provides an acceptable minimum level of protections for Victorian consumers. Other states are not so fortunate. Consequently, Jurisdictional Directions may result in significant inequity between consumers in different jurisdictions.

The role and powers of Jurisdictional Directions are highly unclear in the *NERA/G+T Paper*. While they are on the one hand described as "mandatory" (page 92), it is also asserted that: "the AER in making regulatory determinations must either give effect to or have regard to the Jurisdictional Direction". This seems to suggest that the AER may override Jurisdictional Directions on a whim. Consequently we are not confident that the proposed framework for Jurisdictional Directions enables state and territory governments to have any jurisdictional-specific measures implemented under the national regulatory framework, something we consider essential for protecting consumers.

## 5 The consultation process

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As outlined in the combined Councils of Social Service submission on the *Proposed Framework Schedule for Transfer of Distribution and Retail Functions* in November 2005, we have grave concerns about the consultation process that has accompanied the development of this framework. The *Proposed Framework Schedule for Transfer of Distribution and Retail Functions* and the *NERA/G+T Paper* do not include sufficient analysis of the intended purpose of the transfers, nor the likely outcomes and impacts of the changes. In particular, the *NERA/G+T Paper* is clearly industry-focused, with scant regard for social and environmental issues. The economic criteria discussed are decontextualised, and several assertions (such as “*The current Jurisdictional regulatory regimes are often not simple, are inconsistent between gas and electricity, and conflict as between jurisdictions. In some cases the scope and degree of prescriptive regulation is so wide and deep that the costs of regulation may exceed the benefits.*”) are repeated in the paper without any data to back them up.

### 5.1 The rationale for a comprehensive consultation process

With an overriding concern to work for equitable access to community resources and services for all Victorians, VCOSS and other Victorian consumer advocacy and support organisations (and their equivalents in other States and Territories) are key stakeholders in the energy market reform process. The redistribution of regulatory functions has the potential to pose serious challenges to the accessibility and affordability of essential service provision, especially for the low income and disadvantaged consumers the COSSs represent. Because of the gravity of the proposed changes and the potential impacts on consumers, it is crucial that community stakeholders are consulted in an appropriate and timely manner. We contend that the process employed has been neither appropriate nor timely

### 5.2 Problems with the process

In our view, the consultation process has been flawed primarily due to its ambiguous two-part nature, an absence of analysis and contextualisation, and an insufficient timeframe.

#### 5.2.1 The two-part consultation process was ambiguous and detracted from the available timeframe

The two-part nature of this process (with the *Proposed Framework Schedule for Transfer of Distribution and Retail Functions* requiring comment by November and the *NERA/G+T Paper* by January) has been problematic. The *Proposed Framework Schedule* was simply a list of functions allocated to the three categories of ‘National’, ‘State/Territory’ and ‘Abolish’. No discussion or scoping was included and the paper’s purpose, and relationship to the *NERA/G+T Paper*, was unclear. The need for stakeholders to make sense of and subsequently respond to the *Proposed Framework Schedule* detracted considerably from the time available to respond to the *NERA/G+T Paper*. And while there was a considerable degree of overlap between the two papers (primarily, they both allocated regulatory functions between the States/Territories and the national regulator), there was no indication of the relative weight each would carry in the decision-making process.

#### 5.2.2 Both papers are overly technical and lack a broader context

The functions listed in the *Proposed Framework Schedule*, and the more detailed explanations given in the *NERA/G+T Paper*, are presented without significant contextualisation and in complete isolation from broader considerations. Little analysis is provided of the benefits of the proposals beyond compliance requirements and costs for energy businesses. Consumers are barely mentioned. The broader implications of the changes

are unmentioned and unexplored. No attempt has been made to help non-technical stakeholders understand and thus usefully respond to the proposals<sup>19</sup>.

### **5.2.3 The timeframe given was insufficient**

As noted above, the dual nature of the process served to constrain the time available to respond to the *NERA/G+T Paper* due to the need for stakeholders to first respond to the *Proposed Framework Schedule*. This was compounded by the need, owing to the reasons discussed in 5.2.2 above, for consumer advocates to engage specialists and proactively build capacity among the sector to facilitate responding to the paper, and again by the remaining time straddling the Christmas–New Year period. A more generous timeframe that took account of these factors would have enabled broader input from consumer advocates and other community stakeholders.

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<sup>19</sup> Consumer-oriented stakeholders found it necessary to seek specific funding to engage consultants and host information workshops simply to build capacity to respond to the papers.