



Submission to:

**ENERGY COMPETITION
COMMITTEE**

**Electricity Full Retail Competition:
Electricity Customer Transfer and Consent
Code and Retail Marketing Code of
Conduct in the Electricity Industry Code.**

**Centre for Credit and
Consumer Law, Griffith University**
With funding from the National Consumers Electricity
Advocacy Panel
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The Centre for Credit and Consumer Law is funded by the Queensland Government through the Consumer Credit Fund (administered by the Office of Fair Trading) and Griffith University.

Acronyms

CCCL - Centre for Credit and Consumer Law

ECC – Energy Competition Committee

ESC - Essential Services Commission

FRC - Full Retail Competition

1. About the Centre for Credit and Consumer Law

The Centre for Credit and Consumer Law is an academic centre, hosted by Griffith University Law School.

The Centre for Credit and Consumer Law was established in March 2004 to be a source of expertise, and a centre of excellence, on credit and consumer law issues, and it has the overall objective of promoting the attainment of a fairer, safer, and more efficient marketplace, particularly for low income and vulnerable small end-users.

The Centre for Credit and Consumer Law is funded by the Queensland Government's Consumer Credit Fund (administered by the Office of Fair Trading) and Griffith University. However, this submission is possible because of funding received by the Centre for Credit and Consumer Law from the National Consumers Electricity Advocacy Panel.

2. About this Submission

The Centre for Credit and Consumer Law (CCCL) welcomes the opportunity to provide a submission to the Energy Competition Committee (ECC) in relation to Consultation Paper No.5 'Consumer Protection Provisions for Electricity and Gas' (9 May 2006) and the subsequent revised Chapters of the Electricity Industry Code – Customer Transfer and Consent Code and Retail Marketing Code of Conduct. The main focus in this submission is in relation to Chapter 7 – the Retail Marketing Code of Conduct. This is a key area of concern for CCCL because a move to Full Retail Competition (FRC), in an environment where consumers have little awareness, can create potential for abuse and deception by marketers

Our research with consumers in four focus groups indicates that it is very difficult for people to anticipate what environment they will be facing in terms of market offers once FRC is introduced. Participants in the focus groups asked the following questions:

- What will happen if companies go belly up?
- Will there be cold callers trying to sell products?
- What would happen if, as a result of signing a market contract, the quality of service were reduced?

A number of participants pointed to the sale of Telstra as an example of what might happen such as the proliferation of retailers followed by an ensuing rationalisation of services and ultimately reduced services for rural and regional residents. Most participants in the focus groups expressed wariness in switching retailers in the short-term given their uncertainty about how the market would play out and whether or not they would actually benefit from going onto market contracts.¹

Given the lack of consumer knowledge our research has uncovered we would encourage the ECC to take this opportunity to ensure that Queensland consumers are not only well informed but well protected in the new FRC environment of energy retail. A report prepared for the UK Office of Fair Trading by London Economic makes the point that

¹ CCCL (2006), Focus Group Interviews - Low Income 9th May – Transcript; Focus Group Interviews – Rural and Regional, 10th May - Transcript.

‘...consumers are rarely well informed when making purchase decisions. Indeed in many cases, consumer ignorance – for whatever reasons – is so high that a significant detriment occurs.’²

3. Priority Issues

We welcome the release of Chapters’ six and seven of the Code. These sections bring Queensland broadly in line with other states and territories and establish key elements in relation to consumer protection provisions. We reiterate the main points covered in our previous submission to the ECC in relation to the need to base the Queensland Code on best practice and the need to overtly identify electricity as an essential service in order to address the social equity concerns of residential consumers and vulnerable consumers in particular.³ We favour the relevant Victorian Code as the benchmark and recommend the attached Victorian Code of Conduct for Marketing Retail Energy to the ECC for its transparency, consumer protection provisions and plain English.⁴ However, we understand that the ECC has made a decision to rely solely on the SA Code as the model. We are disappointed with this decision and do not believe it is in the best interests of consumers and is, at best, a second-best arrangement pending the finalisation of National arrangements. In other words it is a missed opportunity for the Queensland Government to advocate for best practice in future national arrangements. Given the benchmark established in Victoria we would advocate that Victorian arrangements form the basis for any National arrangements.

Key provisions

Firstly, we note the absence of provisions in relation to retailer of last resort, cooling off and liability. We understand from the draft Electricity Industry Code that clauses 1.3.3 to 1.3.7 and 14 that deal with specific consumer protection issues (such as cooling off, retailer of last resort and liability) will be discussed and clarified.⁵ These issues are fundamental to the drafting of consumer protection provisions. As a general principle, our support for marketing provisions discussed in this submission is conditional on the above provisions being satisfactory.

