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**PIAC Submission to the First Exposure Draft
Legislation of the National Energy Customer
Framework**

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The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Energy + Water Consumer Advocacy Program (EWCAP)

This Program was established at PIAC as the Utilities Consumers' Advocacy Program in 1998 with NSW Government funding. The aim of the Program is to develop policy and advocate in the interests of low-income and other residential consumers in the NSW energy and water markets. PIAC receives policy input to the Program from a community-based reference group whose members include:

- Council of Social Service of NSW (NCOSS);
- Combined Pensioners and Superannuants Association of NSW (CPSA);
- Park and Village Service;
- Ethnic Communities Council NSW;
- Rural and remote consumers;
- Institute of Sustainable Futures (ISF), University of Technology (UTS);
- Indigenous consumer representative; and
- Western Sydney Community Forum (WSCF).

1. Introduction

The Public Interest Advocacy Centre (PIAC) welcomes this opportunity to comment on the National Energy Customer Framework (NECF) Draft Legislation. The NECF consists of the National Energy Retail Law (NERL), the National Energy Retail Regulations and the National Energy Retail Rules (NERR).

The bulk of PIAC's response to the NECF Draft Legislation is contained in two attachments to this document. The first, in the form of the template for comments provided by the Ministerial Council on Energy Secretariat, is a joint response compiled by members of the National Consumers Roundtable on Energy.

The second document attached is a document prepared for PIAC that compares the stated policy intent of the Ministerial Council on Energy Standing Committee of Officials against the draft legislation. This report was commissioned to ensure that, if tested in court, the drafting would be held to be consistent with the policy intent.

The two documents have a different focus. The first, in table form, is intended to address failures and inadequacies in the policy positions as stated in this draft legislation. The second, in report form, is focused on the drafting of the legislation.

In addition, PIAC submits the following points as areas of particular concern to energy consumers in NSW.

2. National Energy Retail Law Objective

PIAC is concerned that the objective proposed in the NERL does not properly address the essential nature of energy supply, and the need for energy supply to be environmentally sustainable and socially equitable. Please see NERL Division 3 – National Energy Retail Law Objective and principles section of the table attached for an alternative approach and section A of the report attached for the justifications for this approach.

3. Minimum Meter Readings

Rule 210 (2) of the NECF states that:

The retailer must use its best endeavours to ensure that there is an actual reading of the relevant meter at the small customers premises, or metering data is obtained, as frequently as required to prepare its bills and in any event at least once every 12 months.

PIAC is concerned that by allowing retailers to estimate bills for a period of up to twelve months, customers may be exposed to potentially large accumulated debts caused by inaccurate usage estimates over a considerable period. PIAC strongly recommends that the minimum period for actual meter reads be reduced to six months.

4. Informed consent

Section 219 (1) of the draft NERL outlines the conditions required for informed consent prior to the signing of a retail contract. PIAC is concerned that these conditions do not include the disclosure of all matters relevant to the consent of the customer in a language that is comprehensible to the customer, including community languages and plain English. Nor does it include a requirement for the customer to be a person capable of understanding the matters relevant to the consent and capable of giving consent.

These conditions have been referred to as Explicit Informed Consent at (218) and (219) on the table attached.

5. Approval Hardship Programs

In order to both encourage innovation and to ensure that an adequate level of protection is available to all consumers, PIAC strongly recommends that retailer hardship programs require approval by the Australian Energy Regulator. For more detail see NERL Division 9 – Customer Hardship Policies section of the table attached.

6. Payment plans limited to hardship customers

PIAC is particularly disappointed to see that Rule 222 (3) considers payment plans to be optional for customers experiencing difficulty paying their bills. PIAC notes that payment plans are compulsory for customers identified by the retailer as in hardship, but expresses deep concern that this definition removes the distinction between payment plans and hardship programs, which PIAC believes to be two separate forms of assistance. The arrangement suggested in Rule 222 (3) is not currently the case in any jurisdiction to be covered by the NECF.

PIAC contends that under the proposed legislation, it will be possible for a customer to experience difficulty in paying bills whilst not being classified by the retailer as being a hardship customer. These customers may not require or benefit from hardship programs, however a payment plan may stop the customer from going into hardship later on. Therefore, any customer experiencing difficulty paying bills must have access to payment plans, regardless of the hardship classification of that customer. Moreover capacity to pay, consumption needs and amount of any arrears owing should be taken into account in payment plans. This is currently the case in section 13 (a) of the NSW Electricity Supply Regulation.

Comments – First Exposure Draft of the National Energy Customer Framework: Law, Rules, Regulations and Contracts

This table provides a template for stakeholders to make comments on the National Energy Customer Framework (NECF). The NECF package released for public consultation includes a first draft of the National Energy Retail Law, National Energy Retail Rules and National Energy Retail Regulations. Included in the package are three contracts: the model standard distribution contract, default retail support contract and model standard retail contract.

Organisation commenting:

The Public Interest Advocacy Centre (PIAC)

Our response below has been prepared jointly with other organisations representing residential and small business consumers in all jurisdictions that participate in the National Energy Market. The simple fact that we have reached strong consensus positions, despite covering a diverse and comprehensive constituent base, serves to highlight the need for best practice consumer protections to be available to all Australian energy consumers as we face a generally uncertain future, but certain and significant energy price rises.

This submission represents PIAC’s views based on the information detailed within the First Exposure Draft of the National Energy Customer Framework: Law, Rules, Regulations and Contracts, However, given the potential for errors and omissions within the draft materials and the potential changes that will emerge as the package is developed we reserve the right to revisit and revise our comments accordingly.

Draft National Energy Retail Law		
Title of Law		
	Title	We oppose the title of this Law as the “National Energy Retail Law (NERL) and the law must be renamed to be the “National Energy Consumer Law”. Accordingly, the “National Energy Retail Rules (NERR)” should be renamed the “National Energy Consumer Rules”.

		<p>While we recognise that the legislation must be consistent with National Energy Law and National Gas Law, the focus of this specific legislation should be unequivocally directed towards the consumer. Specifically crucial consumer considerations need to be entrenched in this Law, and that the current draft does not achieve this nor adequately reflect the full intent of the National Energy Consumers Framework, which was to provide fair and reasonable terms for supply and delivery of energy services to consumers.</p> <p>Throughout this document we refer to the “National Energy Consumer Law” as the “NERL” and the National Energy Consumer Rules as the “NERR”, for consistency, however we re-confirm our position that “National Energy Consumer Law” and the “National Energy Consumer Rules” remain the most appropriate and accurate name of the law and the rules for the purposes outlined above.</p>
Part 1 – Preliminary		
Division 1 – Citation, commencement and interpretation		
Section	Subject Matter	Comment
101	Citation	In accordance with the title change above, the citation for the law should be the “National Energy Consumer Law”.
103	Definitions	All definitions need to be consistent throughout the NERL, NERR and Schedules.
103	Interpretation <i>AER Guidelines</i>	The contents of this section may have a material impact upon the NERL. It is difficult to comment on guidelines that are not included in this draft of the NERL and as such we reserve the right to review and adjust our position on consumer protections when these details are made public.
103	Interpretation <i>connection</i> Redefining the term ‘connection’	For the same reason as mentioned above, we strongly advocate for reassigning the definition of <i>connection</i> ’ to reflect the commencement of an energy contract with a retailer, in some situations, connection may also entail <i>energisation</i> (as defined in s. 103) by the distributor.’ ¹

¹ s 103, National Energy Retail Law (First Exposure Draft): energisation of the premises of a customer means the activation or opening of a connection in order to allow the flow of energy between a distribution system and the premises.

103	Interpretation <i>customer retail service</i>	The reference to <i>sale of energy</i> in the definition of <i>customer retail service</i> is limiting as retailers provide a range of services and products to consumers, other than just selling energy. We have therefore amended the definition to include <i>provision of energy services</i> , as follows: <i>'means the provision of energy services by a deemed retailer or their agents to a customer at a supply point.'</i>
103	Interpretation <i>customer distribution service</i>	The reference to <i>sale of energy</i> in the definition of <i>customer distribution service</i> is limiting as distributors provide a range of services to consumers. These services should not be limited to those specified in sub-paragraphs (a) to (c). We have therefore amended the definition to include <i>provision of energy services</i> , as follows: <i>'means the provision of energy services by a distributor including any one or more of the following:</i> <ul style="list-style-type: none"> <i>(a) a customer connection service;</i> <i>(b) a customer supply service;</i> <i>(c) a service prescribed by the Rules as a customer distribution service for the purposes of this definition.</i>
103	Interpretation <i>customer hardship policy</i>	The Australian Energy Regulator (AER) must approve retail hardship policies. As such, an amendment to the definition of <i>Customer hardship policy</i> is required: <i>'a customer hardship policy under Division 9 of Part 2, as approved by the AER'.</i>
103	Interpretation <i>de-energisation</i> Use of the term 'disconnection' instead of de-energisation'	We reject the use of the term <i>de-energisation</i> in the NERL where it is applied to energy retailers. The terms <i>de-energisation</i> and <i>disconnection</i> are distinct terms used to describe different activities undertaken by distinct parts of the energy industry. <i>De-energisation</i> is an activity that is undertaken by a distributor in enclosing a connection when there is a planned outage (meter replacement, line upgrade, safety reason etc). It is related to the maintenance of the distribution/transmission system. Similarly the term <i>energisation</i> is an activity that is undertaken by a distributor in opening a connection when a consumer is connected to the

		<p>distribution or transmission system (ie they meet all the technical standards and can be energised).</p> <p><i>Disconnection</i> is a term that is applied to the withdrawal of energy due to non-payment or breach of other contract terms and the finalisation of a contract through move in/move outs and it is a term applicable to retailers where their contracts have been breached and disconnection is warranted (at this time however, the connection continues to meet all the technical standards required by the networks to remain energised).</p> <p>In all jurisdictions, consumers currently interact with retail energy businesses with the same understanding regarding connection and disconnection. This is common language on energy bills and associated terms and conditions in energy retail contracts and is consistent with other laws, regulations, policies and practices.</p> <p>Subsequently the NERL must include the definition '<i>disconnection</i>', as the term which is more commonly understood by consumers and their relationship with retailers, not for the physical de-linking from the distribution system but for the withdrawal of energy (actual deactivating or closing of a connection point) due to non-payment or breach of other contract terms of the retailer. For example;</p> <p><i>Disconnection, the withdrawal of energy due to non-payment or breach of other retail contract terms and the finalisation of a contract through move in/move outs.</i></p> <p>Extensive work has been carried out on this issue and is reflected in the 'competition by comparison' and 'retailer performance reporting' regimes within the various jurisdictions across the national energy market.</p>
103	<p>Interpretation</p> <p>New definition</p> <p><i>explicit informed consent</i></p>	<p>We strongly support the inclusion of 'Explicit Informed Consent' as a definition in the NERL and a consistent definition throughout the NERR and Schedules, including the National Energy Marketing Rules.</p> <p>We have provided a critique of the construct of Explicit informed consent in s. 219 of the NERL, it is deficient and absent as such we propose the following definition:</p> <p><i>Explicit Informed consent</i></p>

		<p><i>is consent provided for a retail energy market transaction by a residential or small customer who:</i></p> <p><i>(a) is the authorised account holder;</i> <i>(b) is competent ; and</i> <i>(c) has capacity to do so.</i></p> <p><i>to a regulated entity, where—</i></p> <p><i>(d) the regulated entity, has clearly, fully and adequately disclosed to the customer,, in a manner that ensures energy retailers meet their obligation to secure explicit informed consent, all matters relevant to the consent of the customer, including the information required under Rule 4 of the National Energy Marketing Rules and each specific purpose or use of the consent; and</i> <i>(e) the customer gives the consent to the transaction in accordance with (a), (b) and (c); and</i> <i>(f) any requirements prescribed by the NERR for the purposes of this subsection have been complied with.</i></p>
103	<p>Interpretation</p> <p><i>hardship customer</i></p> <p>Use of the term '<i>vulnerable customers and customers experiencing hardship</i>' instead of '<i>hardship customer</i>'</p>	<p>We reject the current definition and application of <i>hardship customers</i> throughout the NERL and NERR.</p> <p>The definition for '<i>hardship customer</i>' must be amended to '<i>customers that are vulnerable or experiencing hardship</i>' because the former implies membership of a class of consumer as opposed to someone who is experiencing hardship, at a particular moment in time. The drafting must be changed to '<i>customer experiencing hardship</i>':</p> <p><i>'a,small customer of a retailer who is experiencing difficulties fulfilling the terms and conditions of their retail energy contract'</i>.</p>
103	<p>Interpretation</p> <p><i>supply point</i></p>	<p>The definition of <i>supply point</i> must reflect the fact that consumers must not be responsible for equipment which they do not own; this includes impacts on consumer assets via technologies owned by retailers or distributors, such as the Home Area Network and Direct Load Control. This will be explored further in relation to consumer protections and the smart meter roll out.</p>

104	Meaning of civil penalty provision	The Table of civil penalty provisions has not yet been identified. This is a significant provision and will require consultation once drafted.
105	Meaning of conduct provision	As with above, the Table of conduct provisions has not yet been identified and this provision will therefore require further consultation once drafted, particularly because, as currently drafted, the NERL proposes to limit consumer (and business) rights to seek orders and compensation to breaches of conduct provisions. See our comments below regarding Part 11, Division 3 of the NERL.
106	Meaning of customer and associated terms	We seek an expansion of the definition of <i>small customer</i> to the following: <i>(a) a residential customer, who purchases energy principally for personal, household or domestic use at premises.'</i>
Division 3 – National Energy Retail Law Objective and principles		
113	National Energy Retail Law Objective	<p>The <i>National Energy Retail Law Objective</i>, as presented in the exposure draft, does not reflect the full intent of the National Energy Customer Framework (and subsequent NERL and NERR), or best practice consumer protections.</p> <p>As a result, this draft legislation is unacceptable and will not meet the expectations of members of the Ministerial Council on Energy which are to ensure Australian energy consumers are afforded adequate and appropriate protections.</p> <p>We highlight that crucial consumer considerations need to be entrenched in the NERL, and that the draft legislation does not achieve this, nor does it adequately reflect the full intent of the <i>National Energy Customer Framework</i>, which was to provide fair and reasonable terms for supply and delivery of energy services to consumers.</p> <p>There are two concepts that must be captured in the <i>National Energy Retail Law Objective</i>, that are not present in the exposure draft, these being:</p> <ul style="list-style-type: none"> • The essential non-storable, non-transferable nature of energy; and • The importance of energy provision being environmentally sustainable, socially equitable and economically viable. <p><i>Essential Nature of Energy</i> In contemporary society, energy accessibility, particularly for electricity, is essential for</p>

