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Dear Mr Sarcich

Submission to Department of Primary Industries' Discussion Paper – Energy Customer Contracts (Victoria) Transition Issues and the Victorian Licensing Arrangements- Issues Paper

Jointly, the undersigned organisations welcome the opportunity to comment on the Department of Primary Industries' (DPI)'s Discussion Paper – Energy Customer Contracts (Victoria) Transition Issues (the **Discussion Paper**) and the Victorian Licensing Arrangements - Issues Paper (the **Issues Paper**). Our organisations represent the interests of Victorian residential and small business energy consumers – being particularly cognisant of the special needs of low income and vulnerable households – and we have a keen interest in ensuring that they are not worse off after the transition to the National Energy Customer Framework ("NECF").

We agree that Victorian regulations provide stronger consumer protections than other jurisdictions, and welcome the Minister for Energy and Resources, the Hon. Michael O'Brien MP's public statements that the Government will only adopt the NECF if Victorian consumers' current protections are not compromised. We support best practice consumer protection in essential services and this should be reflected in the overall approach towards transitioning to the national framework, regardless of the complexities involved. A robust customer framework is particularly important in a deregulated energy market. As the desire to harmonise regulation across the National Energy Market moves us toward a national framework, ensuring that Victorian consumers do not lose key protections at a time when they are exposed to increasing prices and market complexity is paramount.

Accordingly, this submission comprises an outline of our key concerns with the transition to the NECF in addition to our response to both the Discussion Paper and the Issues Paper.

1. Transition to national laws - key consumer concerns

Several issues critical to ensuring that Victorian consumers are not worse off under the NECF have not been adequately addressed in the final NECF package but lie outside the scope of the Discussion Paper and Issues Paper. We understand that a future paper will address a range of customer protection issues; however in the interests of ensuring that they receive the necessary attention in the drafting of transitional legislation, we summarise them here:

1. Wrongful disconnection payment

There is no provision for wrongful disconnection payment (WDP) under the NECF. WDP is an important regulatory tool that protects consumers by providing an incentive to retailers to ensure that they have proper checks and processes in place to prevent wrongful disconnections, ensuring continuity of supply to consumers and compensating them when their entitlements are breached. That Victoria's disconnection rate is lower than other jurisdictions' is testament to its effectiveness. Nevertheless, the Essential Services Commission (ESC) reported an increase in the rate of disconnections (40 per cent for electricity and 54 per cent for gas) in 2009-2010, suggesting that more consumers are experiencing payment difficulties.¹ We are concerned that the removal of WDP will result in further increases in the disconnection rate.

2. Late payment fees

The NECF allows retailers to impose late payment fees on consumers.² This is detrimental to consumers experiencing payment difficulties. The prohibition on late payment fees has been a key customer protection for Victorian consumers and is therefore essential that it is retained.

3. Payment plans

There is no universal right to a payment plan under the NECF – instead, payment plans are extended only to customers who are currently experiencing hardship or those with payment difficulties.³ Victorian consumers have been able to use payment plans as a preventative strategy to minimise financial stress. Access to universal payment plans helps prevent people from falling into payment difficulties and are essential to the ongoing protection of Victorian consumers as they experience increasing payment difficulties.

4. Hardship principles

¹ Essential Services Commission, Energy Retailers Comparative Performance Report – Customer Service (2009-2010), at viii.

² National Energy Retail Rules, Schedule 1 (Model terms and conditions for standard retail contracts), clause 10.4.

³ National Energy Retail Law (South Australia) Bill 2010, section 5.

The NECF fails to recognise that the purpose of a retailer's hardship policy is not merely to assist customers experiencing hardship better manage their energy bills on an ongoing basis,⁴ but also to help avoid disconnection. The fundamental principle that no consumer should be disconnected solely due to an inability to pay for their energy bills must be upheld in any national framework. The general principle regarding disconnection⁵ in the NECF fails to recognise this.