Compliance

We understand that there will be no enforceable undertaking provision in the Queensland legislation. This clearly has compliance implications. Regulators should have a range of tools available to them. Experience in other jurisdictions has shown that enforceable undertakings can play an important role in ensuring compliance. We note that recently the Independent Pricing and Regulatory Tribunal in NSW received a complaint referred by the Energy and Water Ombudsman in that state regarding the marketing practices of a retailer who had engaged a telemarketing agent who had ‘...transferred customers without their consent and did not fully disclose the terms of its contractual offers and as such did not comply with its retail suppliers licence.’ The retailer was required to enter into enforceable undertakings with the Tribunal to prevent

² London Economics (1997), Consumer Detriment under Conditions of Imperfect Information, Prepared for the Office of Fair Trading, Research paper 11, p.5

³ CCCL (2006), Submission to the Energy Competition Committee (2006), Proposed Electricity Industry Code, CCCL, 20th June 2006.

⁴ ESC (2004), Electricity Customer Transfer Code, p.1; PDF Attachment - ESC (2004), Code of Conduct for Marketing Retail Energy in Victoria.

⁵ ECC (2006), Draft Electricity Industry Code, p.20.

the conduct recurring.⁶ Another example occurred earlier in Victoria with an energy retailer signing a court-enforceable undertaking to address breaches of the Victorian Fair Trading Act.⁷

Plain English Drafting

In our view, the current Queensland draft provisions in the Retail Code would not be easily understood by lay persons and we recommend further revision/clarification to ensure this occurs. The South Australian Code, upon which the Queensland Code is based, is not written in plain English, which would make the Code more accessible and easy to understand for lay readers and therefore be a more beneficial document to residential consumers generally. We mentioned the benefits of using Plain English in our previous submission.⁸ The drafting of the Queensland Electricity Industry Code and, in particular, the Queensland Retail Marketing Code of Conduct provides an opportunity for plain English drafting. We note that both the Victorian Electricity Customer Transfer Code and the Victorian Code of Conduct for Marketing Retail Energy are written in much plainer English than the equivalent draft Queensland Codes. The Victorian Code of Conduct for Marketing Retail Energy identifies ‘Clear language’ as an essential part of the Code and states the following: ‘Information that this Code requires to be provided to consumers shall be written in plain English and designed to be readily understood by consumers.’⁹

There is a strong international and national basis for undertaking a plain English approach in drafting consumer protection provisions. The movement for plain legal language commenced in North America, the United Kingdom and in Australia in the 1970s.¹⁰ Plain English is the official draft policy of the Queensland, Victorian and Australian Capital Territory Parliamentary Counsel’s Offices. The Law and Justice Foundation of New South Wales, the Independent Commission Against Corruption and in particular the Victorian Law Reform Commission have been instrumental in promoting the use of plain English. The Victorian Law Reform Commission chose to rewrite the “uniform” credit laws as part of its reform platform and ultimately the Consumer Credit Code including the *Consumer Credit (Queensland) Act 1994* benefited from this re-writing. The Queensland Law Society established a plain language committee in the 1990s and private law firms in Australia including Mallesons Stephen Jaques have been at the forefront of this initiative preparing documents in plain language in response to client demand.¹¹

Putting the Consumer first

Ideally the introduction of a Code is designed to protect the interests of the consumer using a transparently worded and easily understood tool that is accessible to both retailers and consumers. The Victorian Code of Conduct for Marketing Retail Energy centralizes consumers as part of a holistic policy in a way the Queensland draft Retail Marketing Code of Conduct does not. We flagged this holistic policy in our previous submission in

⁶ IPART (2006), Media Release Jackgreen (International PL) Licence Compliance, 23rd June 2006.

⁷ Media Release, Minister for Consumer Affairs (2005), ‘Energy Australia Agrees to Better Protect Consumers, 13th March 2005.

⁸ CCCL (2006), Submission, Electricity Full Retail Competition: Proposed Electricity Industry Code, p.19.

⁹ See PDF Attachment: ESC (2004), Code of Conduct for Marketing Retail Energy in Victoria, p.8

¹⁰ Michele M Asprey (2003), *Plain Language for Lawyers*, third edition, The Federation Press, Leichhardt, NSW, Chapter 4.

¹¹ Asprey (2003), *Plain Language for Lawyers*, pp.40, p.44 (page numbering is based on excerpt on Federation Press website www.federationpress.com.au/bookstore/book.asp); ‘Christopher Balmford (2006), ‘Law firms lead with plain language’, www.cleardocs.com/wordsandbeyond.jsp?thispage=debate 2/07/2006.

which a much broader policy framework is engaged that involves not only Government, but retailers, regulators and community organisations.¹² The Code should reflect these elements. For instance the Victoria Code of Conduct for Marketing Retail Energy contains clear objectives focusing on protecting consumers and promoting consumer confidence and the need for cooperation between the retail energy industry, regulatory authorities, ombudsman and consumer representatives.¹³

A “live” document

The Victorian Code of Conduct for Marketing Retail Energy identifies the Code as a “live” document subject to continuous improvement through consultation...The principles of transparency, integrity and inclusiveness that underpinned the development of the Code will inform future improvements.¹⁴ The Queensland Code is not being generated in this manner although we understand the ECC is doing its best within the limitations of its mandate to consult. As stated in our previous submission these consultation mechanisms are inadequate.

