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By email: katherine.koesasi@esc.vic.gov.au

Ms Katherine Koesasi
Regulatory Analyst
Essential Services Commission
Level 2, 35 Spring Street
Melbourne VIC 3000

Dear Ms Koesasi

**SUBMISSION TO THE ESSENTIAL SERVICES COMMISSION
FINAL DECISION - REVIEW OF THE ELECTRICITY
AND GAS RETAIL CODES – ENERGY RETAIL CODE**

The Consumer Law Centre Victoria (CLCV) welcomes the opportunity to make a submission to the Essential Services Commission (the **Commission**) in relation to the Final Decision - Review of the Electricity and Gas Retail Codes – Energy Retail Code (the **Final Decision**) dated May 2004.

This submission does not discuss in detail all of the issues raised in the Final Decision, and we continue to hold the views expressed in our earlier submissions (dated 25 July 2003 and 27 February 2004) with regard to this review. Accordingly, the primary purpose of this submission is to reiterate our concerns regarding the introduction of late payment fees (clause 7.4 of the Energy Retail Code) and to convince the Commission of the validity of those concerns. We also note that certain parts of this submission support and repeat comments made to the Commission by the Victorian Council of Social Services in its letter to the Commission dated 31 May 2004.

We are extremely disappointed that the Commission has decided to allow the introduction of late payment fees and find little comfort in the measures proposed by the Commission to 'quarantine' those who cannot afford to pay their energy bills on time from paying late payment fees. In our view, the Commission has failed to adequately address the concerns raised by community organisations and the Minister for Energy Industries and Resources with respect to this issue. While national consistency appears to have been the primary motivation for the Commission's decision, this is not a sufficient justification for what we perceive to have been a failure by the Commission to provide more robust and transparent reasons for the decision.

As we noted in our earlier submissions, and indeed as the Commission itself acknowledges, there has been little evidence provided by either the Commission or retailers to support the assertion that late payment fees would act as a disincentive for those customers who 'choose' to pay their energy bills after the due date. With respect to both the Commission and Telstra, the fact that

Telstra's National Credit Manager believes that the imposition of late payment fees has been partially responsible for more customers paying on time, is hardly convincing, nor impartial. It would also be interesting to know from Telstra what percentage of the revenue received from the collection of late payment fees ultimately ends up as profit, as opposed to cost recovery.

Clause 7.4 – Payment of a bill – late payment fees

8. The Commission's decision to allow for the introduction of late payment fees is by far the most disappointing aspect of the Draft Decision. In our view, the reasoning behind the decision is seriously flawed and lacks transparency and accountability. We remain fundamentally opposed to the introduction of late payment fees in energy contracts (including market contracts). However, rather than repeat the arguments presented in our earlier submission, we take this opportunity to add to the strength of those arguments and, in doing so, seek to convince the Commission that, on social policy grounds, late payment fees will compound existing hardship, and on legal grounds, may not only be unlawful penalties but could also be in breach of unfair contract terms legislation in Victoria.
9. We note that the Commission took into consideration concerns in relation to exemptions from late payment fees only for concession card holders (with the Draft Decision exempting consumers on payment arrangements or those with a dispute before the Ombudsman) but this does not guarantee that those least able to afford late payment fees will not end up paying them. The reason for this is that, in our view, retailers are routinely failing to offer affordable instalment plans to consumers suffering from financial hardship, particularly in circumstances where the consumer is not a concession cardholder. A study on the experiences of consumers who have been disconnected, soon to be jointly released by the CLCV and the Consumer Utilities Advocacy Centre, overwhelmingly supports this view. Interviews with consumers who have been disconnected from electricity or gas show that there is clearly an inability (or lack of willingness) on the part of retailers to accurately distinguish between those consumers who choose not to pay a bill on time and those who simply cannot afford to do so. As a consequence, many consumers told us that they were not offered instalment plans, or if they were, that the plan offered was not affordable. Furthermore, a number of consumers told us that the retailer did not advise them that they could take up the dispute with the Ombudsman. Given this situation, we do not consider that the IPART model protects the 'working poor' or those for whom poverty is transitional, any more than the original proposed exemptions in the Draft Energy Code. We submit that until such time as the Commission holds retailers accountable with respect to their dealings with consumers in financial hardship, late payment fees will simply penalise low-income and vulnerable consumers and compound existing hardship.
10. Late payment fees will not act as an incentive to pay for low-income and vulnerable consumers. Indeed, we query whether, in reality, a late payment fee will encourage those who choose to pay late to instead pay on time. Has the Commission tested this proposition in industries where late payment fees are applied, for example, the telecommunications industry? If it is a question of balance, can the Commission guarantee that late payment fees will stop late payment at a rate that justifies the imposition of the fee in inappropriate circumstances?
11. We remain of the view that late payment fees may be unlawful penalties and do not consider that the legal opinion in the Draft Decision adequately addresses this issue. We do not disagree that an agreed damages term in a contract, which fairly and reasonably reflects the loss to the non-breaching party as a result of the breaching party's action, would be