5. Compensation claims

Part 7 of the National Energy Retail Law (South Australia) Bill 2010 (small compensation claims) incorporates the Victorian Voltage Variation Compensation Guideline. However, the wording in section 195 undermines the intent of Part 7, by essentially giving too much discretion to distributors to reject a claim for compensation. This power asymmetry will result in a significant diminution of customer protections for Victorians.

6. Retailer authorisations

The Australian Energy Regulator's (AER)'s inability to assess whether an applicant for retailer authorisation is able to comply with jurisdictional obligations is a serious flaw. We believe that an applicant should be assessed on their ability to meet jurisdictional as well as national obligations in the supply of an essential service. We are concerned that inappropriate applicants will be issued with retailer authorisations.

7. Smart meter protections

There are currently no smart meter protections in the NECF. While this is forthcoming, it will nevertheless need to be addressed in the Government's implementation of the NECF and the development of the transitional legislation to ensure that consumers do not experience detriment as a result of the use of smart meters and are best placed to access their benefits.

8. Penalties and enforcement

Part 13 of the National Energy Retail Law (South Australia) Bill 2010 (enforcement) is inadequate. The civil penalty amounts are too low to effectively deter energy businesses from breaching their obligations under the regulations, particularly in comparison to the potential benefits they can receive through non-compliance. The AER's ability to apply for civil penalties and other orders appears to be limited to cases in which a breach is ongoing.

These issues need to be addressed as a priority for a successful transition to a national framework that preserves and prioritises the interests of consumers.

2. Discussion Paper – Energy Customer Contracts (Victoria) Transition Issues

DPI Proposed policy principles

⁴ National Energy Retail Law (South Australia) Bill 2010, section 43(1).

⁵ National Energy Retail Law (South Australia) Bill 2010, section 48.

In general, we support the policy principles and broad approach set out by DPI in the Discussion Paper:

- *The transition should be implemented with minimal disruption for customers and existing customer contracts.*
- *Where possible there should be no diminution of customers' existing/accrued contractual rights.*
- *Customer contracts should be made compliant with the NECF as soon as reasonably possible.*
- *For in-flight contracts (i.e. where procedures have commenced for a small customer to enter into a jurisdictional energy contract, but the process is incomplete at the start date) – the general policy approach should be that customers should not be disadvantaged by whatever transitional arrangement is agreed.⁶*

We do, however, have some concerns over the wording used in the policy principles.

We suggest that the qualification, “where possible,” in bullet point 2 be deleted as it could undermine the protections which customers have under their existing or accrued contractual rights. We strongly believe that there should be no diminution of customers' existing/accrued contractual rights, and that customers should not be disadvantaged by transitional arrangements.

To ensure that customers' contractual rights are safeguarded, we strongly recommend that where there is a conflict between a term in the customer's existing contract and a NECF provision the term that affords the customer a higher level of protection should prevail.

DPI's proposed approach

We largely support the DPI's proposed approach as outlined in the Conclusion of the Discussion Paper, which are as follows:

- *Customers on standing offers be transferred to NECF standing offers at the commencement of the NECF.*
- *A transition for customers on market offers under the Victorian arrangements to market retail contracts under the NECF be specifically provided for.*
- *No specific provision be made for large customer contracts (this will be a matter for the parties).*
- *Distribution contractual arrangements will transfer to the NECF arrangements at the commencement of the NECF.⁷*

⁶ Discussion Paper – Energy Customer Contracts (Victoria) Transition Issues, at 6.

⁷ Discussion Paper – Energy Customer Contracts (Victoria) Transition Issues, at 11.

We note however that this approach can be tailored to more specifically reach the desired consumer protection outcomes. We discuss the proposed approach further in our response to the questions posed throughout the Discussion paper. Our responses are based on the basic premise that the protections currently afforded to Victorian consumers are not compromised.