	<p>shelter, safety (including health) and quality of life. The 'essentialness' of energy means that energy services form a different class of goods from standard goods and services as understood by economics and public policy. As such, Australian residents expect the safe and affordable supply of energy as a right, not as a matter of consumer preference.</p> <p><i>Sustainable Energy Markets</i> Governments across Australia are implementing steps to curtail greenhouse emissions and introduce other innovations which will particularly impact upon the Australian energy industry and its consumers.</p> <p>Any legislation or regulation associated with energy markets, must therefore give careful attention to the social implications of these policies and the ongoing environmental sustainability of energy provision. This crucial objective also needs to be stated as part of the National <i>Energy Consumers Law Objective</i>.</p> <p>Our proposed objective is as follows:</p> <p><i>The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply.</i></p> <p><i>For the purposes of this section, in determining whether a particular thing promotes the long term interests of consumers of energy with respect of price, quality, safety, reliability and security of supply, regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:</i></p> <p><i>(a) the objective that consumers can be confident about the price, affordability, safety and reliability of essential energy services;</i></p> <p><i>(b) the objective that energy services should be provided to all consumers equitably;</i></p> <p><i>(c) the objective that all consumers be treated fairly in their purchase of energy services;</i></p> <p><i>(d) the objective that energy should be affordable for all consumers;</i></p> <p><i>(e) the objective that the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage, be protected, and that energy not be denied to any customer on the basis of financial hardship or other circumstances of vulnerability;</i></p>
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		<p><i>(f) the objective of providing accessible and timely redress where customer detriment has occurred;</i></p> <p><i>(g) the objective that consumers always be entitled to proportionate, risk-based responses from suppliers of energy;</i></p> <p><i>(h) the objective that consumer interest is served by the supply of clean and sustainable energy.</i></p>
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Draft National Energy Retail Law		
Part 2 – Relationship between retailers and small customers		
Division 1 – Preliminary		
Section	Subject Matter	Comment
Division 3 – Standing offers and standard retail contracts for small customers		
203	Model terms and conditions	<p>The format of the model standard retail contract does not reflect all of the substantive rights and obligations of the retailer and the small customer provided for in the NERL and NERR, let alone additional provisions in jurisdictional laws. It contains mainly terms and conditions reflecting retailer rights but few terms and conditions reflecting the rights or obligations for the protection of consumers that are contained in the NERL and NERR. Further, it attempts to draft additional standard terms and conditions around issues such as limitations of liability that clearly favour retailers, even though these matters are not addressed in the NERL and NERR and there appears to be little reason why governments would attempt to draft contract terms relating to these issues. In addition, in some cases the terms and conditions do not accurately reflect the content of NERL and NERR provisions or only partially communicate NERL and NERR provisions. One of the more serious effects of these problems is that, in its present format, it is arguably quite misleading for consumers (and retailers) as to their actual rights and obligations.</p> <p>We believe that a more appropriate framework would be to clarify that all substantive obligations are provided for in the NERL, NERR and regulations (and jurisdictional laws where relevant). It is not unreasonable to provide for a model contract to be used by all retailers but it should be called a ‘Customer Charter’ to reflect more accurately what it is and ensure that consumers actually understand that it is relevant to them and contains the details of their relationship with their</p>

		<p>retailer. The <i>Customer Charter</i> should constitute the contract and detail, in plain English, the key consumer rights and obligations, as well as retailer rights and obligations, fully and accurately consistent with the actual provisions of the NERL, NERR and regulations (and with space to insert any relevant jurisdictional requirements).</p> <p>Where a consumer is considering entering into a market retail contract, the retailer must provide the consumer with a copy of the <i>Customer Charter</i>, in addition to the single document which outlines the 'Required Information' as defined in <i>Schedule 4 Rule 4(1) of the National Energy Marketing Rules</i>.</p>
204	Standing offer to small customers	We strongly support the inclusion of the <i>obligation to offer</i> in the NERL.
205	Standing offer prices	<p>A definition of standing offer prices must be included in the NERL. This definition must reflect that a standing offer is the generic offer within an energy market and the offer must be inclusive of all fees, charges and associated terms and conditions.</p> <p>This definition is required as the standing offer price is calculated on the full cost to deliver the terms and conditions of the standard / regulated energy contract that is outlined in the NERL. In this context the standing offers include the cost associated with offering the full terms and conditions including the collection cycle up to and including disconnection. As such additional fees and charges, including late payment fees, early termination fees and fees for various payment methods must be explicitly excluded from the terms of the standing offer contract.</p>
205(1)	Publication of standing offer prices	We support the requirement of designated retailers to publish standing offer prices on their website. We believe that this subsection should also include an obligation to publish a notice of variation in a newspaper circulating generally in a jurisdiction where this change is to take effect. All standing offer prices should be published 20 business days prior to the change taking effect, in each medium, as required. This is to ensure that consumers have the opportunity to be informed of price increases before they take effect and seek alternative tariffs and offers if they wish to do so. The publication on both the designated retailer and AER website is an important tool, however we do not believe this is adequate to provide information to all consumers.
205(4)(b)	Limitations on commencement of	We strongly believe that the notice for variations of standing offer prices must be 20 business days, not 10 business days. We oppose the proposed change to halve the best practice

	variation	notification period of 20 days for a change in standing offer prices. In all jurisdictions except Victoria, standing offer prices are regulated and thus the risk of financial exposure identified by retailers is unfounded. In Victoria the current notification period required is 20 days. We see no justification for reducing this requirement. As discussed in our proposed amendments to s. 205 (1) above, adequate notification of any price variation is vital to ensure consumers can make informed choices about their energy provider.
205 (5)	Notification to AER	As per the publication requirements above, we believe that the AER should be notified of any variation of standing offer prices at least 20 business days prior to the changes taking effect.
205 (6)	Publication by the AER	We believe that the AER must be obliged to publish a variation of a tariff on the day that that variation takes effect, not 'as soon as practicable'.
206	Adoption of form of standard retail contract	See our comments in response to s. 203 of the NERL.
207	Formation of standard retail contract	Please refer to our comments in response to s. 203 and s. 206 of the NERL.
207(b)	Formation of standard retail contract	This section states that the standard retail contract takes effect after the consumer has complied with conditions set out in the NERR. We believe that these conditions should apply subsequent to the formation of the contract, as very few retailers have shopfront services where acceptable identification may be presented. The retailer may retain the right to disconnect the property where acceptable identification is not provided within a reasonable period. This change has regard to the nature of energy as an essential service and recognising that impediments to the obligation to supply should be limited.
208	Obligation to comply with standard retail contract	To ensure that the intent of the NERL is met this section needs to be redrafted to ensure that obligations captured in the law, rules and under jurisdictional community service obligations apply. For example; <i>A designated retailer must comply with the obligations on the retailer under the terms and conditions of a standard retail contract between the retailer and a small customer, including obligations in the rules and jurisdictions.</i>
209(4) (a)	Required alterations	We believe this to be a drafting error – this subsection refers to distributors rather than retailers.
209 (5)	When variation takes effect on existing	We believe that this section of the NERL should include a requirement to notify consumers that a variation to the price has been made and when the variation has taken effect.

	contracts	
210	Standard retail contract to be consistent with model terms and conditions	Please refer to comments in our response to s. 203 of the NERL.
212	Satisfaction of designated retailer's obligation to make standing offer by making market offer to certain small customers	Please refer to our comments in response to s. 106 of the NERL.
Division 4 – Market retail contract for small customers		
215(2)	Minimum terms and conditions for market retail contracts	S.215(2) of the NERL allows for a market retail contract to <i>contain terms and conditions that have the same substantive effect as the relevant minimum terms and conditions</i> . We believe this is an unnecessary inclusion that may allow for confusion by both consumers and retailers of minimum terms and conditions and their substantive effect. We believe that to avoid confusion it should read; <i>A market retail contract must adopt the relevant minimum terms and conditions as detailed in the Rules.</i>
215 (3)	Minimum terms and conditions for market retail contracts	The intent of this subsection is unclear. Our understanding is that the intent is to ensure that no sections included in a market contract are those prohibited by the NERR.
Division 5 – Informed consent		
218	Requirement for informed consent for certain transactions	S. 218 (1) (b) of the NERL should apply to all customer retail contracts. Explicit informed consent should be gained from all consumers entering into any contract with a retailer. On the basis of current and potential issues arising from energy marketing activity we believe that explicit informed consent should also be explicitly required for market retail contracts under s. 218 (1) of the NERL, which relate to direct debit transactions, on the basis that direct debit arrangements can impose significant detriment on some consumers. In particular, consumers should be notified at the time of signing a new contract that direct debits can attract significant dishonour fees. We strongly support s. 218 (2) of the NERL.

219	Nature of Informed Consent	<p>We are pleased to see the inclusion of <i>informed consent</i> in the Law. We strongly recommend, however, the renaming of this section and content to <i>Explicit informed consent</i>.</p> <p>It is a fundamental principle of any transaction that a consumer must provide their informed consent; however, informed consent is typically based upon supplier obligations of information without regard to a consumer's understanding of the information, in particular competency. Best practice regimes in both South Australia and Victoria further define informed consent as 'Explicit informed consent' and capture the obligation to assess competency based upon the essential nature of energy services and the specific energy market.</p> <p><i>Explicit informed consent</i> in the NERL must guarantee all Australian consumers best practice principles and be extended to all jurisdictions.</p> <p>To ensure best practice, <i>[Explicit] informed consent</i> in s. 219 (1) (b) of the NERL should also include a provision for 'competency' and 'authorised account holder'. This will be achieved by requiring the retailer to take all reasonable steps to conduct contract negotiations with a person who;</p> <p style="padding-left: 40px;">(a) is the authorised account holder; (b) is competent ; and (c) has capacity to do so.</p> <p>The obligation for a retailer to determine whether the consumer is the authorised account holder will specifically exclude minors from entering contracts.</p> <p>We strongly support the expansion of s. 219 (1) (a) of the NERL to ensure the disclosure of materials provided in a manner that can be readily understood by all consumers, including the information required under <i>Rule 4, National Energy Marketing Rules</i>.</p> <p>Documentation that demonstrates explicit informed consent must be collected and retained by the retailer.</p>
220	Record of informed consent	Verification processes must include assessment of competency and capacity.
Division 6 – Energy Marketing		
223	National Energy	We recommend in s. 223 (2) of the NERL that the <i>National Energy Marketing Rules</i> should

	Marketing Rules	<p>regulate the conduct of marketing by retail marketers in connection with '<i>customer retail contracts</i>' to ensure marketing activity in relation to both standard retail contracts and market retail contracts is effectively managed. This would ensure protection for all consumers against marketing conduct, regardless of contract type. We note that this must be reflected in the NERR.</p> <p>To directly address the issues associated with door-to-door marketing we support a requirement that the retailer provide a prescribed form which highlights to a consumer that they are changing contracts and that there is a cooling off period which they can exercise. This accords with current best practice in regulating door-to-door sales contracts generally, not just in the energy area.</p> <p>The form would be retained by a consumer and should include, but not be limited to, requirements such as:</p> <ul style="list-style-type: none"> • being in minimum 12 point font size and in plain English; • clearly specifying that the consumer has a cooling off period in which to rescind the contract, the duration of the period and how to exercise their cooling off right; • stating whether and the amount of any exit fees and charges that will apply for termination after the cooling off period; and • setting out the applicable tariffs. <p>All consumers who enter into a <i>market retail contract</i> must receive this document, including those approached via telemarketing activities. The development of this form must be conducted in full consultation with stakeholders. Examples of such documents already exist, such as the 'Warning Statement' required to be attached to the front of a contracts for sale of residential property in Queensland and to be signed by the buyer before they sign the contract, under the <i>Property Agents and Motor Dealers Act 2000</i> (Qld) (PAMD Form 30c), and the 'Notice' required to appear on the front page of a contact sales agreement or telephone marketing agreement in Victoria and, in the case of a contact sales agreement, to be signed by the purchaser, under the <i>Fair Trading Act 1999</i> (Vic) (Schedule 2).</p> <p>S. 223 of the NERL should also include the obligation on retailers to provide information to consumers about their right to complain about marketing.</p>
Division 7 – Deemed customer retail arrangements		
225	Deemed customer retail arrangement for new or	We support the arrangements for deemed customer contracts, however have concerns with regard to the treatment of 'carry-over customers'. These concerns are outlined in response to s.

	continuing customer without customer retail contract	238 of the NERL and Rule 609 of the NERR.
226(3)	Terms and conditions of deemed customer retail arrangements	Delete s. 226 (3) of the NERL. It is not appropriate for the NERR to make alternative terms and conditions for deemed customer retailer arrangements. Deemed customers must be offered the full suite of consumer rights and responsibilities as those on a standard retail contract. This section must be removed.
Division 8 – Prepayment meter systems		
	Prepayment meter systems	Prepayment meter systems effectively exclude the provision of terms and conditions afforded consumers in the NERL. As such, rigorous guidelines and protections need to be developed.
227	Use of prepayment meter systems only in jurisdictions where permitted	This section should be re-labelled 'Use of prepayment meter systems <i>and operations</i> only in jurisdictions where permitted', to limit the automatic use of smart meters as prepayment meters, where their functionality may allow.
227 (1)	Use of prepayment meter systems only in jurisdictions where permitted	This subsection must also include the requirement for a jurisdictional multi-stakeholder consultation process to be carried out prior to Ministerial decisions being made on the use of prepayment meter systems in a jurisdiction.
227 (2)	Use of prepayment meter systems only in jurisdictions where permitted	The opt-in system for prepayment meter system use must apply to all jurisdictions. All jurisdictions that permit the use of the prepayment meters should be listed in this section. Any jurisdictions seeking to permit the use of prepayment meters under this section of the NERL, that are not listed, must seek an amendment to the legislation to become listed. In those jurisdictions where the use of prepayment meter systems is already approved, these meters must meet national regulatory and regional requirements at the time that the NERL takes effect.
New section in Division 8	Purpose of Division	We recommend the inclusion of a section that emphasises the purpose of Division 8 Prepayment meter systems, for example; ' <i>The purpose of this Division is to minimise the instances of self-disconnection and to protect customers from the higher risk of disconnection through the use of prepayment meters.</i> '
New	Hardship and	We recommend the addition of a section to Division 8 that explicitly states that prepayment meter

section in Division 8	prepayment meter system use	systems must not be used as a payment method for vulnerable consumers or consumers experiencing hardship.
Division 9 – Customer hardship		
	Customer Hardship	<p>The current drafting of the hardship provisions and guidelines in the NERL and NERR are convoluted, inadequate and are a significant deviation from existing consumer protections available to many Australian energy consumers.</p> <p>The NERL has an obligation to ensure that all consumers receive adequate information, appropriate billing and collection cycles, payment arrangements and information on government concessions and other assistance schemes. We have made detailed comment in Division 4 of the NERR regarding these matters. Hardship policies provide additional support to vulnerable consumers and to those who are experiencing hardship.</p> <p>Failure to recognise and incorporate the relationship between standard terms and conditions of retail contracts and additional support required for vulnerable consumers and those experiencing hardship will result in many, if not all, consumer advocates actively campaigning against the adoption of this legislation.</p>
232 (1)	Customer hardship policies	We strongly support the requirement within the NERL, for retailers to develop and publish a hardship policy based on minimum requirements which are outlined in the NERL Division 9 s. 232 and 233 and further defined within the NERR (Part 3). The AER must approve retailer hardship policies.
232 (2)	Customer hardship policies	The current section must be amended for it is contrary to current industry best practice hardship programs. The section must state that the purpose of a retailer's consumer hardship policy is to ensure vulnerable consumers and consumers experiencing hardship are not disconnected due to an inability to pay.
233 (2)	Minimum requirements for customer hardship policy	<p>The drafting that introduces what a hardship policy 'must contain' could be interpreted as to limit the content of a hardship policy. We encourage the drafting to have these as the 'minimum requirements', including that 'the customer hardship policy must contain, but is not limited to'.</p> <p>In devising this section regarding minimum requirements/standards for retailer hardship programs we reference the <i>Committee for Melbourne - Utility Debt Spiral Project 2004</i> initiated by the Committee for Melbourne under the auspices of the United Nations Global Compact. This is published at www.melbourne.org.au. This project harnessed the expertise of business, government, regulators and civil society project partners. It established a best practice hardship response program.</p>

