



16 February 2007

**By email:** [MCEMarketReform@industry.gov.au](mailto:MCEMarketReform@industry.gov.au)

Manager, MCE Secretariat  
Department of Industry, Tourism and Resources  
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Dear MCE Secretariat

**Retail Policy Working Group – Working Paper 3  
National Framework for Distribution and Retail Regulation**

We welcome the opportunity to comment on the MCE Retail Policy Working Group's (RPWG) Working Paper 3 on the National Framework for Distribution and Retail Regulation (the **Paper**). The Consumer Action Law Centre (**Consumer Action**) would like to make the following comments in relation to some of the options proposed by the Paper.

**Business authorisation**

We strongly support the requirement for a form of business authorisation to apply to all energy retailers and distributors participating in the national energy market. In our view, business authorisation, through a licensing or registration scheme, allows for a valuable process of assessment of companies prior to market entry. Such an assessment can ensure that market participants establish and maintain minimum competencies. We disagree with the opinion expressed in the previous consultation paper by Gilbert+Tobin/NERA Economic Consulting that such business authorisation is an inappropriate barrier to entry. In addition to the benefits identified in the Paper, there is significant consumer benefit in being able to identify whether particular companies are authorised market participants, especially in relation to consumers being marketed to in the competitive market.

We agree that most obligations imposed on retailers and distributors that are currently in jurisdictional licences can appropriately be placed in the National Gas and Electricity Rules (the **Rules**) as direct regulatory obligations. However, we note that one of the major benefits of a licensing scheme is that it can be much more responsive to changing market conditions resulting from economic, social and technological changes. We note that the Rules and the Rules amendment process are designed to be responsive, with market participants and other stakeholders able

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to initiate rule-changes. We are concerned, however, about current proposals to amend the rule-change process to introduce additional barriers for stakeholders that wish to initiate rule changes.<sup>1</sup> We seek an assurance from the RPWG that the regulatory obligations imposed on retailers and distributors under the Rules are at least as flexible and adaptive to changing circumstances as is the case with licence conditions.

Other advantages of licensing systems relate to compliance and enforcement. While the Paper concentrates on using licensing or registration to set entry requirements, licensing is ultimately a tool to protect consumers and, as noted by the Paper, this involves not only establishing but maintaining minimum competencies. Licensing also gives a licensing agency a more proactive role in achieving consumer protection regulatory compliance, particularly by facilitating reporting and compliance monitoring. This means that three agencies, the licensing agency (the AER), industry ombudsman and the fair trading agencies (either state/territory or the ACCC), with somewhat different roles, can work collaboratively to achieve the highest compliance levels.

A second important benefit of licences that appears to have been overlooked by the Paper is the ability for licence conditions to be individualised to particular market participants. We agree that the use of licence conditions by the various jurisdictions has until now been primarily to impose general regulatory obligations on all market participants, a function better achieved through the Rules. However, where the regulator or other stakeholders are concerned about the behaviour of a particular retailer or distributor, additional specific licence conditions might be available as one of a range of lighter-touch tools to target the concerns. For example, the regulator could require a particular company, by imposing a licence condition, to undergo additional regular compliance reporting regarding certain obligations in response to high levels of consumer complaints in relation to that company.

It has been suggested that flexible enforcement action could also be achieved through the regulator's administrative enforcement powers, such as through enforceable undertakings. We are yet to see any detailed proposals in relation to enforcement and compliance, including enforceable undertakings, as part of the RPWG's work, yet we understand that there will be an additional paper on this topic. We look forward to further consultations. For the moment, we wish to re-state our support for the regulator having a power to accept enforceable undertakings. We believe that such undertakings should have a legislative basis, rather than merely an administrative one, and that they should be public. The public nature of the undertakings is important to promote compliance with regulatory obligations. We note, however, that both enforceable undertakings and licence conditions could be available as enforcement and compliance options for the regulator, as they have different uses. Enforceable undertakings are usually used to require businesses to comply with specific actions while licence conditions generally relate to ongoing issues, for example limiting who a retailer may offer contracts to.

We are generally supportive of the entry tests proposed by the Paper in relation to prudential requirements, organisational and compliance capacity and the fit and proper or suitable person test. It is our view that these are not onerous requirements and are similar to what is required currently in existing jurisdictional regulation. Rationalisation of the jurisdictional entry tests would have the desired goal of a

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<sup>1</sup> MCE SCO, *Electricity Amendments and further amendments to the electricity and gas rule-change process*, January 2007.

reduced burden for industry participants. We also believe that these registration tests should not only be complied with upon entry into the market, but that it should be a requirement for the party to continue to satisfy the criteria. This will enable the regulator to revoke registration where those criteria are no longer met.

The option proposed by the Paper (Option 5) suggests a more limited form of business authorisation for distributors. This proposal was on the basis that the Rules already require electricity distributors to register with NEMMCO and that a similar registration requirement would be forthcoming in the gas sector with the establishment of a Short-Term Trading Market. It is our understanding that, in practice, NEMMCO registers retailers and distributors (or at least satisfies itself of some of the registration requirements) on the basis that those parties are licensed by jurisdictional regulators. Furthermore, we do not think that it is appropriate for NEMMCO, as the market operator, to be responsible for ensuring that the proposed entry requirements are satisfied. This task is more rightly assigned to an independent regulator. Considering this, we think it is inappropriate to have the more limited form of business authorisation for distributors but would instead support Option 4 as it is outlined in the Paper.

### **Ring fencing**

We generally support the Paper's proposals regarding ring fencing arrangements. However, we seek assurance that the transition of ring fencing requirements from the jurisdictional regulations to the national framework will ensure that businesses are not able to evade regulation and engage in anti-competitive conduct. We see a need for transitional arrangements to be robust, considering the potential for anti-competitive conduct that may arise as a result of a regulated monopoly being able to disadvantage competitors of a related party in an upstream or downstream industry sector.

### **Retailer failure arrangements**

The Paper proposes that the 2007 legislative package authorise the AEMC to make rules in relation to retailer failure arrangements, rather than fully developing those rules to come into operation as part of the 2007 package. We broadly support this proposal for the reasons outlined in the Paper, namely that existing arrangements are not highly developed, that there are significant divergences in approach in current jurisdictional arrangements, and that there remain high level policy and legal issues to be addressed. We seek assurance, however, that jurisdictional arrangements will continue to apply until the national framework for retailer failure arrangements is finalised.

It has been suggested that instead of this work being undertaken by the AEMC, that it could be undertaken by a specific working group, under the MCE or perhaps made up of industry representatives. Recognising that the expertise in the commercial and practical issues that relate to retailer failure primarily lays with industry, we are nevertheless wary of this proposal. In any event, we would demand that consumer input be specifically sought in such a working group, particularly considering the devastating impact that retailer failure can have for consumers. However, we see no reason why the industry's expertise cannot be provided through consultations undertaken by the AEMC in its rule-making process, which has proved to be transparent and accountable.

Should you have any questions in relation to this submission, please contact us on 03 9670 5088.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive style with a large, prominent initial 'G'.

Gerard Brody  
Senior Policy Officer