Energy contracts between retailer and customer

All consumers must be able to access energy services under fair and reasonable conditions, having regard to the nature of energy as an essential service and the power and information disparity between retailers, distributors and small customers.

Essential to the success of the transition will be a broad, government-funded, community-led energy literacy program, supported by significant funding, that ensures a range of face-to-face, online and other consumer education programs around energy (including smart meters, energy use reduction to save money etc). An important aspect of this would be the transition to the NECF on 1 July 2012 which highlights the protections available to customers under the new law, with a summary of their rights and responsibilities, a clear outline of the AER's new responsibilities and those of the Energy and Water Ombudsman (Victoria) ("EWOV").

- 1. Is it appropriate to transfer customers on existing standing offers to the corresponding standing offer under the NECF?*

Generally, it is appropriate to transfer customers on existing standing offers to the corresponding standing offer under the NECF. Retailers, however, should notify customers of that change before it has taken place, including information detailing that the AER (and not the ESC) is the new regulator.

- 2. Are there potential accrued rights and obligations of parties that should be specifically dealt with in the transition?*

It is important to clarify the meaning of "accrued rights and obligations." If "accrued rights and obligations" refer to current arrangements a customer may have with a retailer – such as payments made under an instalment plan, payment extensions granted by a retailer, hardship assistance, security deposits held by the retailer, and so on – these should also be transferred when that customer moves to the NECF standing offer so that the customer's rights are preserved and the customer is not worse off in the transition.

- 3. How should market retail contracts be handled as the Victorian Energy Retail Code is replaced by the NERR minimum terms regime?*

To ensure that customers on retail market offers are not worse off in the transition to the national framework, we recommend an alternative approach which is dependent on whether the market contract is fixed term or evergreen.

Fixed term market contract

At the time of transition to the NECF, a customer on a *fixed term* market contract should remain on this contract until it expires. The terms and conditions of the contract should remain the same except where a particular term in the NECF offers a higher level of protection, in which case the NECF term should prevail. Upon expiration of the fixed term contract, the customer and retailer can negotiate a new market contract under the NECF terms and conditions.

Evergreen market contract

For those customers on evergreen contracts there is a need to address contractual transparency and to notify customers about the changes that will arise as a result of the transition to the national regime, including informing customers that the AER is now the regulator (in place of the ESC) as discussed above. At the time of transition to the NECF, a customer on an evergreen market contract should remain on this contract. The terms and conditions of the contract should remain the same except where a particular term in the NECF offers a higher level of protection, in which case the NECF term should prevail.

4. Is there any reason why dual fuel contracts might need to be specifically addressed in the transition?

Care needs to be taken to ensure that in the transition, customers who are on dual fuel contracts are not disconnected from their gas and electricity supply concurrently. We note that clause 13.1(c)(A) of the Victorian Energy Retail Code and Rule 117 of the National Energy Retail Rules prohibits disconnecting customers who are on dual fuel contracts from their gas and electricity supply concurrently.

5. What particular issues do energy only contracts present for the transition and how best can they be resolved?

As a general principle, customers who are on “energy (electricity) only” (i.e. non-application of network tariffs) contracts with licensed retailers should have equivalent consumer protections to customers who purchase energy from licensed retailers with the network charges component included in their bill. We understand that the AER will be releasing a paper on exempt distribution networks. We do not know if or to what extent “energy related” contracts might be addressed in the AER’s paper.

6. How can customers receiving supply under deemed supply arrangements best be handled in the transfer?

Customers receiving deemed supply under the Victorian framework will transition to the NECF deemed supply arrangements. The financially responsible retailer, however, should notify customers that the change has taken place, that the AER (and not the ESC) is the new regulator, and provide customers with contract information so as to facilitate the customer establishing a billing relationship as soon as practicable.

7. How should the contracts of 'small market offer customers' be handled in the transition from the Victorian scheme?

The Victorian Energy Retail Code threshold for small businesses is 40MWh for electricity and 1,000GJ for gas. Therefore, some large customers under the Victorian framework will be considered small market offer customers under the NECF and benefit from relevant NECF customer protections.