		<p>These minimum requirements/standards need to be carefully defined and developed in consultation with multiple cross-industry stakeholders.</p> <p>Minimum requirements/standards for a hardship program within the NERL must also include:</p> <ul style="list-style-type: none"> • Payment methods, including Centrepay; • Review of customer tariff and terms and conditions; • Review customer's current consumption and where appropriate provide personalised assistance to better manage consumption; • The development of options to assist future payments, this may include incentives, discounts etc.; • Development of referrals to local support services; • Suspension of disconnection, debt collection, legal action – while consumers are participating in the hardship program; and • A clearly articulated and communicated hardship policy.
233 (a)	Minimum requirements for customer hardship policy	This section should also allow for identification by all social institutions, such as hospitals, local members of parliament, welfare agencies etc.
233 (c)	Minimum requirements for customer hardship policy	<p>Payment plans, options and methods should be fair, reasonable and accessible and consistent with hardship policy objectives, to ensure vulnerable consumers and consumers experiencing hardship are not disconnected due to an inability to pay.</p> <p>Please refer to our response to s. 235 of the NERL.</p>
233(d)	Minimum requirements for customer hardship policy	Referral options should also be required for other support agencies where appropriate.
233 (e)	Minimum requirements for customer hardship policy	<p>We strongly support the inclusion of a minimum requirement that the retailer's staff be made aware of the hardship policy including that all staff involved in the administration of the hardship program have the necessary skills to engage with consumers regarding their payment difficulties.</p> <p>In addition, the drafting of s. 233 (e) of the NERL could be changed to; '<i>a range of additional programs that the retailer uses to assist customers experiencing hardship to respond to their individual circumstances</i>'.</p>
234	Obligation of retailer to	The current drafting of this obligation does not sufficiently ensure consumers will be made aware

	communicate customer hardship policy	of a retailer's hardship program. As such we propose the following: <i>Retailers must publish details of their hardship program on their website and advise consumers on all correspondence related to late payment or non payment of bills about the existence of payment plans and the retailers hardship program.</i>
235	Payment plans	Payment plans, options and methods should be fair, reasonable and accessible and consistent with hardship policy objectives, to ensure vulnerable consumers and consumers experiencing hardship are not disconnected due to an inability to pay. Retailers must offer affordable payment plans to all consumers covered by the NERL.
236	General Principle regarding de-energisation of premises	Consumers participating in hardship programs must not be disconnected. This section should be redrafted from 'a last resort option' to 'shall not occur'. No one should be disconnected due to inability to pay.
Division 10 – Miscellaneous		
239 (2) (b)	Presentation of prices	We support the requirement that both standard and market offer prices be presented in line with the <i>AER Pricing Information Guideline</i> .

Draft National Energy Retail Law		
Part 5 – Authorisation of retailers and exempt selling regime		
Division 1 – Prohibition on unauthorised selling of energy		
Section	Subject Matter	Comment
Division 2 – Application for an issue of retailer authorisation		
504	Public notice and submissions	We recommend that the consultation period be six weeks, as is consistent with other areas of the NERL related to public consultation.
511	Duration of retailer authorisation	We are concerned about a retailer no longer facing certain obligations once a retailer licence has been revoked, for example consumer access to an ombudsman scheme. We strongly recommend that this section of the law address this issue.
Division 6 – Exemptions		
524	Power to exempt	We support the AER holding the ability to exempt sellers from the requirement to hold a retailer authorisation under these conditions.
524 (2)	Power to exempt	We recommend that <i>all</i> sellers under a class exemption be required to be registered in the Public Register of Authorised Retailers and Exempt Sellers in relation to the exemption, where the consumer under the arrangement is a small customer.
525	Conditions	We strongly recommend the inclusion of an additional point referring to maintained protections on disconnection and relevant hardship provisions for small customers under exempt supply arrangements.

Draft National Energy Retail Law		
Part 6 – Functions and powers of the Australian Energy Regulator		
Division 1 – General		
Section	Subject Matter	Comment
601	Functions and Powers	We support the powers and functions of the AER as defined in s. 601 of NERL, however we highlight the importance of ensuring these functions are carried out effectively. This will largely depend upon many of the supporting provisions regarding compliance auditing, performance reporting, sanction powers and enforcement mechanisms.

Draft National Energy Retail Law		
Part 7 – Functions and powers of the Australian Energy Market Commission		
Division 1 – General		
Section	Subject Matter	Comment
701	Functions and powers of AEMC	We believe that in relation to the AEMC's rule making, market development and "other" functions that the drafting of the NERL is an important time to consider the AEMC's role in relation to consumers and to consider broadening its functions to meet an expanded objective which is focused on protecting the interests of consumers.
704	AEMC must have regard to the National Energy Retail Law objective	We strongly advocate that the NERL objective is expanded to recognise the importance of access to affordable energy for consumers. As such, the AEMC must then have regard to the NERL (with expanded objectives) and ensure it addresses consumer interests. The current objective limits the role of the AEMC and the AER.
Division 3 – Committees, panels and working groups of the AEMC		
707	Establishment of committees and panels and working groups	We strongly support the AEMC establishing committees, panels and working groups that take into consideration consumer representation from all jurisdictions and have representatives from multiple stakeholders. It is essential that these are convened for all rule changes where relevant and that the AEMC establishes an ongoing customer consultative committee, as currently exists with jurisdictional regulators.
Division 4 – MCE directed reviews		
708	MCE directions	We believe there should be an obligation rather than an option to consult for MCE direct reviews.
709	Terms of Reference	We believe there should be an obligation rather than an option to consult for MCE direct reviews.
710	Notice of MCE directed review	We believe there should be an obligation rather than an option to consult for MCE direct reviews.
711	Conduct of MCE directed review	We believe there should be an obligation rather than an option to consult for MCE direct reviews.
Division 5 – Other reviews		
712	Other reviews	We believe there should be an obligation rather than an option to consult in relation to "other"

		reviews.
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Draft National Energy Retail Law		
Part 8 – National Energy Retail Rules		
Division 1 – General		
Subdivision 1 – Interpretation		
Section	Subject Matter	Comment
801	Definitions <i>Publish</i>	Currently the definition of <i>publish</i> only anticipates that material will be available on the AEMC website or at the offices of the AEMC. Proactive communication should also include a monthly summary of activities to stakeholders.
Subdivision 2 – Rule making test		
802	Application of National Energy Retail Law Objective	We strongly advocate that the NERL objective is expanded to recognise the importance of access to affordable energy for consumers as per our recommendation in s. 113 of the NERL. As such, the AEMC must then have regard to the NERL (with expanded objectives) and ensure it addresses consumer interests. The current objective limits the potential role of the AEMC in its Rule making responsibilities.
Division 2 – National Energy Retail Rules generally		
803	Subject Matter of Rules	We strongly oppose the AEMC having authority to make or change Rules that impact on the fundamental supply of energy as an essential service. As such we strongly advocate for the removal of s. 803 (2)(g) of NERL the energisation, de-energisation or re-energisation of premises of consumers. These functions specifically should remain in the law. Similarly, we oppose the AEMC making rules about standard retail contracts s. 803 (4) and believe the provisions for standard contracts should be contained in the NERL, not the NERR.
Division 3 – Initial National Energy Retail Rules		
Division 4 – Subsequent rules and rule amendment procedure		
810	AEMC may make Rules more preferable Rule in certain cases	We strongly advocate that the NERL objective is expanded to recognise the importance of access to affordable energy for consumers, as per our recommendation in s. 113 of the NERL. As such, the AEMC must then have regard to the NERL (with expanded objectives) and ensure it addresses consumer interests. The current objective limits the potential role of the AEMC in its

		Rule making responsibilities. In this scenario, the current objective would prevent the AEMC from making a Rule that prioritises the interests of consumers.
812	AEMC may make Rules more preferable Rule in certain cases	We oppose the charging of a fee for requesting a rule change as it may act as a deterrent to good policy making.
813	Waiver of fee for Rule requests	We oppose the charging of a fee for requesting a rule change as it may act as a deterrent to good policy making.
817	Notice of proposed Rule	We suggest a six week minimum be the standard timeframe in which to require a response to a proposed rule.
818	Publication of non-controversial or urgent final Rule determination	This section provides for expedited progress of an “urgent” or “non controversial rule”. We again propose that the NERL objective recognises the importance of access to affordable energy for consumers, as per our recommendation in s. 113 NERL. This will help ensure that this provision is not misused to subvert normal consultation processes where the issue under consideration may impact on the achievement of this objective.
819	“Fast Track” Rules where previous public consultation by energy regulatory body or an AEMC review	As above, it is important that this provision is not used to avoid consultation processes where the matter is of fundamental importance. An expanded objective for the NERL is important to ensure this does not occur in relation to matters that have an impact on consumers’ access to affordable energy.
822	Draft Rule determinations	We support this provision with the caveats noted above in s. 818 and s. 819 of the NERL.
825	Final Rule determination	We support this provision, but note that it may be useful for the legislation to limit the overall time that a rule change process should run, for example to no more than 12 months.
Division 5 – Miscellaneous provisions relating to Rule making by the AEMC		
833	AEMC may extend period of time for making of final Rule determination for further consultation	We support a six week minimum for all public consultation processes.

Draft National Energy Retail Law		
Part 10 – Compliance and performance		
Division 1 – AER compliance regime		
Section	Subject Matter	Comment
1001	Obligation of the AER to monitor compliance	<p>The section states that the AER must “monitor compliance of regulated entities”. The section must be expanded to also state that the AER has responsibility for public reporting of its compliance monitoring regime.</p> <p>The section must also include reference to the AER having responsibility for enforcement where regulated entities do not comply with the NERL or NERR.</p>
1002	Obligation of regulated entities to establish arrangements to monitor compliance	Policies, systems and procedures established by regulated entities must be approved by the AER.
1003	Obligation of regulated entities to provide information and data about compliance	We believe that regulated entities should be required to provide information and data regarding their compliance with hardship policy minimum requirements under the Law (see recommendation above under Division 9 s. 232 (1)).
1004	Compliance audits by AER	<p>This section states that the AER may (a) carry out compliance audits; or (b) arrange for the carrying out of compliance audits. This section needs to be amended by removing the word “may” and replacing it with the word “must”, so that the undertaking of compliance audits by the AER is prescribed activity and not an option.</p> <p>Due to the critical nature of ‘hardship’, we strongly recommend that compliance with the minimum requirements/standards for hardship policies (approved by the AER) must form part of a compliance regime.</p> <p>Hardship compliance audits must be conducted and reported as part of the annual compliance audit.</p>
1008	Compliance reports	<p>We support the annual compliance report being released following 30 June of the reporting year.</p> <p>Further to the requirement for the AER to publish an annual compliance report, compliance</p>

		<p>update reports should also be published by the AER on a quarterly basis. Quarterly update reports will be very important in the initial and ongoing operation of the NERL, by providing a more dynamic compliance reporting process aimed at identifying areas of noncompliance, identifying any market failures that may become evident and facilitating response to any ad hoc or seasonal issues that arise, as well as enabling response to a disaster (eg bush fires) in a timely manner.</p> <p>The quarterly update reports should be released within three months from the end of each quarter, specifically the last day of March, June, September and December each year.</p>
1008	Compliance reports	We believe that the AER must be required to include hardship audits in its compliance reporting.
1009	Contents of compliance reports	<p>Additional subsections are proposed:</p> <p>(d) mandatory sanctions or financial penalties imposed for all noncompliance, with compensation delivered directly to consumers; and</p> <p>(e) strategies to rectify any noncompliance.</p>
1010	AER Compliance Procedures and Guidelines	The AER Compliance Procedures and Guidelines must be developed with consumer consultation through a formal and structured consultation process. Please see comments in Part 11 of the NERR on Retail Consultation Procedure.
Division 2 – AER performance regime		
1012	Performance audits - hardship	As per our previous comments in s.1004 retailer hardship policies must undergo compliance audits, not performance audits.
1012	Performance audits - hardship	Note comments as per Division 1 s. 1008.
1013	Retail Market performance reports	<p>We support the retail Market performance report being released following 30 June of the reporting year.</p> <p>Further to the requirement for the AER to publish an annual report, update reports should also be published by the AER on a quarterly basis. Quarterly update reports will be very important in the initial and ongoing operation of the NERL, by providing a more dynamic regulatory process.</p> <p>The quarterly update reports should be released within three months from the end of each</p>

		quarter, specifically the last day of March, June, September and December each year.
1014	Contents of retail market performance reports	<p>Two of the items listed in this provision are detailed further in the NERR, but for the remaining items there is no detail and it is not clear whether the service standards referred to are standards that will be set by jurisdictions under Guaranteed Service Level Minimum Service Level schemes, or whether this refers to standards imposed by the NERL. Some clarification would be useful.</p> <p>AER reporting must recognise the role that performance reporting has played in the development of the various jurisdictional energy markets. Where energy markets and associated performance monitoring regimes have been established, the AER must implement reporting regimes that are consistent with, and complement these market structures, in particular those in South Australia and Victoria.</p> <p>In addition to the criteria listed we strongly believe that the following must be included as minimum performance reporting criteria:</p> <ul style="list-style-type: none"> • Rolling annual comparisons and trend analysis; • Number of estimated and substituted accounts; • Payment methods (direct debits, estimated accounts etc); • Payment options (payment plans, bill smoothing etc) • Customer hardship program information; <ul style="list-style-type: none"> • number of customers on hardship programs, for the specified period; • number of customers successfully leaving hardship programs; • number of new hardship customers, for the period; • customer satisfaction survey of hardship programs, across retailers; • data on repayment arrangements; • reasons for people leaving hardship programs; • complaints to ombudsman schemes from people on hardship programs; and • numbers of people refused access to hardship • Marketing activity; • Transfers; • Customer service (call centre performance and customer complaints); • Disconnections and reconnections; • Multiple disconnections and reconnections; • Concession cardholder disconnections and reconnections; • Complaints to retailers; and • Complaints to relevant ombudsman schemes.