enforceable at law. However, a clause in the Energy Code that states a retailer may include an agreed damages clause in a contract if it represents a genuine pre-estimate of the loss suffered as a result of late payment is simply a restatement of the law. It does not in any way guarantee that the retailers will, in practice, arrive at a late payment fee which accurately reflects their loss. As far as we can tell from the Draft Decision, the retailers did not provide the Commission with any evidence of their actual costs in the event that a customer does not pay on time. Further, there is no evidence presented in the Draft Decision to show that existing tariff structures do not already contain sufficient headroom in which costs, such as late payment, are already built in.

12. In industries in Australia in which late payment fees are allowed, it is notoriously difficult to assess whether the late payment fee imposed by a business represents a genuine pre-estimate of the costs to the business in processing the late payment or whether the fee is, in fact, set much higher than any such cost to the business. However, due to the difficulty faced by an individual consumer in challenging the imposition of such a fee, late payment fees have not yet been subjected to appropriate legal scrutiny by an Australian court.
13. Australian banks that issue credit cards routinely impose a late payment fee on credit card accounts when the customer fails to make payment of the minimum monthly payment due on their credit card account's outstanding balance by the due date. In August 2003 we surveyed six of the larger Australian banks that provide retail banking services – Australia and New Zealand Banking Group Limited (ANZ), Bendigo Bank Limited (Bendigo Bank), Commonwealth Bank of Australia Limited (CBA), National Australia Bank Limited (NAB), St. George Bank Limited (St George) and Westpac Banking Corporation Limited (Westpac). Bendigo Bank charged the lowest credit card late payment fee at \$15, while the NAB, the CBA, the ANZ and Westpac charged the highest such fee at \$25. St George charged a late payment fee in the middle of this range, at \$21.80. For the late payment fee to represent mere cost recovery, the NAB, CBA, the ANZ and Westpac must be \$10 less efficient in processing each instance of late payment than Bendigo Bank. This seems unlikely, particularly given that a late payment will simply cause the automatic generation of an additional line on the customer's credit card account statement stating that payment is late (and given the larger customer base of the big four banks, economies of scale would be more likely to make this *less* expensive per instance for them than for Bendigo Bank). In fact, it seems unlikely that this automatic line generation costs a bank even \$15, let alone \$25, per late payment to process. Rather, it seems much more likely that the banks generate a profit from their customers by charging credit card late payment fees. Can the Commission ensure that late payment fees reflect the actual cost to retailers of a consumer making a late payment? Furthermore, how does the Commission propose to monitor the calculation of late payment fees?
14. A further point in relation to the legality of late payment fees arises in the context of recent amendments to the *Fair Trading Act 1999* (Vic) prohibiting the use of unfair contract terms in consumer contracts. An unfair term is defined in the legislation as:

*A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.*¹

¹ Section 32W

Section 32X contains a list of matters that may be taken into account in determining whether a term is unfair, and includes a term of a contract which has the object or effect of ‘penalising the consumer but not the supplier for a breach or termination of the contract’.² Arguably, the inclusion of a late payment fee in an energy contract could be considered an unfair term under the Act and therefore could be the subject of a future legal challenge.

