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23 May 2016

Essential Services Commission  
Level 37, 2 Lonsdale Street  
MELBOURNE VIC 3000

Dear Dr Ben-David

### **Submission to ESC's Draft Energy Compliance and Enforcement Policy, April 2016**

The Consumer Action Law Centre (**Consumer Action**) wishes to make a brief submission to the Essential Services Commission's (the **Commission**) consultation on its Draft Energy Compliance and Enforcement Policy (**Draft Policy**).

We support the Commission's efforts to ensure it integrates the revised objective "*to promote protections for customers, including in relation to assisting customers who are facing payment difficulties*" into its compliance and enforcement approach. This will ensure that the Commission views takes action both to penalise business and compensate customers.

We recognise that the policy only applies to licensed businesses operating in energy markets in Victoria. We use this opportunity to encourage the Commission to pursue a small scale licensing framework to enable it to apply its compliance and enforcement framework to those businesses currently operating in the market as exempt networks.

#### **Principles**

We consider that the principles outlined in the Draft Policy of responsiveness, proportionality, consistency and accountability are important considerations.

An additional principle, however, will assist the Commission to achieve its objectives more fully. This is recommended so as to aid the Commission's approach to assessment of consumer detriment, so that it considers the level and nature of impact on consumers or a group of consumers as well as the level of detriment overall. This principle might be described as "impact on consumers".

There is a risk that conduct that has significant impact on particular groups of consumers, including disadvantaged and vulnerable groups, will continue to occur if the Commission considers it necessary to look for cases of wide-spread detriment before acting.

#### **Consumer Action Law Centre**

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The 'accountability' principle currently limits the transparency of the outcomes of compliance and enforcement actions to making them public only in accordance with the statutory reporting obligations. We encourage the Commission to go beyond statutory reporting obligations and ensure that it prioritises the consumer 'right to know' when there has been misconduct amongst energy market participants.

While we acknowledge that the Commission may not be able to regulate for good customer service, we consider it has a role in exposing retailer conduct to enable consumers to make more informed decisions about retailer service. We encourage the Commission to use the media or other forms of publicity at the time of the misconduct. We consider reputational risk that may arise from publication of compliance and enforcement action is the cost of doing business, particularly if that business is done poorly.

### **Compliance-enforcement pathway**

The compliance enforcement pathway must, as noted above, consider the *impact* of misconduct on consumer groups. This should underpin each aspect of decision making.

### **Identification of breaches**

We support the Commission's approach to potential breaches. We particularly encourage the Commission to consider a means of identifying potential breaches through *(d) external stakeholders*. We consider that a referral pathway for breaches to be an effective means of the Commission understanding market activity and potential breaches. Consumer Action has established referral pathways with both Australian Securities and Investments Commission and the Australian Competition and Consumer Commission, whereby complaints are logged and referred on a regular basis, with clear feedback loops as to how those complaints have been assessed by the regulator.

### **Investigation and consideration of further action**

We consider that the concept of *(a) the risk of harm, or actual harm to energy customers* should be moved to underpin the entire policy, as opposed to being a catalyst for determining investigation or further action. Where detriment has occurred, it is imperative that the *impact* is first understood—with then the *impact* being the catalyst for further action.

### **Reporting**

The *timeliness* of the reporting of compliance and enforcement outcomes is imperative to the transparency of the activity, including as to whether the activity *enhances trust and confidence in the integrity of the Victorian energy regulatory* and assists *energy customers to make informed decisions about their choice of regulated energy business*.

Publicising compliance and enforcement outcomes on the Commissions website, with respect, is not going to result in large numbers of consumers being aware of the issue. Consumers deserve to know when the regulator has had to intervene in a business's conduct. As noted above, we encourage the use of media or other publicity to inform consumers.

### **Conclusion**

Finally, in the context of its enhanced compliance and enforcement powers, we consider that the Commission needs to be proactive in establishing the boundaries of the law. We consider that an early success in the effectiveness of the policy is that the Commission use the new enforcement tools and take on cases.

If you require any further information, please contact Janine Rayner, Senior Energy Policy Officer, Consumer Action Law Centre, on .

Yours sincerely,

**CONSUMER ACTION LAW CENTRE**

Gerard Brody  
Chief Executive Officer