		<p>We strongly recommend that entities supplying energy services under an exempt supply arrangement to small customers be obligated to provide information and data about compliance and to report on the number of connections under exempt supply arrangement, and of disconnections for unpaid bills.</p> <p>The market performance reports should also include all distributor information relating to consumers and market innovation information such as demand management schemes and load management etc.</p>
1015	AER Performance Reporting Procedures and Guidelines	The AER Performance Reporting Procedures and Guidelines must be developed with consumer consultation through a formal and structured consultation process. See comments in relation to the Retail Consultation Procedure in Part 11 of the NERR.
1016	National Hardship Indicators	<p>The development of indicators around energy hardship is problematic. It is based upon the analysis of consumer experience at a point in time. This analysis does not assist the industry or consumers in strategically enhancing hardship programs to reflect actual and evolving consumer experiences of hardship and vulnerability.</p> <p>What is appropriate is the development of best practice procedures, designed by the AER in consultation with stakeholders, to assist retailers identify and support vulnerable consumers and those experiencing hardship. This was consistent with the findings of the Committee for Melbourne Debt Spiral Project as referred to in our response to s. 233 of the NERL.</p> <p>Further, the AER should develop an ongoing data collection / research program to inform the broader discussion around energy hardship and vulnerability. This would be consistent with the models that exist in the United Kingdom and the United States of America.</p>

Draft National Energy Retail Law		
Part 11 – Enforcement		
Division 1 – Enforceable undertakings		
Section	Subject Matter	Comment
1101	Enforceable undertakings	Proposed amendments to the enforcement and remedies powers under general consumer law are due to be introduced shortly. If any improvements are intended to be made to the current enforceable undertakings provision under the <i>Trade Practices Act 1974</i> (Cth), on which this section is based, those changes should also be reflected here.
Division 2 – Proceedings generally		
1102	Instituting civil proceedings under this Law	<p>This section expressly limits a consumer’s (or business’) right to take legal action in relation to a breach of the NERL, the NERR or the Regulations to breaches of ‘conduct provisions’.</p> <p>The conduct provisions have not yet been identified. This makes it impossible to comment as to whether the limitation in s. 1102 is reasonable or not.</p> <p>However, we note that unless a broad range of provisions are listed as conduct provisions, this limitation will not be appropriate. For example, the <i>Trade Practices Act</i> enables businesses and consumers to seek injunctions and other orders in relation to all the major contravention provisions of that Act.</p>
Division 3 – Proceedings for breaches of this Law, the Regulations or the Rules		
1104 (1) and (2)	AER proceedings for breaches of this Law, Regulations or the Rules that are not offences	<p>The first two subsections limit the ability of the AER to seek orders, including payment of a civil penalty, to situations in which a person is <i>in breach of</i> a provision. This means that unless the person is currently in breach, these orders are not available. This includes a situation in which a person has committed a serious breach in the past, but is not currently in breach.</p> <p>There is no reason to limit the availability of civil penalties to cases in which a breach is ongoing. The <i>Trade Practices Act</i> provides for its civil penalties to be payable if a person <i>has contravened</i> a relevant provision. The <i>Corporations Act 2001</i> (Cth) also provides for pecuniary penalties if a person <i>has contravened</i> a civil penalty provision.</p> <p>Civil penalty orders must be available for all breaches of a civil penalty provision, whether once-off or ongoing, and whether subsequently rectified or not. Matters such as subsequent</p>

		<p>rectification would be relevant to the Court in making a decision as to whether a civil penalty order was appropriate, but should not constitute a blanket bar on the availability of this order.</p> <p>S. 1104 (1) should be amended to provide that orders can be made declaring a person is in breach of <i>or has breached</i> a relevant provision, and s. 1104 (2) should be amended to provide for those orders if the order declares a person to be in breach of <i>or to have breached</i> a relevant provision.</p>
1104 (4)	AER proceedings for breaches of this Law, Regulations or the Rules that are not offences	<p>S. 1104 (4) attempts to ensure the Court’s power to grant injunctions is not unnecessarily limited and, we assume, is based on similar provisions in the <i>Trade Practices Act</i>. However, subsection (4) (b) may unnecessarily limit the Court’s general ability to grant an injunction under subsection (3) (a) by stating that the power to grant the injunction may be exercised ‘if it appears to the Court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind’.</p> <p>The Court’s general discretion to grant or refuse an injunction based on what it considers appropriate is usually considered sufficient. These additional words about a person being “likely to engage in conduct” are unnecessary and do not appear in the provision in the <i>Trade Practices Act</i> (s. 80 (4)) on which this subsection is based. They should be removed.</p>
1104 additional subsection	AER proceedings for breaches of this Law, Regulations or the Rules that are not offences	<p>S. 1104 (4) adopts the provisions in s. 80 (4) of the <i>Trade Practices Act</i> to ensure the Court’s power to grant an injunction <i>restraining</i> a person from doing something is not unnecessarily limited. However, the related provisions in s. 80 (5) of the <i>Trade Practices Act</i>, that ensure the Court’s power to grant an injunction <i>requiring</i> a person to do something is also not unnecessarily limited, have not been adopted here.</p> <p>This should be rectified and provisions based on s. 80 (5) of the <i>Trade Practices Act</i> should be included here.</p>
1105	Proceedings for declaration that a person is in breach of a conduct provision	The comments made above in relation to s. 1104 (4) apply equally to s. 1105 and we recommend the same amendments.
1106	Actions for damages by persons for breach of conduct provision	We support the NERL providing for persons other than the AER to be able to seek compensation for loss or damage suffered as a result of conduct in breach of a relevant provision.

		<p>However, s. 1106 requires a person who suffered loss to undertake two separate legal actions – one to recover compensation (under s. 1106) and another if they want to obtain other orders or an injunction to prevent ongoing harmful conduct (under s.1105).</p> <p>s. 1106 also does not allow for the AER to seek an order for such compensation to affected persons, particularly if it is already seeking other orders in relation to the same conduct under s. 1104.</p> <p>This invites inefficiencies in using the court system. It is also unnecessarily burdensome and effectively ensures that small customers, in particular, will almost always be unable to pursue compensation for conduct in breach.</p> <p>It is also directly counter to current reforms being proposed to the general consumer law and due to be introduced shortly through the new Australian Consumer Law. For example, the Government has confirmed it intends to improve the ability of consumer regulators to seek consumer redress for consumer law breaches. These will render this section inconsistent with the general consumer law and behind best practice.</p> <p>We therefore strongly recommend that Division 3 be redrafted to ensure it is consistent with these new proposals and allow for non-party redress to be sought as part of general civil proceedings against breaches.</p>
Division 4 – Matters relating to breaches of this Law, the Regulations or the Rules		
1109	Breaches of civil penalty provisions involving continuing failure	It is unclear why this section is needed, other than to try to rectify some of the deficiencies caused by limiting ss. 1104 (1) - (2) to situations where a person is <i>in breach</i> . This should be more appropriately rectified as per our comments above.
1111	Persons involved in breach of civil penalty provision or conduct provision	<p>It is unclear why this section is limited to civil penalty provisions and conduct provisions.</p> <p>Why should a person be allowed to aid, abet, counsel or procure, or be directly or indirectly knowingly concerned in, or party to, some breaches of the NERL, NERR or Regulations?</p> <p>The <i>Trade Practices Act</i>, for example, does not so limit its provisions.</p>

1112	Attempt to breach a civil penalty provision	As above, we do not understand why this section is limited only to civil penalty provisions. A person should not be permitted to attempt to breach other provisions.
1113	Civil penalties payable to the Commonwealth	The Government should consider directing some or all civil pecuniary penalty payments to matters related to energy regulation, for example to the Advocacy Panel for distribution to consumer education and capacity building programs.
Division 8 – Infringement notices		
		<p>We strongly support this Division, which provides for an infringement notice regime.</p> <p>This accords with upcoming reforms to general consumer law announced by the Government. We note that makes it more unclear why other reforms to be made as part of that reform package, such as improved non-party redress mechanisms, have also not been adopted in the NERL.</p>
Division 9 – Search warrants		
		<p>We are very concerned that this Division does not currently provide workable search and investigation powers to the AER. They are significantly more constrained than the corresponding provisions applying to the ACCC under the <i>Trade Practices Act</i>. For example, the Division does not even allow for an authorised person undertaking a search pursuant to a warrant to be assisted by other persons, for example simply to undertake manual labour associated with loading documents identified by the authorised person into a vehicle or copying the documents.</p> <p>We strongly recommend that the Government consult further with regulators such as the ACCC which have significant experience in undertaking searches and investigations, and make amendments to this Division to ensure it enables workable investigations in practice.</p>

Draft National Energy Retail Law		
Part 13 – General		
Section	Subject Matter	Comment
1301	Immunity in relation to	This section provides for too broad an exclusion of liability. In addition to specifying that it does

	failure to supply energy	<p>not apply in cases of bad faith or negligence, we recommend that it be stated not to apply in cases of breaches of conduct provisions.</p> <p>This would continue to ensure retailers and distributors do not incur liability where this is not appropriate or fair, but do incur civil liability for loss or damage suffered where they have engaged in conduct it is clear they should not have, by breaching conduct provisions under the NERL, NERR or Regulations.</p>
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Draft National Energy Retail Rules		
Part 1 – Preliminary		
Division 1 – Introduction and definitions		
Rule	Subject Matter	Comment
103	Definitions	All definitions need to be consistent throughout the <i>NERL and NERR</i> and Schedules.
103	Definitions <i>Payment plan</i>	<p>Payment plans, options and methods should be fair, reasonable and accessible and consistent with hardship policy objectives, to ensure vulnerable consumers and consumers experiencing hardship are not disconnected due to an inability to pay.</p> <p>The definition of payment plan does not take into consideration that retailers might waive some arrears or offer other incentive payment schemes to consumers. The definition should be amended as follows:</p> <p><i>Payment plan means a plan negotiated with a small customer based on their capacity to pay, by periodic instalments, to a retailer, including all or some arrears and any connection, disconnection or reconnection charges, relating to the continued usage of electricity.</i></p>

Draft National Energy Retail Rules		
Part 2 – Customer retail contracts		
Division 1 – Standard retail contracts – terms and conditions generally		

Rule	Subject Matter	Comment
Division 3 – Customer retail contracts – pre-contractual procedures		
205	Pre-contractual duty of retailers	We support this Rule.
206	Pre-contractual duty of distributors	We support this rule. We believe subrule 206 (1), ‘by a small customer for premises who is seeking customer retail services for the premises’ could be made clearer.
207(3) (c)	Pre-contractual request to designated retailer for sale and supply of energy	Rule 207 (3) (c) requires a consumer to ‘ensure that there is safe and convenient access to the meter at the premises’. We would suggest that the drafting of the Rule in the previous SCO paper to ‘ensure that there is safe and <i>unhindered</i> access to the meter at the premises’ more realistically reflects the causes that are within a consumers control. This is particularly the case for tenant households. Further discussion of the obligation on meter access for tenant households is discussed in our response to Rule 607.
208 (1)	Responsibilities of designated retailer in response to request for sale and supply of energy	<p>The retailer must be required to provide consumers entering standard retail and market retail contracts the information necessary to ensure the retailer has met their obligations to acquire explicit informed consent as defined in our response to s. 103 of the NERL. This Rule should include the responsibility of a retailer to provide a small customer with the full terms and conditions their contract within two business days of entering into the contract.</p> <p>Rule208 (1) (c) should also include a notification about the existence of the life support register and the consumer’s obligation to notify the retailer if they require life support equipment.</p>
Division 4 – Customer retail contracts – billing		
210(1) (d)	Basis for bills	This Rule allows for a consumer and retailer to enter into an arrangement to calculate bills on a basis other than a meter reading. This should only be permitted with the explicit informed consent of the consumer.
210 (2)	Basis for bills	We support the requirement for meter readings to occur as frequently as required to prepare a bill, however we believe that the mandated minimum meter reading period should be twelve months and where a consumer has received estimated accounts for a period between six to twelve months they may request, at no charge, a special meter read.
211(6)	Estimation as basis for bills	This Rule is applied to market retail contracts except where estimation has been agreed to as the basis of the consumer’s bill as part of that market contract. Notwithstanding this agreement contract Rule 210(2) should continue to apply ensure that the estimation is based on an actual meter read at least once every twelve months.