15. Finally, we suggest that the Commission have regard to the widespread opposition to the introduction of late payment fees in Victoria. Not only are the consumer and community sectors opposed to late payment fees, but so too is the Victorian government, which has stated publicly its opposition.³ While we appreciate that the Commission is an independent regulator, we consider that regulation does not take place in a vacuum but rather decisions should be made within a social, as well as economic framework.

Clause 7.3 – Payment methods

16. We agree with the Commission’s decision to clarify payment methods in the Code and take this opportunity to express our support for the Energy and Water Ombudsman’s suggestion that Centrepay be a mandated payment option.

Clause 31 – Additional retail charges

17. We continue to oppose the introduction of additional retail charges for all energy contracts on the basis that they will increase the cost of energy for consumers. This is because, as with late payment fees, it is highly likely that the existing tariff structures already contain sufficient headroom in which the costs of items for which additional retail charges may be levied are already built in.
18. We broadly support the Reserve Bank of Australia’s (**RBA**) reforms to the credit card system that permit merchants to charge consumers an additional fee for the use of a credit card to make payment, and accordingly we are not unconditionally opposed to permitting energy retailers to charge an additional fee for credit card payment. However, we only support such a change if the energy prices charged by a retailer that introduces a credit card payment fee are reduced across the board by the amount of the margin already incorporated into their energy prices to cover the cost of credit card payments by customers.
19. Further, the RBA has assumed that the imposition of credit card payment fees by merchants will be controlled by competitive market forces between merchants competing for customers. However, given the immature nature of competition in the Victorian electricity market (as discussed in our submission to the Review of Effectiveness of Retail Competition and Consumer Safety Net), we consider that, if the Commission does propose to permit retailers to charge credit card payment fees, the Commission must continue to monitor the fees to ensure they do not become excessive and/or require regulation.

Customers in vulnerable circumstances – additional assistance

Clause 1 – Customer connections – tenants

² Section 32X(c)

³ See ‘Gas companies in hot water on bills’, Jeremy Kelly, *Herald Sun*, 27 February 2004

20. We fully support the Commission's decision not to adopt clause 1(c)(B) in the Draft Energy Code.

Clause 10.1 – Adjustment of a bill – overcharging and undercharging

21. As stated in paragraph two of this submission and, indeed, as acknowledged by the Commission in the Draft Decision, late and inaccurate bills can compound existing financial hardship for low-income and vulnerable consumers. Accordingly, at a time when problems with retailer customer information systems are becoming more prevalent it is pleasing to note that the Commission has decided to reduce the amount recoverable when undercharging has occurred to nine months and allow equal time for the consumer to pay. We do, however, consider that there is still further scope to improve incentives for retailers to address their billing problems. At the very least, this adds even greater weight to the argument that late payment fees should not be introduced when there is clear evidence that billing inaccuracies are contributing to payment difficulties for low-income and vulnerable consumers.

Clause 26.6 - Energy efficiency advice

22. We support the request for there to be greater obligation on retailers to provide energy efficiency advice to consumers and submit that this is an issue of considerable importance in the context of the current Review of Effectiveness of Retail Competition and Consumer Safety Net.

Administrative and drafting

Clause 20 - Variations regarding the customer's agreement

23. We endorse the Commission's decision that any variations to the terms and conditions of an energy contract, other than previously agreed tariff charges, must be agreed in writing.

Other matters (bankruptcies)

24. We endorse the Commission's decision not to include special provisions in the Energy Code to apply where a customer is declared bankrupt on the basis that such individuals are already in a vulnerable situation and therefore require more, if not less, protection under the Energy Code.

Please contact Anna Stewart on 9629 6934 (Direct) should you have any questions about this submission.

Yours sincerely

Anna Stewart
Principal Solicitor