For small market offer customers, the customer's existing contract should continue on at the time of transition to the NECF. If there is any inconsistency between an NECF term and a term in the customer's existing contract, the term that offers the higher level of protection will prevail.

Disputes

8. *How should disputes arising between customers and retailers concerning the transition to the new regime be handled?*

Disputes arising between customers and retailers, *as well as* between customers and distribution businesses need to be handled in the transition to the national regime. We recommend that DPI work with EWOV to ensure that there are no jurisdictional barriers to customers raising complaints during the transitional process.

RoLR

9. *If a RoLR event happens immediately prior to the commencement of the NECF, how should the failed retailer's customers be treated?*

RoLR events have a significant impact on customers. To minimise disruption, there must be a clear and simple process for treating the failed retailer's customers. Customers should not be transitioned twice if the RoLR event occurs immediately prior to the commencement of the NECF. We recommend that an appropriate time period prior to the commencement of the NECF be defined and customers caught up in a RoLR event within this time period be transitioned directly to the NECF RoLR standing offer contract. Further, customers should not be charged any fee for moving to the RoLR standing offer.

Distribution contracts between distribution business and customer

Generally, we are supportive of the fact that the NECF adopts an approach that includes a more direct relationship between the customer and distributor. However, there is a need for distributors, which may currently have limited interaction with customers, to be well equipped to manage this new relationship and more direct interaction with customers. For example, distribution businesses may require more information about their customers than just the National Meter Identifier (NMI); thus, appropriate privacy protections are needed. Customers also need to be aware of any changes to the relationship between themselves and the distributor as the transition to the NECF takes place.

The NECF marketing rules do not apply to distributors. As energy networks become "smarter", it is likely that distribution businesses will offer new energy products and services to their customers. The marketing rules must extend to distribution businesses, including a requirement that any contract between a customer and a distributor requires the customer's explicit informed consent.

The Consumer Advocacy Panel funded CUAC to undertake a research project into the customer distributor relationship under the first exposure draft of the NECF.⁸ The majority of recommendations contained in the research report (which we have attached to this submission) remain relevant. We strongly urge your consideration of this report to ensure adequate balance in the distributor-customer relationship and that best practice consumer protections apply nationally.

10. How should the transition from electricity deemed distribution contracts to the NECF be treated?

Customers on electricity deemed distribution contracts should transition to the NECF framework at the time of transition. If there is any inconsistency between a NECF term and a term in the customer's existing contract, the term that offers the higher level of protection will prevail.

Distribution businesses should notify customers that the change has taken place and that the AER is the new regulator.

11. Do any issues arise in respect of establishing a new contractual relationship in gas?

Please refer to our general comments on distribution contracts above.

12. How should individualised negotiated contracts be treated?

Individualised arrangements that have been agreed to between the customer and distribution business should continue on through the commencement of the NECF. If there is any inconsistency between a NECF term and a term in the customer's existing contract, the term that offers the higher level of protection should prevail.

13. How should customers who are in the process of procuring new connections to premises be treated in the transition?

We assume that that these customers have not signed up for a new connections contract with the distribution business yet. For customers in the process of procuring new connections to premises in the period immediately prior to the commencement of the NECF (which needs to be defined as discussed above), the connection contracts should fall under the NECF framework. This will avoid the situation of customers having to transition twice.