212	Bill smoothing	We support this Rule however we suggest that drafting should be amended to ensure that bill smoothing is made available at the consumer's request and with their explicit informed consent.
214 (1)	Contents of bills	<p>The Rules must ensure that information is included on consumer bills that enables them to monitor their energy use and calculate the fees and charges applicable.</p> <p>In addition to the information provided in Rule 214 (1) (a) to (s), consumption graphs and information about greenhouse gas emissions should also be included. In addition information about jurisdictional ombudsman schemes must be included on a bill as least once every 12 months.</p> <p>Contact details of interpreter services in community languages must also be included on bills.</p>
215(1)	Pay by date	<p>As the pay by date is calculated in relation to the date of issuance by the retailer, rather than the date of receipt by the consumer, we suggest that the pay by date be extended to 15 business days after the date of issue.</p> <p>The extended pay by date is to ensure that delays in issue and delivery do not negatively impact on the time in which a consumer has to pay the bill.</p> <p>In addition to the number of days outlined above, delivery standards in rural and regional areas need to be considered by retailers where 15 days may not be sufficient.</p>
215(3)	Pay by date	<p>Consumers (whatever their contractual arrangements) must have adequate opportunity to pay their bills within a reasonable period, otherwise there is a risk that payment times may be made unreasonably short in order to generate late payment fees. This Rule must be applied to market retail contracts.</p> <p>Details of pay by dates (due dates) must be developed for the additional components of the collection cycled (including the shortened collection cycle). As a fundamental principle, consumers on a shorted collection cycle should have no less than 22 business days from the receipt of the bill to disconnection.</p>
217	Historical billing information	<p>The proposed rules for access to historical billing data are a significant reduction on the consumer protections currently provided in most NEM jurisdictions.</p> <p>We note that most jurisdictions currently specify that historical billing information must be</p>

		<p>provided within 10 business days of the request being made. This timeframe should be specified in this clause rather than relying on the undefined notion of 'promptly'.</p> <p>Consumers should not be charged for requesting billing information more than once in any 12 month period. Consumers should have the right to dispute more than one bill in that period, particularly as billing problems can often be systemic and recurring.</p> <p>The regulator should approve any proposed charges for billing information and these should be listed in the retailer's standard retail contract and market retail contract.</p>
218(2)	Billing disputes	<p>This subrule refers to a retailer's standard complaints procedure and time limits applicable under this procedure. It is unclear whether 'time limits' refers to the time in which a dispute must be resolved, or a time limit in which disputes can be raised.</p> <p>If it is the latter we do not believe it is appropriate to limit the time in which a consumer can raise a dispute with the retailer. Under limitations of actions law, parties generally have six years to dispute something under a contract, including a bill.</p>
218(5) (b)	Billing disputes	<p>This subrule allows for a retailer to request any charges for a meter check up front, if the check is requested in relation to billing disputes. We consider that this would be a barrier to raising (and resolving) billing disputes and should be prohibited.</p>
219(2) (a)	Undercharging	<p>A retailer should only recover amounts undercharged during the previous six months, as this is current best practice (Tasmania). A consumer should not be penalised due to retailer or distributor error. Given the significant billing issues currently being experienced by a significant number of consumers in Queensland and Victoria, we consider that retailers require additional incentive to ensure that their billing practices are accurate.</p>
219(2)(d)	Undercharging	<p>We believe that there should be no limitation on the time taken to repay the undercharged amount and suggest that subclauses (i) and (ii) be removed. There may be cases where households, through no fault of their own have been significantly undercharged, requiring these households to repay effectively two years worth of bills in a 12 month period which is unreasonable.</p>
220(6)	Overcharging	<p>Applying an overcharging threshold limits a consumer's ability to make choices about how and where their funds are used. While we do not believe that any overcharging threshold amount is appropriate, we acknowledge that the retailer may incur costs in arranging a refund. As such we</p>

		recommend that the amount of the overcharging threshold should be set at the lowest rate in any jurisdiction which represents best practice and is currently \$25 (NSW).
221 (1)	Payment methods	Electronic payment options such as Bpay should also be included in the required payment methods. Consumers must not be penalised by fee or otherwise for their choice of payment methods.
221(2)	Payment methods	We believe that where a consumer requests the use of Centrepay this must be permitted. Restricting the use of Centrepay to consumers experiencing hardship, limits a consumers ability to manage their funds in a way that is most appropriate to them.
222 (3)	Payment difficulties	We believe that this subrule should state that a retailer <i>must</i> offer a payment plan to all consumers. Flexible and affordable payment plans are a critical tool to assist consumers experiencing short term financial difficulty and prevent them from falling into ongoing financial hardship.
223(1)	Shortened collection cycle	We strongly reject this proposal.
223 (2) (b)	Shortened collection cycle	The proposed process detailing when a consumer can be assigned to a shortened collection cycle have been reduced from current best practice in Victoria and South Australia where a shortened collection cycle can be introduced after reminder notices for three consecutive bills or disconnection warnings for two consecutive bills. The current Rule in the NERR has conflated these two notices, effectively reducing the notice requirements for a shortened collection cycle. We strongly oppose this change.
224	Request for final bill	This Rule should apply to both standard and market retail contracts. We see no reason why a consumer should not be able to request a bill to finalise their dealings with a retailer.
Division 5 – Customer retail contracts – security deposits		
225	Consideration of credit history	This Rule should only relate to utility debts and explicitly refer to “ <i>utility credit history</i> ”. As previously stated in our response to the SCO paper, we are concerned that in many cases general information held by credit referencing agencies is not fair, accurate or relevant to payment of utility bills.
226	Requirement for	The requirement for a security deposit must be limited to debts owed to the retailer over the

	security deposit	<p>minimum disconnection amount (see comments to Rule 610(1) (g)). We also note that arrangements for regular payment, such as Centrepay, offset risks to the retailer and should be considered in lieu of requiring a security deposit and the requirement for a security deposit should be waived if these arrangements are entered into.</p> <p>In addition, the Rules must provide that the retailers offer an alternative to security deposits to establish the connection of essential energy services. Consistent with best practice arrangements it is a requirement on retailers that they offer consumers a payment plan in lieu of the payment of a security deposit.</p> <p>Subrules (d) and (e) are circular and should be removed.</p>
227(2)	Payment of security deposit	If a consumer elects to accept a security deposit, a payment plan must be offered to assist the consumer to pay for the security deposit. Connection should not be withheld for inability to pay for the security deposit.
227 (5)	Payment of security deposit	This Rule must apply to market retail contracts; otherwise it explicitly allows for certain consumer classes to be denied access to the best offers available because they cannot afford retailer requirements for up front payment.
228	Amount of security deposit	We support this calculation of the security deposit amount. This Rule should apply to market retail contracts There is no basis for a retailer to require a punitive amount above these amounts for market contracts.
229(2) (a)	Interest on Security deposit	We believe that consumers should be repaid the full interest accrued on their security deposit. There appears to be no justification for the interest calculated to be less than the bank bill swap rate as currently drafted.
231	Obligation to return security deposit	This Rule should apply to market contracts. Security deposits provide surety to the retailer and should not be a feature of a market retail contract.
Division 7 – Customer retail contracts – termination		
234 (1) (e)	Termination of standard retail contract	We are concerned about the implication of this subrule for consumers who reconnect after 10 days, and who would therefore lose access to hardship provisions or access to favourable contract conditions.

235 (4)	Termination of market retail contract	<p>We support this subrule. Fees for early termination of a market retail contract must be limited to the retailer's actual administration costs of processing the termination of the contract earlier than they would otherwise have to.</p> <p>If changes are to be made to this subrule we suggest that clause 32 of the Victorian Energy Retail Code be the model for these terms.</p>
236 (2)	Cooling off period and right of rescission – market retail contracts	<p>The current drafting defines the cooling off period as being within 10 business days commencing on, and including, the date of receipt by the consumer of the required information in <i>Rule 4 of the National Energy Marketing Rules</i> provided in respect of the contract. This does not ensure that consumers are fully aware of the actual details of their contract with the retailer before their cooling off period starts to run. The 10 day cooling off period should not commence until the <i>contract</i> is received by the consumer, as well as the full requirements for information itemised in the National Energy Marketing Rules, Rule 4 (1). As noted above in relation to s. 223, we also consider that customers should be given a prescribed form explaining their cooling off rights before the cooling off period starts to run.</p> <p>As 'cooling off period' is referred to in several places throughout the NERL and NERR, it may be worth adding it to the list of definitions in s. 103 and stating that its definition is as set out in this subrule.</p>
Division 8 – Deemed customer retail arrangements		
238	Obligations of move-in customers and carry over customers	<p>It is not appropriate for this Rule to be applied to carry-over customers. In the case of carry-over customers, a retailer has the full contact and billing information of that consumer, who may not be aware that their market retail contract has expired. The retailer in this scenario has the capacity to contact the account holder and offer an alternative contract if it desires, however the lapsing of a market retail contract should not require a carry over customer to contact the retailer to enter into an alternative contract.</p>
Division 9 – Other retailer obligations		
241	Provision of information to customers	<p>In addition to the information listed in Rule 241, the retailer must also provide details of its hardship policy.</p>

Draft National Energy Retail Rules

Part 3 – Customer hardship regime

Rule	Subject Matter	Comment
Part 3		The AER must also consult with stakeholders in the development of any Rules around hardship policies. It is essential that training for the retailer customer service team is an integral component of a retailer's hardship program to aid the identification and referral process of vulnerable customers and customers experiencing hardship to the specialist 'hardship team'.
301 (1 and 2)	Obligation of a retailer to communicate customer hardship policy	We support retention of these obligations on retailers. We refer to the definition we proposed in the NERL regarding 'hardship customers'.
302	Payment plans	<p>As stated under the Division 9 s. 235 of the NERL, the requirement to offer a payment plan should not be limited to customers experiencing hardship. Some consumers will not self-identify, or be identified by a business, as experiencing hardship. Domestic consumers may need an option to pay by a payment plan (including arrears) due to a range of circumstances eg. budgeting or a one off event.</p> <p>Payment plans, options and methods should be fair, reasonable and accessible and consistent with hardship policy objectives, to ensure vulnerable consumers and consumers experiencing hardship are not disconnected due to an inability to pay. Specifically, a payment plan (as per our response to Rule 103 of the NERR), should be as follows</p> <p><i>a plan negotiated with a small customer based on their capacity to pay, by periodic instalments, to a retailer, including all or some arrears and any connection, disconnection or reconnection charges, relating to the continued usage of electricity.</i></p>
	Additional clause	A retailer must provide a consumer experiencing hardship with energy efficiency audits.
303	Waiver of late payment fee for hardship customer	We support this clause. Further, as we have effectively argued, late payment fees do not apply to standard retail contracts and should only apply to market retail contracts.
304	National hardship	See our comments in response to s. 1016 of the NERL.

	indicators	
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Draft National Energy Retail Rules		
Part 4 – Relationship between distributors and customers		
Division 5 – Distributor obligations to customers		
410	Provision of information	The Rules should allow recovery of information at a premise by a consumer, for as long as that consumer has been at the premise and no longer. The Rules should specify if provision of such information is subject to a charge – we believe it should not be subject to a charge. The Rules should also specify whether consumers can, and how they can, transfer data to 3rd parties.

Draft National Energy Retail Rules		
Part 6 – De-energisation of premises		
Division 1 – Preliminary		
Rule	Subject Matter	Comment
Part 6	De-energisation of premises	<p>Rename this Part 6 to be 'Disconnection of premises' as per comments regarding the definition of disconnection in s. 103 of the NERL.</p> <p>There are no provisions in Part 6 that relate to a distributor taking a property on or off the distribution / transmission system. All the provisions in Part 6 relate to the withdrawal of energy supply due to consumer actions, whether that be non-payment, breach of other contract terms or the finalisation of a contract through move in/move outs. There is therefore no justification for using the term de-energisation rather than disconnection in this Part.</p>
601	Definition	Amend protected period definition (a) to read after 2.00pm (in line with current best practice, enabling more time for consumer to contact their retailer).
604 (2)	De-energisation warning notices	Information on disconnection warning notices must include information about the availability of retailer payment plans and hardship assistance, as well as government concessions and rebates.
604 (2c)	De-energisation warning notices	We believe that the date of disconnection should be not fewer than 7 business days after the date of issue of the warning notice; this is in line with current jurisdictional best practice and with our comments in relation to s. 215 of the NERL.
Division 2 – Retailer initiated de-energisation of premises		
Division 2	Retailer-initiated de-energisation of premises	Rename Division 2 to be 'Retailer-initiated disconnection of premises' as per comments regarding the definition of disconnection in s. 103 of the NERL and our comments above regarding Part 6..
605(1) (d)	De-energisation for not paying bill	This Rule should refer to the retailer's best endeavours to contact a consumer either in person or by telephone. The other mechanisms listed (mail, facsimile or email) provide no guarantee that the consumer has received or understood the earlier notices, nor does it allow consumers a final opportunity to identify any payment difficulties they may be having. Retailers should also be further obliged to attempt one out-of-hours contact before disconnection. This acknowledges that

		not all consumers are at home during business hours due to work and other commitments.
605(2)	De-energisation for not paying bill	This Rule must be re-drafted so as to preclude disconnection for households who are participating in a retailer's hardship program. The current drafting refers solely to adherence to a payment plan, however hardship plans should contain additional assistance (refer to our comments Section 233 of the NERL, minimum requirements for customer hardship policy) and households should not be disconnected when they are participating in a hardship program.
606(1)	De-energisation for not paying a security deposit	To reflect issues raised in relation to Rule 227, we believe an additional Rule should be included to ensure that retailers have offered a payment plan for payment of the security deposit. The protections under this Rule must apply to market retail contracts. There is no policy rationale for excluding vulnerable consumers, and consumers experiencing hardship, who happen to be on a market retail contract from basic protections such as these.
607	De-energisation for denying access to the meter	This Rule must acknowledge that tenant households may not be able to rectify physical meter access issues and therefore set out alternative arrangements and retailer responsibilities in this case.
607(1) (c)	De energisation for denying access to the meter	As per the comments to Rule 605(1)(d) above, we believe that this Rule must refer to the retailers best endeavours to contact a consumer either in person or by telephone.
609	De-energisation for non-notification by move in or carry over customers	We do not believe that disconnection is an appropriate measure for carry-over customers. Where a consumer is a carry-over customer the retailer has the proper identification and contact details for billing and service. Should the retailer wish to offer the consumer a market retail contract they are able to do so, if the consumer does not wish to take up this contract, they are protected by the retailer's obligation to supply under the standard retail contract. Disconnection is not an appropriate measure in this case.
610	When retailer must not arrange de-energisation	We understand that the exclusion of this Rule from market retail contracts is a drafting error. If it is not, this Rule must be included as a minimum term for market retail contracts.
610(1)(c)	When retailer must not arrange de-energisation	We suggest that the inclusion of a reference to being on a payment plan is unnecessary and that it is sufficient to refer to a consumer participating in the retailer's hardship program. Participation in this program must not be limited to payment plans.
610 (1)(g)	When retailer must not arrange de-energisation	As is currently the practice in jurisdictional frameworks, we believe that the Rules must include a threshold amount under which disconnection cannot occur.

	– suggested additional Rule	<p>We suggest a Rule along the lines of (g) <i>where the customer has an overdue debt under the threshold for disconnection.</i></p> <p>As is currently the practice in many jurisdictions, the threshold should be set by the AER, or alternatively could be set in the NERR as an amount 1.5 times the consumer’s average bill.</p>
611	Timing of de-energisation where dual fuel contract	We understand that the exclusion of this condition from market retail contracts is a drafting error. This condition must be included as a minimum term for market contracts.
612	Request for de-energisation	We understand that the exclusion of this condition from market retail contracts is a drafting error. This condition must be included as a minimum term for market contracts.
Division 3 – Distributor de-energisation of premises		
613 (3)	Grounds for de-energisation and disconnection warning processes	<p>The ability for a retailer to disconnect a consumer must be limited to the grounds listed in Rule 613. This could be achieved by inserting the word ‘only’ after the word ‘may’ in the first line.</p> <p>Processes for disconnection should be inline with retailer processes for de-energisation in terms of warning notices and timeframes. Of particular concern is that a premise could be disconnected at the order of a relevant authority, or if there are health and safety reasons. It is not clear what authority would be considered relevant, who decides what are health and safety issues and how this would be determined?</p> <p>The process for disconnection warnings, and disconnection, need to provide adequate opportunity for consumers to either resolve the issue, or raise the issue for dispute resolution. This is particularly important for tenants who may have limited control over the timeliness and effectiveness of landlord response to issues. We note the Victorian Distribution Code, (clause 12.6) protects tenants from disconnection by a distributor. If safety issues are significant enough, and a landlord is not responding to requests, an alternative mechanism is required to have the safety issue resolved, without disconnecting the tenant, and monies recovered for work undertaken at a later date.</p>
Division 4 – Re-energisation of premises		
615	Re-energisation of premises	<p>This Rule should outline timeframes for reconnection.</p> <p>If a request for reconnection is made prior to 2pm on a business day, reconnection should occur</p>

		<p>that same business day. Where the request is made after 2pm (and in line with the restrictions for disconnection as outlined in Rule 601 and our amendments to that Rule), reconnection should occur as soon as possible, and no later than, the following business day.</p> <p>Outlining reconnection timeframes is important as it limits a consumers time off supply. Where a household is disconnected prior to 2pm, mandated timeframes allow them the opportunity to rectify the problem and get back on supply within the same business day.</p>
615	Obligation on retailer to arrange re energisation	<p>The Rules must clarify the service standard for reconnection of the property, including the setting of timeframes and any payments a consumer may be eligible for if timeframes are not met.</p> <p>Up front payment of the reconnection charge should not be a precondition of reconnection, particularly if disconnection has occurred as a result of payment difficulties. In order to prevent reconnection being with-held for upfront non-payment of a reconnection charge, the drafting of Rule 615 (1) (c) must add that as an alternative the retailer must offer the consumer alternative payment arrangements, for example a payment plan, to pay any reconnection charge.</p> <p>Reconnection might be occurring following a wrongful disconnection. The Rules must make clear that in the case of reconnection following a wrongful disconnection no charge is payable by the consumer for reconnection and a retailer or distributor must pay compensation to the consumer.</p>
616 (2)	Obligations on distributor to re-energise premises	The comments in response to Rule 615 above, apply equally to subrule 616 (2).

