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Contact: Gerard Brody

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Dr John Tamblyn
Chairman
Australian Energy Market Commission
Level 16, 1 Margaret Street
SYDNEY NSW 2000

Dear Dr Tamblyn

**National Electricity Rules
Rule Change Request – Advocacy Panel**

1. Background on the CLCV

The Consumer Law Centre Victoria (**CLCV**) welcomes the opportunity to make this submission to the Australian Energy Market Commission's (**AEMC**) consultation on the Ministerial Council of Energy's (**MCE**) request for a change to the *National Electricity Rules* (the **Rules**) relating to the National Electricity Consumers Advocacy Panel (the **Panel**).

The CLCV is one of Australia's leading consumer and public interest organisations. A not-for-profit, independent organisation, we undertake research, policy development, advocacy and education. The CLCV's work is focussed on advancing the interests of consumers, particularly low-income and vulnerable consumers. The CLCV is currently working on a range of issues, including utilities, competition and consumer protection policies, financial services, telecommunications, exploitative credit and access to justice. The CLCV also operates a large free consumer legal practice.

2. Interim and long term advocacy arrangements

The Panel, being established under the Rules and the *National Electricity Law*, is currently concerned only with advocacy in the National Energy Market and does not have a role with respect to advocacy in relation to natural gas. The proposed rule change does not intend to change this.

However, the MCE has determined that consumer advocacy arrangements for both gas and electricity users should be dealt with by a single body.¹ As such, the MCE has stated that the long term model for consumer advocacy will comprise a new independent Panel which has the capacity to allocate funding for the purpose of energy end user advocacy, with a particular focus on small to

¹ MCE, *Energy Market Reform Bulletin No 57*, December 2005.

medium consumers. Despite this, the rule change proposed by the MCE does not include a requirement that the Panel give preference to small and medium consumers.

The proposed rule change is foreshadowed in the MCE description as being an interim change only, with the long term model outlined above not taking effect until 1 January 2007. Rule 8.10.4 of the Rules currently states that the funding provided by the AEMC for the Panel to provide grants for consumer advocacy expires on 30 June 2006. The proposed rule change deletes this clause, which would appear to suggest that the Panel will continue to be funded beyond this date until the establishment of the long term model in 2007.

Given this delay in establishing the long term model for consumer advocacy arrangements, and the existence of the current proposed rule change, it seems appropriate that any current rule change include a requirement that the Panel, in its allocation of funding, give particular focus to small and medium consumers. This would ensure that the interim changes to the operation of the Panel will be in accordance with the MCE's direction, until the long term model is established.

3. Composition of Panel

Currently, rule 8.10.2(a) requires that the Panel be constituted by an independent chairperson, two representatives of end-users and two representatives of market participants. Due to a perception that Panel members who represent particular constituencies are unable to make objective fund allocation decisions, the proposed rule change de-links members of the Panel from particular representative constituencies. Instead, the proposed rule change will require the chairperson and members to be appointed by the AEMC in accordance with guidelines for the terms and conditions of appointment (which are to be published by the AEMC in consultation with the MCE), and having regard to any recommendation by the MCE.

In our view, the perception that members who are representative of particular constituencies as being necessarily unable to make decisions objectively is unfounded. Boards of, or committees overseeing, organisations, including companies or incorporated associations, are commonly made up of nominees of particular constituencies who are affected by the relevant organisation. Nevertheless, directors of companies are required by law to exercise their powers bona fide in the best interest of the company and not for themselves or their particular constituents. The position is similar for trustees, who have a primary duty to execute the trust according to its terms and a general duty to act in the interests of beneficiaries, rather than in the interests of themselves or their particular constituents.

While the Panel is neither a company nor a trust, the appointment and duties of Panel members may be viewed as analogous to those of directors of companies or trustees. Panel members should have an overriding obligation to act in accordance with the purposes of the Panel. This should ensure that members who are nominated as representatives of particular constituencies make decisions objectively in accordance with the purposes of the Panel.

Nevertheless, it is important that members of the Panel, in their role of overseeing the independence and operation of the Panel, have a balance of consumer, industry and, if relevant, other key stakeholder interests. The Department of Industry, Science and Tourism (**DIST**) *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* recognises that while the decision-making processes and administration of industry-based customer dispute resolution schemes must be independent, there should be a balance of stakeholder interests in an overseeing entity.² Further, representatives of consumer interests in an overseeing body must be capable of reflecting the

² Department of Industry Science and Tourism, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*, August 1997, clause 2.6.

viewpoints and concerns of consumers and be persons in whom consumers and consumer organisations have confidence.³

In June 2005, the Commonwealth Consumer Affairs Advisory Council (the **Council**) released *Principles for the Appointment of Consumer Representatives: A process for Government and Industry*. This publication states that ‘the inclusion of consumer representatives on appropriate bodies is important because:

1. it ensures that government and industry bodies have access to a wide range of views in their deliberations. Subsequent decisions or advice will therefore be more robust and/or more likely to be accepted by stakeholders; and
2. consumers should have input into decisions which impact on them. This can be argued both from a “natural justice” perspective, as well as representing sensible business practice’.⁴

The Council then provides six appointment principles which provide guidance in appointing consumer representatives, while maintaining flexibility so that appointments can be adapted for particular circumstances. These principles should be used in the appointment of consumer representatives to the Panel to ensure independence as well as robust decision-making.

Considering that the Panel grants funds for advocacy to representatives of end-users of electricity, and that there are a wide range of business and consumer stakeholders affected, it is appropriate that Panel members continue to be appointed as representing particular interests. This should not, however, affect their duty to act in accordance with the purposes of the Panel, rather than the interests of themselves or their particular constituencies.

If you have any questions in relation the above comments, please contact Gerard Brody on 03 9629 6300 or at gerard@clcv.net.au.

Yours sincerely

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³ As above, clause 2.7.

⁴ Commonwealth Consumer Affairs Advisory Council, *Principles for the Appointment of Consumer Representatives: A process for Government and Industry*, June 2005 at p.3.