3. Victorian Licensing Arrangements - Issues Paper

In our response to the Issues Paper we have largely supported the conclusions reached by the Department and have provided further clarification, where we have deemed it necessary, as follows:

Jurisdictional registration

⁸ Prins, David (2009) Advice on National Energy Customer Framework (NECF), Etrog Consulting Pty. Ltd., Melbourne

- *The authorisation structure chosen must be capable of linking to and supporting important statutory obligations and powers under the energy industry and energy safety laws. At a minimum, major energy companies must be registered, nominated or authorised under Victorian legislation for the purposes of these local provisions.*

We strongly support the additional registration of energy companies under Victorian legislation for the purposes of ensuring these businesses meet jurisdictional safety laws and in particular to ensure they meet any additional obligations placed upon them – such as wrongful disconnection payments, the banning of late payment fees and smart meter protections – that are not provided for in the NECF.

Small scale networks

- *It is desirable that the current Order in Council regime governing small scale generation, sale and supply be replaced with a more robust oversight structure for this sector. The form of regulation should be flexible by nature in order to avoid stifling innovation, but should be more attuned to protection of customer interests than current arrangements.*

Changing urban forms and demographic shifts have led to a steady increase in the numbers of households who are customers of exempt networks. Thus it is critical that the transitional arrangements address any gaps in the AER's exempt selling framework and specifically empower the AER to ensure the interests of *all* Victorian consumers are protected.

Access to EWOV and VCAT

We support a review of the Order in Council (“OIC”) that governs small scale generation, sale and supply. While we give in principle support to the ESC's recommendations – as set out at page 13 of the Issues Paper – further customer protections are still necessary, as well as consultation in relation to these. In particular, we seek to clarify the ESC's recommendation 4, which currently reads: “Remove the requirement to advise the customer of his or her right to apply to have the matter heard by VCAT”; this must instead be re-phrased to ensure that customers retain their right to have their case heard by VCAT, especially for customers of exempt networks who are dissatisfied with an outcome received from EWOV.

Consumer protections

Customers of exempt networks frequently do not have access to retail competition (the cost of changing metering infrastructure to access retailer choice being prohibitive), and many, such as those in retirement villages or caravan parks, have their energy service and accommodation provided by the same person. These customers often do not have equivalent consumer protections to those enjoyed by customers purchasing energy from an authorised retailer; for example, access to basic customer protections, including:

- payment plans;
- hardship programs; and

- a free, impartial and independent external dispute resolution scheme⁹.

Taken together, these factors place customers of exempt networks in a vulnerable position where insecurity of tenure, fear of rent increases and retaliatory eviction act as additional barriers to tenants raising utility issues or complaints to their landlords. Many of these customers already experience disadvantage – including social isolation, low income and financial hardship – it is unacceptable that as one of the most vulnerable groups in our community they are denied basic customer protections.

Customers of exempt networks must be entitled to an equivalent level of protection as those customers who purchase energy from authorised retailers if they are to also benefit from the community expectation (codified in the Electricity and Gas Industry Acts) that no person should be disconnected from energy supply due solely to an inability to pay.

Registration of exempt sellers

Registration of exempt sellers is important as it will increase awareness of the scale of on-selling activities being carried out under the exemptions and provide a framework for compliance monitoring of those activities. We believe that this process will not be unduly burdensome, as exempt sellers currently engage in similar activities, such as complying with industry-specific registration or accreditation requirements and registering their business names with the relevant authorities.

Monitoring and compliance of exempt sellers

Without a robust monitoring and enforcement regime there is no means to drive or assess exempt operators' ongoing compliance with their obligations. Strong regulatory oversight is especially important in this situation as customers of exempt sellers are unable to access, or encounter difficulties in accessing, the competitive retail market and the consumer protections other Victorians can take for granted. We believe that the AER needs to be further empowered to regulate the exempt selling framework under the OIC.