Draft National Energy Retail Rules		
Part 7 – Life support equipment		
Rule	Subject Matter	Comment
702	Retailer obligations	We support this Part of the Rules but believe it is appropriate to include an obligation on retailers to inform consumers about any relevant concessions and applicable grants, including grants to upgrade appliances or the energy efficiency of the premises, available to consumers using life support equipment.

		Further, it must also be an obligation of retailers to provide life support consumers experiencing difficulty paying their bills, with energy efficiency advice and an energy audit.
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Draft National Energy Retail Rules

Part 8 – Prepayment meter systems

Rule	Subject Matter	Comment
803 (3)	Self-disconnection times	<p>This Rule should be re-titled from ‘Self-disconnection times’ to ‘Disconnection times’ in line with both South Australian and Tasmanian Prepayment meter codes. While consumers may ‘self-disconnect’ by not re-charging the prepayment meter with credit, the meter itself is programmed to <u>disconnect</u> in the absence of any credit, therefore the process carried out by the meter is disconnection, not self-disconnection. Please note that all references to self-disconnection in this Rule need to be amended to note disconnection in all Rules.</p> <p>The disconnection times must align with the protected period under Rule 601. Prepayment consumers are more, not less, vulnerable to inappropriate disconnection and require at least the same level of protection afforded to other consumers.</p>
803 (6)	Emergency credit	The amount of emergency credit required must be reviewed every two years to ensure that the amount of emergency credit is maintained at a level equivalent to the average cost of 3-5 days of electricity supply, as in the Tasmanian Electricity Code (9A.4.3.5) and that this Rule should be amended to reflect this.
807	Limitation on recovery of credit	We strongly support this Rule.
808	Credit retrieval	We recommend the inclusion of a Rule similar to Rule 810 Overcharging (2) (b) providing payments for consumers as cash or a credit to an account as agreed with the consumer.
809	System testing	<p>The requirement for up front payment of the cost of meter checks unfairly and unnecessarily deters consumers, particularly lower income consumers, from raising issues with faulty meter equipment. Up from payment for meter checks must be prohibited.</p> <p>This is in line with our comments relating to billing disputes in Rule 218.</p>

810	Overcharging	Add requirement that overcharge be repaid to consumer with interest (note that an interest rate is detailed in Rule 229 (2) 'Interest on security deposit'), as in the Tasmanian Electricity Code 9A.8(b)(1).
811	Undercharging	Limit recovery to amounts accrued in six months or less, rather than 12 months, as per Tasmanian Electricity Code 9A.9(a)(2).
814	Customer enquiries and complaints	It is necessary that the emergency telephone service provided to consumers is available 24 hours a day, 7 days a week, 365 days of the year.
816	Payment difficulties and hardship	<p>816(2)(b) To limit the time off supply for consumers, the <i>maximum</i> number of 'self-disconnections' in any three month period should be reduced to 2 times, rather than '3 or more'.</p> <p>816 (2) (d) To ensure those receiving Centrelink payments have the opportunity to pay via Centrepay, add 'Centrepay as a payment option.'</p> <p>816(2)(e): Add 'and/or financial counselling services'.</p> <p>816(2) As a minimum requirement upon retailers for managing prepayment consumers experiencing payment difficulties, the retailer must enter the consumer into its hardship program.</p>
820 (2)	Different retailer	A retailer must not recover any costs for the removal of a prepayment meter where the prepayment meter retail contract has <i>ended</i> and where the consumer wishes to sign onto an alternative consumer retail contract (which does not have a prepayment meter). Ability to charge for removal of a prepayment meter is a significant barrier to switching and hinders the operation of a competitive market.
821	Customer consultation	Note omission of 'Customer' in 821 (3), 'Prepayment Meter Customer Consultation'.
822	Deemed customer retail arrangements	In some instances it may be inevitable that a consumer moves into a property where a prepayment meter exists, and that they may therefore default onto a deemed prepayment meter contract. In those situations where the consumer chooses to sign onto an alternative customer retail contract (which does not have a prepayment meter) it is essential that the retailer immediately arranges the removal of the prepayment meter, and that the prepayment meter is removed within 10 business days and replaced with an alternative meter.

Draft National Energy Retail Rules		
Part 9 – Exempt selling regime		
Division 1 – Preliminary		
Division 2 – AER power to exempt		
904	Deemed Exemptions	We recommend that all sellers under a class exemption be required to be registered in the Public Register of Authorised Retailers and Exempt Sellers in relation to the exemption, where the consumer under the arrangement is a small customer, and that protections on disconnection and relevant hardship provisions apply for small customers under deemed exempt supply arrangements.
905	Registrable exemptions and registered exemptions	See comments at (Rule 904) above.
906	Conditions generally	We support this Rule.
907	Conditions for deemed exemptions and registered exemptions	We recommend explicit reference to disconnection for non-payment and hardship provisions as relevant.
Division 3 – Exempt Selling Policy Principles, Policy Factors and Guidelines		
908	Exempt Selling policy Principles	We support these positions however strongly recommend that a minimum set of protections be set for small customers under exempt supply arrangements. We also see the need for reporting on the number of connections under exempt supply arrangement, and of disconnections for unpaid bills. Access to an ombudsman for complaints should be available to all small customers, regardless of whether under a licenced or exempt supply arrangement.
908 (c)	Exempt Selling policy Principles	We acknowledge the need for licence exemptions; however wish to ensure that vulnerable consumers under exempt supply arrangements maintain a level of consumer protections best suited to their particular circumstance. Therefore, we suggest that this point should read; <i>“the likely cost of providing customer protections to exempt supply customers should not outweigh the likely benefits of customer protections to exempt supply customers overall”</i> . This would ensure that the protections that are appropriate under exempt supply arrangements

		remain.
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Draft National Energy Retail Rules

Part 10 – Retail market performance reports

This Part details the content to be included for two of the areas to be covered in the retail market performance report (see NERL Section 1014)– namely the retail market overview and the retail market activities report. Other areas to be included in reporting and listed at NERL s.1014 are not provided with further detail in this section of the rules. One of the areas with no detail is the reporting on hardship. It would be useful to clarify that the content of this part of the retail market performance report will be in accordance with the hardship indicators to be developed. For the remaining areas, we suggest that either further detail specifying the content to be provided in the retail market performance report be included or alternatively a process for deciding the content be outlined.

Rule	Subject Matter	Comment
1001	Purpose of this Part	
1002	Contents of retail market performance report-retail market overview	The introductory statement describing key elements of a retail performance report should include a requirement that the retail market performance report data be published by jurisdiction, and in aggregate across the National Energy Market and also require that where possible, data should also be reported for the previous five years.
1002 (c)	Contents of Retail Market Performance Report – retail market overview	A recognised measure of retail market concentration should also be included, for each jurisdiction
1002 (e)	Contents of Retail Market Performance Report – retail market overview	Additional sub items for this Rule should include a requirement that; (iv) when delivered by retailers, details of government funded Community Service Obligations and (v) best estimate aggregate carbon emissions for electricity and gas use, are published.
1003	Contents of retail market performance report – retail market activities report	We have concerns with the reporting criteria for performance reports, for example the current definition of de-energisation limits the effectiveness of reporting, specifically for example, the detail of those who were disconnected due to inability to pay. As such, in addition to the criteria listed we strongly believe that minimum performance reporting criteria should reflect jurisdictional information and criteria as outlined in the s. 1014 of the NERL.

Draft National Energy Retail Rules

Part 11 – Consultation for the National Energy Retail Framework

Rule	Subject Matter	Comment
1101	Customer Consultative Group	<p data-bbox="730 170 1962 304">Membership should include at least one representative from each jurisdiction. The AER should develop protocols for effective consumer engagement through this group, and through other ad hoc consultative arrangements. Consumer groups have previously written to the AER with best practice recommendations for consumer consultative mechanisms.</p> <p data-bbox="730 341 1928 440">The functions of the customer consultative group should also be explicitly stated as including responsibility for ensuring that adequate processes for consulting with small customers are undertaken for all significant AER reviews and reports.</p>
1102	Retail Consultation Procedure	<p data-bbox="730 512 1995 780">This procedure is critical to ensuring effective consumer consultation occurs on a number of important matters on which the AER is to develop guidelines. For this reason we are concerned that the current procedure does not specify consultation with the Customer consultative group nor does it require consultation to occur on the preparation of the draft instrument. We suggest that at minimum consultation occur with the customer consultative group prior to the drafting of an instrument. We further propose that written comments on the draft instrument be required no sooner than six weeks from the publishing of the instrument (consistent with the timeframes we have suggested for other consultation procedures).</p>

Draft National Energy Retail Regulations		
Regulation	Subject Matter	Comment
4	Jurisdictional regulator	We suspect this represents a drafting error; however Tasmania has not been included.
5	Recognised energy industry ombudsman	We suspect this represents a drafting error; however Tasmania has not been included.

Draft Model Standard Retail Contract
<p>As discussed is our response to s. 203 of the NERL, the format of the model standard retail contract does not reflect all of the substantive rights and obligations of the retailer and the small customer provided for in the NERL and NERR, let alone additional provisions in jurisdictional laws. It contains mainly terms and conditions reflecting retailer rights but few terms and conditions reflecting the rights or obligations for the protection of consumers that are contained in the NERL and NERR. Further, it attempts to draft additional standard terms and conditions around issues such as limitations of liability that clearly favour retailers, even though these matters are not addressed in the NERL and NERR and there appears to be little reason why governments would attempt to draft contract terms relating to these issues. In addition, in some cases the terms and conditions do not accurately reflect the content of NERL and NERR provisions or only partially communicate NERL and NERR provisions. One of the more serious effects of these problems is that, in its present format, it is arguably quite misleading for consumers (and retailers) as to their actual rights and obligations.</p> <p>We believe that a more appropriate framework would be to clarify that all substantive obligations are provided for in the NERL, NERR and regulations (and jurisdictional laws where relevant). It is not unreasonable to provide for a model contract to be used by all retailers but it should be called a 'Customer Charter' to reflect more accurately what it is and ensure that consumers actually understand that it is relevant to them and contains the details of their relationship with their retailer. The <i>Customer Charter</i> should constitute the contract and detail, in plain English, the key consumer rights and obligations, as well as retailer rights and obligations, fully and accurately consistent with the actual provisions of the NERL, NERR and regulations (and with space to insert any relevant jurisdictional requirements).</p> <p>Where a consumer is considering entering into a market retail contract, the retailer must provide the consumer with a copy of the <i>Customer Charter</i>, in addition to the single document which outlines the 'Required Information' as defined in <i>Schedule 4 Rule 4(1) of the National Energy Marketing Rules</i>.</p> <p>Further to this however, we have made comments on the draft model contract below as we believe the current drafting is unnecessarily</p>

punitive and provides inadequate information to the consumer.		
Clause	Subject Matter	Comment
	Preamble	Unless a copy of the deemed distribution contract is to be included with the standard retail contract, clauses in the standard retail contract that relate to obligations under the deemed distribution contract should be highlighted as such.
2	Definitions and interpretation	The model contract should be written in plain-English and use commonly understood terms. We believe that the current drafting of the model terms and conditions does not meet this requirement. In particular the use of 'de-energisation' is not widely understood in the community and should not be used in the model terms and conditions. References to NERL and NERR are not helpful to consumer understanding, the model contract should reiterate the relevant Law, Rules and consumer protections.
3	Do these terms and conditions apply to you?	Reference to a 'small customer' is meaningless to consumers when there is no information for them to benchmark themselves against, this information needs to be clearly provided.
4.3 (b)	Vacating your premises	The drafting around why a meter may not be read places the onus on the occupier and very little on the retailer, we believe that this clause should be redrafted to reflect the mutual responsibility of the retailer and consumer in finalising a contract.
5.3	Quality of energy supplied to your premises	The wording should clarify that this clause does not override clauses in the consumer contract with distributors relating to guaranteed service levels and associated payments. It should also be made clear that it does not override any obligations distributors may have under their regulatory framework re: service/reliability performance. In short, the contract terms must be consistent with the NERL, NERR and any other regulation of distributor performance.
6.1	Full information	The drafting of 'Clause 6.1 Full information' is unclear. The final statement 'We have rights if information you provide is incorrect, misleading or deceptive' is threatening and not supported by evidence of what rights the retailer has in relation to the consumer.
6.3	Preconditions	If pre-conditions exist they should be listed in the contract and not rely on the retail marketer to accurately explain any pre-conditions at the time of marketing engagement.
6.4 (a)	Life support equipment	We believe that the drafting of this clause should highlight the importance of notifying the retailer of life support equipment and the existence of a distributors 'do not disconnect' list, in order to encourage compliance.