5. Points: proposed Electricity Transfer and Consent Code (Chapter 6)

Customer Transfers

Given that there is a proposal under 4.2 that a transfer may only be initiated following the expiry of a cooling-off period we seek confirmation of the proposals for the cooling-off period (as discussed above under ‘key provisions’).

6. Points: proposed Retail Marketing Code of Conduct (Chapter 7)

1. Application

1.5 This section is not easily understood. As discussed earlier in this Submission there is a need for the Queensland Code be able to be clearly understood by consumers. In simple terms clarification may occur by inserting an ‘and/or’ after each point a) to d)

5. Time of Contact

We support these hours for telemarketing but not for door-to-door contacts.¹⁵ Door-to-door contacts are much more intrusive and need to be more stringently regulated. The door-to-door visiting hours should be consistent with section 63 of the *Fair Trading Act 1989 Queensland* i.e. no contact on Sunday or public holidays, outside the hours of 9:00am-5:00pm Saturday and 9:00am to 6:00pm weekdays. The introduction of the National Do Not Call Register will have implications for when telemarketers can ring and will impact on these provisions.

NB: The Do Not Call Register will begin operation in early 2007. The relevant legislation is the *Do Not Call Register Act 2006* and the *Do Not Call Register (Consequential Amendments) Act 2006*. The *Do Not Call Register Act 2006* establishes a scheme to enable individuals to opt-out of receiving certain unsolicited telemarketing calls via a register undertaken under

¹² CCCL (2006), Submission, Proposed Electricity Industry Code, p.8.

¹³ See PDF Attachment: ESC (2004), Code of Conduct for Marketing Retail Energy in Victoria

¹⁴ See PDF Attachment: ESC (2004), Code of Conduct for Marketing Retail Energy in Victoria, p.1.

¹⁵ See ECC (2006), ‘Retail Marketing Code of Conduct [FRC Version], p.3

the auspices of the Australian Communications and Media Authority. The *Do Not Call Register (Consequential Amendments) Act 2006* will facilitate the development of relevant national industry codes and standards regulating the making of all telemarketing calls including the time at which telemarketing calls can be made, the information which must be provided and the termination of calls.¹⁶

13. Record Keeping

We note that the period for a marketer to maintain records of contact (1 year) is consistent with the Victorian Code. However a clause needs to be inserted that if a person has requested no contact they should not be called. It is not sufficient protection to rely on the ability to terminate a call once it is made. Moreover, given the recent passing of legislation to establish a national Do Not Call register (see NB above) changes in telemarketing contact record keep standards need to be anticipated in the Code. For instance, names on the Do Not Call Register will be kept for three years.

7. Provision of Contact Details

11. Marketing by telephone

As discussed in our previous submission under 4.19.3 ‘Obligations prior to disconnection of residential customers’ the term ‘best endeavours’ is open to interpretation by the retailer and needs to be made more specific to ensure that all necessary contact details for the marketer and/or retailer be given to the ‘small customer’.¹⁷ Similarly, the term ‘best endeavours’ needs to be defined when providing sufficient contact details for the small customer to follow up with the marketer or salesperson.

8. Termination of Marketing Contacts

A clause should be inserted that outlines an obligation on the part of a marketer or salesperson to advise of a right to terminate contact at any time. As discussed in our previous submission in relation to external dispute resolution –information on external dispute resolution should be offered not requested.¹⁸ In other words it should be part of the termination process.

11. Marketing by telephone

12. Marketing by electronic means

There may be some circumstances where customers may want to follow-up contact with the marketer by a different method than when they were contacted, for instance if they wish to check the bona fides of a marketer. We recommend that these clauses 11.1 (b) and 12.1 (b) reflect this cross-over and the different methods of communication. We suggest a clause in which the marketers are required to provide contact details for phone, electronic or mail communication regardless of how the initial contact was made.

Whether marketing is by telephone or electronic means there should also be an obligation by retailers as in the Victorian Code, Clause 4 for marketing representatives to be trained.¹⁹

¹⁶ Department of Communications, Information and the Arts (2006) – see www.dcita.gov.au/tel/do_not_call

¹⁷ CCCL (2006), Proposed Electricity Industry Code, p.15.

¹⁸ CCCL (2006), Proposed Electricity Industry Code, p.17.

¹⁹ See PDF Attachment: ESC (2004), Code of Conduct for Marketing Retail Energy in Victoria, pp.3-4.

15. Dispute resolution

We refer to our previous submission on dispute resolution. We note that the Dispute resolution mechanisms as outlined in the Victorian Code are more comprehensive than those outlined under the proposed Queensland Code. For instance the complaints process is linked to the Australian Standard on Complaints and Handling (AS 4269-1995) and the Code also refers to external dispute resolution elements. These elements will need to be included in the Queensland Code when the relevant external dispute resolution body is established.