The locus of jurisdictional regulatory oversight

- *Victoria-specific regulatory requirements will require a regulatory body to administer and enforce them. Nominating an appropriate body will be important to the success of the NECF transition. There are obvious advantages to conferral of some Victorian-specific functions on the AER in order to avoid fragmentation of regulatory responsibilities and approaches and duplicative costs although the AER's status as a Commonwealth body complicates any such conferral. However, State agencies could continue to perform this role as well.*

We urge the government to transition regulatory responsibility for Victoria-specific regulatory requirements to the AER. It is essential for consumers that the regulation of consumer protections is seamless; dividing regulatory functions between different regulators could

⁹ We note this is one of the recommendations in the ESC's Small Scale Licensing Framework Final Recommendations (March 2007); we support this.

dilute the effectiveness of the overall framework and risk having issues fall through the gaps. There is also the danger that a state-based regulator with few areas of responsibility would lack robustness and depth of expertise.

Other regulatory and legislative assumptions

- *Care needs to be taken not to upset current arrangements which are predicated on licensing during the transition. These arrangements may be commercial (as businesses assume the existence of a licence for some commercial reasons) or legal (in as much as other acts such as the ESA, GSA and Pipelines Act have been drafted assuming a licensing regime). DPI will continue to consult with affected parties on these issues.*

We have significant concerns with the way the national laws are drafted in that there is nothing that prevents another business acquiring a failed business, and subsequently their licence. This results in no adequate protection for consumers of failed retailers. We believe there needs to be some provision in the transitional legislation that prevents any business from acquiring registration in Victoria (or authorisation if nationally) by stealth. Any registration or authorisation must only be gained by undergoing due process and from scratch.

According to the AER:

[u]nder the National Energy Retail Law (“NERL”) the AER’s assessment against the entry criteria for retailer authorisations is limited to the entity that is seeking to perform the retail functions. A change of ownership of an entity (the retailer) does not fall within the scope of a ‘transfer’ under the Retail Law provided that the legal entity remains unchanged.¹⁰

We are concerned that the NECF and the AER’s draft Retailer Authorisation Guideline (3 May 2011) do not sufficiently address scenarios where a failed authorised retailer is acquired by another corporate entity, including an acquisition through a deed of arrangement. The implication is that the corporate entity acquiring the failed authorised retailer may takeover the failed retailer’s authorisation, without any assessment as to whether the corporate entity satisfies the entry criteria (that is, organisational, technical, financial capacity etc).

We cite the following as an example. Jackgreen International Pty Ltd was suspended by the Australian Energy Market Operator (“AEMO”) after it was placed in voluntary administration by its board of directors on 18 December 2009. In Victoria, Jackgreen had around 3,000 customers; in New South Wales 47,000. Creditors of Jackgreen International Pty Ltd subsequently accepted a deed of arrangement from Greenbox IP Pty Ltd which meant that GreenBox IP Pty Ltd acquired Jackgreen International Pty Ltd including its retailer licence. On 7 March 2010, the AEMO reinstated Jackgreen International as a market participant in the National Energy Market. Jackgreen International Pty Ltd and GreenBox IP Pty Ltd merged; they changed their name to GreenBox Group on 29 December 2010. Based on the AER’s above comments, our understanding is that under the NECF and the AER’s draft Retailer Authorisation Guideline (3 May 2011), this would not amount to a “transfer” requiring an assessment of whether the new company is able to operate a viable energy business.

¹⁰ AER, Notice of draft instrument, Retailer Authorisation Guideline (3 May 2011), at 13.

It is essential that where a failed authorised retailer is acquired by another corporate entity, (whether through a deed of arrangement, takeover, or other means) that the AER be empowered to conduct a due diligence process to consider whether the acquiring entity has the ability to meet the obligations of an energy retailer under the NECF. This protection needs to be afforded to Australian consumers and must be addressed in the national framework. While we suggest that this be examined by the NECF Joint Implementation Group, this issue also needs to be addressed in the transitional package so that there are adequate safeguards in place for Victorian consumers should a failed retailer be acquired by another business.

The consultation process for the Discussion Paper and Issues Paper has been relatively short (4 weeks). While we note the challenges in drafting and implementing transitional arrangements, we welcome further opportunity to meaningfully engage with DPI in discussing the transitional arrangements for optimum protections for consumers.

Yours sincerely,

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