6.5	Obligations if you are not the owner	We support this clause; however believe that it is not adequately reflected in the Law or Rules.
7.2	Not liable	As stated above, we are concerned that expressions of limited liability are in conflict with the obligation of retailers in relation to Guaranteed Service Levels and associated payments.
8.2 (a)	Variation to tariffs and charges	As stated in relation to the Law, we believe that the publication of tariff changes should be 20 business days prior to the changes taking effect.
8.3	Information relating to eligibility for type of tariff	This clause is unclear. If the intention is to ensure that consumers who move from being residential to small business consumers notify the retailer of this change then it should be stated as such (although this requirement does not appear to be derived from the Law or Rules).
9.3 (b)	Estimating the energy use	The period for paying back undercharged amounts must reflect what is in the Rules. Please note our changes to Rule 219 of the NERR.
9.3 (c)	Estimating the energy usage	The cost that is passed through should be a 'reasonable' cost and should be referenced to the Rules.
9.5	Contents of a bill	This clause does not provide any information to the consumer.
9.6 (b)	Your historical billing information	Please refer to our amendments in the s. 217 of the NERL. Consumers should not be charged for billing queries within a 12 month period.
10.1	What you have to pay	Please refer to our amendments in s. 215 of the NERL.
10.3	How the bill is paid	If a consumer is required to pay an amount for dishonoured cheques or credit card payments, the amount needs to be clearly outlined in the contract. To have it 'published on our website' is providing no information to the consumer and no guarantee they can access that information readily or easily.
10.5 (b)	Difficulties in paying	The reference to the Hardship program only details payment plan options. As per our comments on Division 9 of the NERL, hardship programs should comprise several other mechanisms to assist consumers, this clause needs to be expanded to reflect this.
10.5 (b)	Difficulties in paying	This clause should be amended to reflect the obligation on retailers to provide a copy of their hardship policy on request.

11 (b)	Meters	This clause does not adequately reflect the obligation on the retailer to use its best endeavours to conduct a meter reading in order to prepare a bill).
12.1 (a)	Undercharging	Clause (a) appears redundant as undercharging as a result of illegal use is covered in Clause (b). Please also see our amendments to clause 9.3 (b).
12.2 (b)	Overcharging	This clause does not make clear a consumer's right to request a refund of any amount above the overcharge threshold.
14.1	When can we arrange for de-energisation	Clause 14.1 (a) and (b) need to clearly address that payment plans are agreed between the retailer and the consumer (and are not as prescribed by the retailer alone). Clause 14.1 (d) see our comments against s. 226 of the NERL – security deposits.
14.2	Comply with the Rules	The provisions in the rules would be useful in this contract so consumers were fully aware of their rights around disconnection.
15(a)	Re-energisation after de-energisation	See comments to Rule 615 of the NERR.
22	Retailer of Last Resort Event	We question the usefulness of including a reference to the Retailer of Last Resort (RoLR) event in the model contract, at a minimum this does not meet the requirement of the contract to be in plain-English. If information on a RoLR event is to be included, it should be under a heading that adequately illustrates the RoLR concept such as “what happens if we go out of business” or “If we can no longer provide you a service”.

Draft Default Retail Support Contract		
Clause	Subject Matter	Comment
13.1	Distributors Indemnity	We seek clarification on the implication of this clause. Its meaning is not immediately apparent.

Draft Model Standard Distribution Contract		
Clause	Subject Matter	Comment
5.3	Supply point	This clause needs to be cognisant of how supply point is defined as per our response to s. 103 of the NERL and reflect the fact that consumers must not be responsible for equipment which they do not own; this includes impacts on consumer assets via technologies owned by retailers or distributors, such as the Home Area Network and Direct Load Control.
5.5	Quality of energy supplied to premises	This clause should make clear that it does not override any obligations the distributor has regarding reliability and quality and supply – e.g. GSL payments, service incentive schemes etc.
7.2	Not liable	It is important that this clause clearly reflects how it interacts with other parts of NERL and NERR and DB regulatory requirements such as service incentive schemes or reliability standards. The contract should be consistent with law, rules and any other regulations affecting distributor performance. Where relevant, the contract should inform consumers of any mechanisms available for recovering financial loss resulting from failure of distribution companies to meet service, reliability, performance standards etc.
8.1	Your obligations	'any reasonable time' requires defining. We believe this includes the hours of 8am and 8pm, Monday to Friday, excluding public holidays.
9	Interruption of supply	The process for notifying consumers looks too broad. It states this could be by mail, letter box drop... 'other appropriate means'. This is too generic. A minimum of mail and/or phone call should be required.
11.1	When can we arrange for de	Limitations on de-energisation need to be built upon. Some consumers, particularly tenants, may require longer timeframe to comply. A distributor needs an acknowledged or confirmed receipt of the notice to account for the potential that household occupants are

	energisation	absent from their property. This clause should provide information on access to dispute resolution. At the least, the same process for disconnection by a retailer should apply.
12.1	Your and our obligations	It appears as though a service standard for reconnection is yet to be defined. We seek confirmation of this, and how this service standard will be developed.
12.2	Time for re-energisation	12.2 (a) – should change this to ‘have entered arrangements to pay the relevant re-connection fee’...this will preclude re-connection being withheld for inability to pay for reconnection....and allows the consumer to enter a payment plan for this if necessary.
12.3	Wrongful de-energisation	This section should spell out that the retailer must pay any charges owing the consumer where there has been a wrongful disconnection, and should identify what those charges are.
13	Notices and bills	This does not properly account for the potential that consumers are not residing at the premise where a notice has been sent, or a situation where a consumer is a tenant and that there is a time delay between a notice being sent to the premises, and being received by the person to whom the notice is addressed (potentially the landlord).

National Energy Marketing Rules

Schedule 4 – National Energy Marketing Rules		
Part 1 Providing information to small customers		
Rule	Subject Matter	Comment
2	Requirement for and timing of disclosure to small customers	Delete Rule 2 (1) (b) – we do not support information being able to be provided to consumers after they have formed a contract. This is inconsistent with the requirement for a consumer to provide explicit informed consent. Explicit informed consent to enter into a contract can only be provided when the consumer has received the information required in <i>Rule 4 Required</i>

		<i>information</i> before entering the contract.
3	Form of disclosure to small customers	<p>Clarify that required information may only be provided verbally in a non-face-to-face situation. When information is provided verbally it is very difficult to prove that a consumer has received and understood all of the information detailed in <i>Rule 4 Required information</i>, adequately. It is therefore a second-best solution and should only be permitted where information cannot be provided in writing before formation of the contract, such as for contracts formed over the telephone. If a contract is formed in a face-to-face situation, this should require providing the required information at that time, in writing. This information should include all information detailed in <i>Rule 4 Required information</i>. Further, if required information is provided verbally in a situation in which this is permitted, written information must be provided within 2 business days of entering into the contract.</p> <p>Delete Rule 3 (2). This clause is not necessary as the information should be provided prior to the formation of a customer retail contract. However, we agree that if the required information is provided verbally, it should be followed up by written information within 2 business days as outlined above.</p>
4 (1)	Required information	<p>We agree with the requirement to provide the information outlined in <i>Rule 4 Required information</i>, however it is important that the following information is provided to consumers to ensure they are fully informed and able to adequately provide 'Explicit informed consent';</p> <ul style="list-style-type: none"> • the type and frequency of bills; • the full name, address and telephone number of the retailer; • the consumer's rights to cancel the contract, including details of any charges that may apply upon cancellation, and how these may be applied; • information detailing that the consumer may be contacted for an independent audit procedure in relation to their understanding of and consent to the contract; • the period of the contract; • any commission or fee for a retailer marketer receives upon formation of the contract; • any material differences between market retail and standard retail contract terms and conditions. <p>All prices and charges included in Rule 4 (1) (a) should be inclusive of GST.</p>
4 (2)	Required information – cooling off period	The standard definition of cooling off period, as outlined in our comments above in response to Rule 236 (2), should also apply here. There is no reason for any difference.

Proposed additional rule	Time to consider required information	It is essential that retailers are required to ensure consumers are provided with a reasonable opportunity to consider the required information, away from the presence of the retail marketer, before entering into a contract.
Part 2 Marketing Activities		
5	Duties of retail marketers	<p>Rule 5 (1) Personal contact must include telephone contact, this is currently unclear.</p> <p>Rule 5 (2) In addition to the requirement for the retail marketer to provide certain identification information to consumers, the identification worn by marketers in any face-to-face activity must be <i>"legible and prominently displayed"</i>.</p>
6	Duty of retailer to ensure compliance	<p>It must be an obligation on retailers to ensure marketers who are associates of the retailer are appropriately trained in relation to compliance with marketing laws and regulatory requirements. See below for more details of retailer training obligations.</p> <p>We also strongly encourage the inclusion of a rule that would oblige the AER to conduct regular compliance audits in relation to a retailer's marketing obligations, including a retailer's training obligations.</p>
7	Record keeping	<p>In addition to the record keeping requirements detailed in <i>Rule 7 Record keeping</i>, we believe the information to be collected should include:</p> <ul style="list-style-type: none"> • The premises visited at which contact with a consumer was made; • The dates and times of each visit, including the time at which the visit concluded; • The names of marketing representatives conducting marketing at the relevant time and place. <p>These records should be kept for all marketing activity whether or not a contract was made.</p> <p>These records must be made available for independent audit.</p>
	No contact lists	<p>Retailers must keep records of all consumers who have requested not to be contacted for marketing purposes, as per their request. At the time of the request the retailer must provide written confirmation to the consumer that they have been placed on a 'no contact list'.</p> <p>Retailers must respect no canvassing signs.</p>
	Duty of retailer to provide training to	Training of retailer marketers is critical to the effectiveness of compliance to a retailer's obligations. As such retailer obligations should also extend to creating and maintaining training

	marketers	<p>manuals for retail marketers and to running regular courses, including update / refresher courses. Training manuals and training records for marketing representatives should be maintained for a period of at least one year from the last date of training on which the training with the relevant manuals took place. These should be maintained for independent audits as required.</p> <p>Information provided to marketers in training should include:</p> <ul style="list-style-type: none"> • The principles of National Energy Retail Law and National Energy Marketing Rules and relevant jurisdictional requirements, for example Fair Trading Acts; • What comprises misleading, deceptive or unconscionable conduct, false representation, coercion and harassment; • Consumer contractual rights including the meaning of and requirement to gain a consumers 'explicit informed consent' prior to forming a contract; • The regulatory framework; • Full product knowledge, including but not limited to: <ul style="list-style-type: none"> ○ Tariffs, billing procedures and payments options (including Centrepay); ○ Eligibility requirements for concessions, rebates or grants; ○ Knowledge of the retailer's policies for consumers experiencing financial hardship; and ○ Availability of instalment plans. • Customer service skills including dealing with consumers with special needs and those without or with limited English language skills; and • Customer service skills to assist in the identification of competency of consumers.
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PUBLIC INTEREST ADVOCACY CENTRE

SUBMISSION IN RESPECT OF

NATIONAL ENERGY CUSTOMER FRAMEWORK

12 June 2009

1. This submission is made on behalf of the Public Interest Advocacy Centre (**PIAC**) in respect of the first exposure draft of the National Energy Customer Framework (**NECF**), comprising the draft National Energy Retail Law (**NERL**), the National Energy Retail Regulations (**NER Regulations**) and the National Energy Retail Rules (**NER Rules**).²

2. The submission addresses certain salient consumer issues arising within the NECF proposal, specifically:
 - (a) the appropriate form and content of the NERL objective;

 - (b) hardship provisions within the NERL;

 - (c) de-energisation/disconnection;

 - (d) the circumstances in which a security deposit can be required and a credit check performed;

 - (e) guaranteed service levels/community service obligations; and

² Pursuant to Australian Energy Markets Agreement (**AEMA**), as amended, 2006, clause 14 and Annexure 2

- (f) obligation to supply.

A NATIONAL ENERGY RETAIL LAW OBJECTIVE

(a) The existing proposal and legislative context

3. Part 1, Division 3, s 113 of the First Exposure Draft National Energy Retail Law (**NERL**), defines the NERL objective as follows:

The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers³ of energy with respect to price, quality, safety, reliability and security of supply.

4. The NERL objective largely replicates the objectives specified within the National Electricity Law, a schedule to the *National Electricity (South Australia) Act 1996*, (**NEL**), and the National Gas Law, a schedule to the *National Gas (South Australia) Act 2008* (**NGL**).

5. Section 7 of the NEL and s 23 of the NGL prescribe the market objective for the electricity and gas industries respectively, being:

The objective of this Law 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: (a) price, quality, safety, reliability and security of supply of electricity; and (b) the reliability, safety and security of the national electricity system.⁴

The objective of this Law is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

³ Cf section 106 regarding the definition of customer and related terms

⁴ The national electricity market objective under the new NEL replaces the list of “Market objectives” and “code objectives” under the former Code. This change reflected the policy position agreed to by Commonwealth, State and Territory governments that reform should be made to promote the “long term interest of consumers”. A single objective that comprehends a number of specific components or elements has the advantage of conveying the message that the long term interests of consumers will be served through a composite of efficient investment in, and efficient use of, infrastructure and capabilities having regard to price, quality, reliability, safety and security of electricity services: *National Electricity Law and National Electricity Rules: Information Paper*, MCE December 2004, pp. 9-10.

6. Section 7A(2) – (7) of the NEL prescribes revenue and pricing principles which the AER in certain circumstances must, and in others, may, take into account when exercising certain of its regulatory economic functions in accordance with ss 15 and 16(2)(a) and (b) of the NEL, as follows:

(2) A regulated network service provider should be provided with a reasonable opportunity to recover at least the efficient costs the operator incurs in:

(a) providing direct control network services; and

(b) complying with a regulatory obligation or requirement or making a regulatory payment.

(3) A regulated network service provider should be provided with effective incentives in order to promote economic efficiency with respect to direct control network services the operator provides. The economic efficiency that should be promoted includes:

(a) efficient investment in a distribution system or transmission system with which the operator provides direct control network services; and

(b) the efficient provision of electricity network services; and

(c) the efficient use of the distribution system or transmission system with which the operator provides direct control network services.

(4) Regard should be had to the regulatory asset base with respect to a distribution system or transmission system adopted:

(a) in any previous:

(i) as the case requires, distribution determination or transmission determination; or

(ii) determination or decision under the National Electricity Code or jurisdictional electricity legislation regulating the revenue earned, or prices charged, by a person providing services by means of that distribution system or transmission system; or

(b) in the Rules.

(5) A price or charge for the provision of a direct control network service should allow for a return commensurate with the regulatory and commercial risks involved in providing the direct control network service to which that price or charge relates.

(6) Regard should be had to the economic costs and risks of the potential for under and over investment by a regulated network service provider in, as the case requires, a distribution system or transmission system with which the operator provides direct control network services.

(7) Regard should be had to the economic costs and risks of the potential for under and over utilisation of a distribution system or transmission system with which a regulated network service provider provides direct control network services.

7. Section 24 of the NGL contains mirror provisions.

(b) Analogous legislative provisions and proposals

8. Sections 7 NEL and 23 NGL (especially when read with s 7A NEL and s 24 NGL) adopt the semantics and structural form of ss 152AB(1) and (2) of the *Trade Practices Act 1974* (Cth) (**TPA**) in respect of the regulation of access to telecommunications carriage services: cf *Re Telstra Corporation Ltd* [2006] ACompT 4 at [63].

9. Section 152AT(1) and (2) of the TPA provide:

(1) The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

Promotion of the long-term interests of end-users

(2) For the purposes of this Part, in determining whether a particular thing promotes the long-term interests of end-users of either of the following services (the *listed services*):

(a) carriage services;

(b) services supplied by means of carriage services;

regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

(c) the objective of promoting competition in markets for listed services;

(d) the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;

(e) the objective of encouraging the economically efficient use of, and the economically efficient investment in:

(i) the infrastructure by which listed services are supplied; and

(ii) any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

10. Sections 152AB(4), (6), (7A), and (8) then further amplify the concepts within s 152AB(2).
11. That is, each of ss 7 and 7A NEL, 23 and 24 NGL and 152AB(1) and (2) TPA prescribe an overarching objective which is then amplified by certain secondary or operational objectives, which give greater content and concreteness to the primary objective without thereby limiting it.
12. The SCO notes in the Explanatory Material to the First Exposure Draft (at §3.1.2), that, where appropriate, terminology from existing national and jurisdictional legislation has been employed, although in many cases the fact that the NECF requires terminology which:
 - (a) has a particular “customer” focus or relevance; and
 - (b) is capable of applying equally in the electricity and gas contexts, has meant that terms and definitions from the existing NEL and NGL regimes have not necessarily been incorporated into the NERL and NER Regulations.
13. It is clear that the NECF generally, and the NERL objective specifically, must interact consistently and coherently with the overarching objectives of both the NEL and the NGL.
14. In addition to linguistic consistency, there is utility (where appropriate) in employing standards and language which have previously been employed in related legislative contexts or which have resulted from consultative processes undertaken by regulatory agencies. This can provide background jurisprudence and guidance as to how otherwise novel tests ought be applied.

15. Within this context, the Productivity Commission's *Review of Australia's Consumer Policy Framework* (Inquiry Report No. 45, 30 April 2008) rewards consideration.⁵

16. Within the Inquiry Report, the Productivity Commission proposed a new objective for Australia's consumer laws, being:

to improve consumer wellbeing by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly and on good faith.

17. The Inquiry Report recommends that this overarching objective be buttressed by various operational objectives, as follows:

- (a) ensure that consumers are sufficiently well-informed to benefit from, and stimulate, effective competition;
- (b) ensure that goods and services are safe and fit for the purposes for which they were sold;
- (c) prevent practices that are unfair or contrary to good faith;
- (d) meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage;
- (e) provide accessible and timely redress where consumer detriment has occurred; and
- (f) promote proportionate, risk-based enforcement.

(c) PIAC Submission

18. In light of the above, PIAC submits that the current proposed s 113 objective be amended as follows:

⁵ http://www.pc.gov.au/_data/assets/pdf_file/0006/79170/consumer1.pdf;
http://www.pc.gov.au/_data/assets/pdf_file/0008/79172/consumer2.pdf

113(1): The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply.

113(2): For the purposes of this section, in determining whether a particular thing promotes the long term interests of consumers of energy with respect of price, quality, safety, reliability and security of supply, regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

- (a) the objective that consumers can be confident about the price, affordability, safety and reliability of essential energy services;
- (b) the objective that energy services should be provided to all consumers equitably;
- (c) the objective that all consumers be treated fairly in their purchase of energy services;
- (d) the objective that energy should be affordable for all consumers;
- (e) the objective that the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage, be protected, and that energy not be denied to any customer on the basis of financial hardship or other circumstances of vulnerability;
- (f) the objective of providing accessible and timely redress where customer detriment has occurred;
- (g) the objective that consumers always be entitled to proportionate, risk-based responses from suppliers of energy;
- (h) the objective that consumer interest is served by the supply of clean and sustainable energy.

19. PAIC notes that the above definition proceeds on the basis of current s 113 and hence uses the term “consumer”; but notes that the defined term with the current exposure draft (ss 103 and 106) is “customer”. Uniformity would be achieved (and ambiguity avoided) within the NERL by using the term “customer” throughout (including in the NERL objective).

B HARDSHIP PROVISIONS

(a) Customer hardship regime

20. Part 2, Division 9 of the NERL sets out the statutory provisions for a national customer hardship regime.
21. Section 103 defines a “hardship customer” as a residential customer who has been identified under a retailer’s Customer Hardship Policy as a customer who is experiencing payment difficulties due to hardship.
22. Section 232 of the NERL requires each retailer to develop, publish and implement a customer hardship policy in respect of residential customers of the retailer, the purpose of which is to assist hardship customers better to manage their energy bills on an ongoing basis.
23. Section 233 prescribes the minimum requirements for a customer hardship policy, which must:
 - (a) include processes for the identification by retailers and self-identification by residential customers of those experiencing payment difficulties due to hardship for the early response by retailers, and early response thereto;
 - (b) flexible payment options (including payment plans; which are dealt with at section 235) for payment of energy bills by hardship customers in accordance with the Rules;
 - (c) processes for identifying government concession programs and financial counselling services to assist in hardship mitigation, and notifying hardship customers; and
 - (d) other programs designed to assist hardship customers.

24. Section 234 requires a retailer to inform a residential customer of its hardship policy where it appears to the retailer that non-payment of an energy bill is due to the customer experiencing payment difficulties due to hardship.
25. Section 235 requires a retailer to apply payment plans for hardship customers in accordance with the Rules. NER Regulation 222(1) requires a retailer to offer a payment plan to a hardship customer, unless the hardship customer has had 2 payment plans cancelled due to non-payment in the previous 12 months.
26. Part 10 Division 1 of the NERL governs AER compliance regimes, which may be referable to customer hardship policies; while Part 10, Division 2 governs AER performance regimes which may also be referable to customer hardship policies.
27. Under the currently proposed scheme, the AER will not have an approval function in relation to a retailer's customer hardship policy. The requirement is for the retailer to publish their customer hardship policy. The AER will monitor and must carry out compliance audits (and thereby ensure compliance) as to whether a customer hardship policy published by a retailer complies with the requirements of the NERL and NER Regulation (see section 1004(2) of the NERL) and whether the retailer is implementing their customer hardship policy.
28. Section 1016 of the NERL, supplemented by Part 3 of the Rules, gives the AER new functions in relation to the customer hardship regime to develop 'national hardship indicators' and to monitor and report on retailer performance against those national hardship indicators.

(b) De-energisation of hardship customers

29. Section 236 provides that retailer must give effect to the general principle that de-energisation of premises of a hardship customer due to inability to pay should be a last resort option.

30. PIAC notes that, as currently drafted, s 236 imposes an obligation of uncertain content on retailers. It is unclear what is meant by “giving effect to” a principle. It is also unclear what is meant by the aspirational normative language of “should”. If the intention of the provision is to impose a mandatory and prohibitive standard in respect of the circumstances of de-energisation, a preferable means of framing s 236 would be: “A retailer must only de-energise the premises of a hardship customer as an option of last resort, and prior to doing so, must exhaust the following steps [to be prescribed].”
31. Rule 605 also provides that supply to the premises of hardship customers should be de-energised only where a customer has not paid a bill and has not:
- (a) agreed to a Payment Plan (the requirements for which are set out in the Rules) or other payment option to pay a bill offered by the retailer; or
 - (b) adhered to that customer’s obligations to make payments in accordance with an agreed Payment Plan or other payment option relating to the payment of bills.
32. Retailers will also often be requested to provide installment payment options to a wider group of customers than just hardship customers. The retailer may choose to provide such payment options via the same payment plan that applies to hardship customers, but also may choose to provide an alternative payment plan option. The NERL and NERR do not contain specific provisions in relation to the requirements of payment plans other than for hardship customers.

(c) PIAC Submission

33. PIAC submits that the NERL ought prescribe a legislative baseline for all customers, under which the statutory protections currently prescribed by s 233 of the NERL are extended universally to all energy customers who are on standard contracts. This extension would acknowledge that basal protections

are required in respect of essential services such as electricity and gas. It would also acknowledge that hardship is a condition that can potentially transiently affect any customer of energy services; and is more likely to affect customers on standard contracts. Hardship customers (or preferably, “customers experiencing hardship”) would then constitute a separate category of persons experiencing distinctive payment difficulties, which would be recognized and respected through a hardship regime adumbrated in the NERL and the Rules and given effect to through each retailer’s customer hardship policy.

34. Specifically, PIAC recommends the following layered regulatory structure:

(a) at the level of the NERL:

- i. the matters currently protected within s 233 be extended to all energy customers on a standard contract; or equivalent instrument;
- ii. provision be made for each retailer to develop, publish details regarding, (on its website and on correspondence with customers, including bills) and implement a customer hardship policy which addresses matters beyond the legislative minimum. The current proposal would create competition *within* and between hardship programs. This would be beneficial not only for energy customers but also for competition within the energy market generally. The focal point of energy competition has often been upon the offerings comprehended by market contracts. This proposal would create real possibilities for competition within standard contracts for customers who would not typically attract market contracts;
- iii. s 232 be amended to read: “The purpose of a retailer’s customer hardship policy is to assist customers in hardship to maintain an affordable and continuous supply of energy on an ongoing basis”

- (b) at the level of the Regulations or Rules, hardship programs developed by retailers would be approved by the AER. This is an important mechanism to prevent an absence of regulatory control. Under the current legislative proposal, a retailer develops a hardship program with which it must subsequently comply. The AER then monitors compliance only with internally defined standards. This structure removes any element of external or objective assessment of a retailer's hardship program. Various options are available, including the development of a model hardship program, which each retailer must minimally implement, but which it can vary to increase the protections or options available to customers; or a set of minimal principles developed by the AER under the Rules;
- (c) the AER would then monitor compliance with retailers' customer hardship policies in compliance with the Rules; and
- (d) the AER would independently assess and publish materials in respect of matters such as national hardship indicators (current s 1016).

C DE-ENERGISATION/DISCONNECTION

35. Within the current exposure draft:

- (a) the term "connection" is used in the context of establishing physical infrastructure for the purpose of supplying energy to a premises; while
- (b) the term "energisation" is used in the context of opening/enabling an existing connection such that energy may be supplied to a premises.

36. Accordingly, "de-energisation" refers to the "shutting off" of the supply of energy, while disconnection refers to the physical removal of assets relating to the supply point.

37. While we understand the technical and systems distinction between the concepts of disconnection and de-energisation, PIAC submits that the use of the language of de-energisation will confuse consumers, and inappropriately transposes the language of distribution networks into a retail context.
38. Technical accuracy notwithstanding, conventional usage designates the cessation of energy supply due to default and other reasons as “disconnection” and such usage ought be retained within a legislative structure designed, *inter alia*, to advance the interests and awareness of energy customers.

D SECURITY DEPOSITS AND CREDIT CHECKS

(a) The legislative proposal

39. Part 2, Division 5 (ss 225 – 231) of the NER Regulations regulates the requirement and use of security deposits in respect of customer retail contracts.
40. Section 226 provides that a retailer may require a small customer to provide a security deposit at the time the customer requests the sale and supply of energy under a customer contract where:
- (a) the customer owes money to that retailer in relation to the sale and supply of energy to other premises; or
 - (b) the customer has fraudulently acquired or intentionally consumed energy otherwise than in accordance with the energy laws within the past 2 years; or
 - (c) the customer has refused or failed to provide acceptable identification to the retailer; or
 - (d) the retailer reasonably considers that the customer has an unsatisfactory credit history; or

- (e) the customer has refused or failed to provide the retailer with the permission or other information requested under rule 225 (1) (a).

41. Section 225 provides that, for the purposes of deciding whether to require a small customer to provide a security deposit under s 226, a retailer may:

- (a) request the customer to provide the retailer with:
 - i. permission to obtain a credit check of the credit history of the customer; and
 - ii. other information relating to the credit history of the customer; and

(b) take into consideration:

- i. any credit history obtained as a result of the credit check; and
- ii. any credit history provided by the customer; and
- iii. any other available information that relates to the credit history of the customer,

that is reasonably required for the retailer to assess the ability of the customer to meet the customer's financial obligations under a customer retail contract.

42. The remaining provisions of Part 2, Division 5 govern the mechanics of obtaining, applying and returning a security deposit. Section 227 governs the payment of a security deposit; s 228 the amount of a security deposit; s 229 interest on a security deposit; s 230, use of a security deposit, and s 231 the obligation to return a security deposit.

(b) The PIAC proposal

43. PIAC makes two central submissions in respect of the request for and application of security deposits, as follows.
44. *First*, a circularity infects s 226(1)(d) and (e) which does not infect s 226(1)(a)-(c) and which recommends that subsections (d) and (e) ought be abandoned.
45. Sub-sections (1)(a) – (c) of s 226 prescribe factors which are likely indicia of a customer’s possible inability to consistently meet its bills, sufficient to predicate a request for a security deposit. These factors are: existing debt to the retailer; historical fraudulent conduct; and a failure to provide adequate identification to the retailer. By contrast, sub-sections (d) and (e) of s 226 provide that a retailer may require the provision of a security deposit where the retailer reasonably considers that the customer has an unsatisfactory credit history or the customer has failed or refused to provide the retailer with permission or information under s 225.
46. Section 226(1)(d) sets a subjective and discretionary standard of assessment for a retailer: it must reasonably consider that the customer has an unsatisfactory credit history. There is no legislative guidance as to the grounds on which such a reasonable view may be reached; although these are necessarily grounds other than the factors prescribed at s 226(1)(a)-(c). The interaction of ss 225 and 226 suggests that one of the grounds upon which such a view may be reached is a request for information under s 225. So much is confirmed by s 226(1)(e). However, this results in a circularity in which a retailer may form a reasonable view that a customer has an unsatisfactory credit history as a result of an information request under s 225 (including a failure to respond to such a request), which request has no external justifying ground.
47. Accordingly, the factors prescribed at s 226(1) ought be external and reliable indicia of customer’s possible inability to consistently meet its bills, sufficient to predicate a request for a security deposit; as opposed to subjective or circular criteria.

48. *Secondly*, any credit check undertaken for the purpose of ascertaining the ability of a customer to pay for energy services should be restricted in scope to an enquiry into payment of previous energy bills.
49. Such a limitation acknowledges:
- (a) that energy services are essential services and ought be distinguished – in respect of the attitude of a customer to their payment and discharge - from other debts, including other forms of direct deposit, telecommunications bills; indeed, most other payments, with the exception of rent. Given the essential role played by energy services, there is a category error in performing a credit check in respect of a customer’s payment of other bills; and
 - (b) the substantial disparity of bargaining power between residential customers of energy and retailers and distributors thereof.

E GUARANTEED SERVICE LEVELS/COMMUNITY SERVICE OBLIGATIONS

50. Under clause 14 and Annexure A of the AEMA, as amended in 2006, the States and Territories maintain responsibility for certain regulatory functions including: off-grid networks; community service obligations; measures to maintain distribution tariff equalisation schemes; land use, planning and environmental approvals or policies; and other items as listed in Annexure 2 of the AEMA.
51. PIAC submits that measures should be taken to ensure that NECF leaves unaffected the operation of CSO and GSL mechanisms at the State level; to ensure that guaranteed service levels continue to apply and community service obligations continue to be fulfilled.

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