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SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

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Dear Sir/ Madam

Proposal for an Australian Consumer Law

The Energy Networks Association (ENA) supports the development of a national consumer law and welcomes the opportunity to comment on the Treasury's consultation paper *An Australian Consumer Law: Fair markets – Confident consumers* (the Consultation Paper). We note that this is part of a much broader range of reforms that will affect the energy industry.

ENA is the peak national body for Australia's energy networks which provide the vital link between gas and electricity producers and consumers. ENA represents gas distribution and electricity network businesses on economic, technical and safety regulation and national energy policy issues.

Energy network businesses deliver electricity and gas to over 13 million customer connections across Australia through approximately 800,000 kilometres of electricity distribution lines. There are also 76,000 kilometres of gas distribution pipelines. These distribution networks are valued at more than \$40 billion and each year energy network businesses undertake investment of more than \$5 billion in distribution network operation, reinforcement, expansions and greenfields extensions. Electricity transmission network owners operate over 42,000 km of high voltage transmission lines, with a value of \$10 billion and undertake \$1.2 billion in investment each year.

The effective and efficient provision of energy to both businesses and residential consumers is fundamental to economic growth and prosperity in Australia; and as such the development of best practice regulatory regimes governing the provision of energy has been, and continues to be, a priority of both the federal and state and territory governments. Effective delivery of energy services; especially electricity to residential consumers, also has significant social welfare implications because it enables the provision of lighting, heating, cooking and may have substantial public health consequences.

As part of the on-going reforms in the energy sector, the Council of Australian Governments (COAG) Standing Committee of Officials (SCO) is currently developing national frameworks for the regulation of the retail energy sector, connection and capital contribution process. At this stage it is intended that these frameworks will comprehensively address all aspects of the provision of energy supply (including distribution services) and connection to end use customers.

Given that the energy specific frameworks are being developed concurrently with a national consumer law, there is a potential for overlap and duplication of rights and obligations under the various regulatory regimes. As a result ENA is extremely interested in the development of both regimes to ensure that any overlap is minimal and inconsistency is avoided.

ENA also considers it important to ensure that where gaps or inconsistencies in the current consumer protection frameworks are identified, the appropriate policy responses are carefully considered and do not add unnecessary costs to businesses, which would reduce their ability to operate and compete effectively, or result in outcomes that increase costs that will ultimately be borne by the consumer.

ENA appreciates the opportunity to input into the reforms and at this stage wishes to make the following key observations:

- Generic consumer protection regimes should complement industry specific regimes; however, there should not be any overlap between the rights and obligations imposed by the two regimes. This could be achieved by exempting services provided under an industry specific regime from the application of the generic regime.
- The use of standard form contracts is generally considered to be an efficient means of conducting business and any additional consumer protections such as a prohibition on 'unfair' terms should be carefully considered to ensure it continues to enable efficient business practices.
- Consideration should be given to whether the costs of enhanced enforcement tools outweigh the benefits.

These issues are discussed in detail below.

Industry specific consumer protection regimes

As indicated above, the Ministerial Council on Energy (MCE) Standing Committee of Officials (SCO) is developing a National Energy Customer Framework (NECF) to apply to the electricity and gas sectors. It has been under development since mid 2006 and has been the subject of five working group papers, a consolidated working group paper and a policy response document issued in August 2008. Industry is currently awaiting the release of draft legislation and Rules.

Similarly, the National Frameworks for Distribution Networks: Network Planning and Connection Arrangements have been under development since August 2007. MCE-SCO commissioned reports by NERA and Allen Consulting Group on, among other things, the interrelationship between distributors and consumers in terms of service, maintenance and connections. These reports were released for consultation and in December 2008, MCE-SCO released its policy response. The proposed arrangements operate parallel to the energy customer frameworks and are designed to ensure a high level of quality and service to the customer.

There are also a series of related reviews currently being conducted through MCE and the Australian Energy Market Commission (AEMC).

Together it is anticipated that these processes will result in a comprehensive regime for the regulation of distributor-customer relationships in energy markets. Both frameworks will include standard contracts based on model terms for both retail supply and distribution services.

One of the recommendations arising from the Productivity Commission's report was that COAG should identify and repeal unnecessary industry-specific consumer regulation. However, it also found that industry specific regulation is desirable when the risk of consumer detriment if things go wrong is potentially significant and possibly irremediable; and the suitability and quality of services is hard to gauge before or even after purchase.¹ The energy specific reform processes that are currently underway reflect the unique role that energy services play in our economy and communities. MCE-SCO noted that self regulation was not an appropriate option for the energy industry because there is strong public interest involved and the nature of the industry means that any detriment incurred is likely to be of high risk and high impact; particularly in relation to the provision of energy to small customers, where energy is an essential service that impacts the wellbeing and livelihood of individuals.²

As a result, MCE-SCO has already decided that the relationship between distributors, retailers and consumers should be regulated. At this stage it looks likely that customer contracts in the energy sector will be mandated by the proposed National Energy Retail Law and National Energy Retail Rules so that differences between contracts are mainly look and feel differences rather than substantive terms. It may be that there will be little, if any, role for generic consumer law in this area. However, given that the regulatory regimes have yet to be finalised, ENA submits that careful consideration needs to be given to the interaction between the Australian Consumer Law and energy industry specific regulation to ensure that the regimes are complementary and there is no scope for duplicated or conflicting requirements to be imposed upon businesses operating in the energy markets.

At page 14 the Consultation Paper states that COAG has agreed to a process for reviewing industry-specific regulation across all Australian jurisdictions with a view to removing differences where possible. It is incumbent upon policy makers working on the Australian Consumer Law and the energy industry specific legislation to ensure that the arrangements put in place for the energy industry are consistent with the policy intent of the Australian Consumer Law such that no further change or review will be required.

Standard form contracts and 'unfair' terms

- *How are standard form contracts used in the energy industry?*

Energy distribution businesses provide a number of different services. In some cases the energy distribution business is the only provider of the service, such as the conveyance of energy to the consumer's premises, and in these circumstances the relationship between the distributor and

¹ Productivity Commission, *Review of Australia's Consumer Policy Framework*, 30 April 2008, p 25.

² Ministerial Council on Energy, Standing Committee of Officials, *Consultation Regulation Impact Statement: A National Framework for Regulating Electricity and Gas (Energy) Distribution and Retail Services to Customers*, p 8.

customer is regulated. As set out above, where the provision of services is regulated we assume that the regulatory frameworks will be developed so that there is no overlap and the prohibition on 'unfair' terms would not apply to regulated standard form contracts. In our view the fact that federal and state and territory governments have seen fit to put in place industry specific regulation presumes that the terms of the regulated contract are fair for the provision of those services.

Energy distribution businesses also provide services in competitive markets and use standard form contracts because they are an efficient means of doing business and allocating risk. These contracts are not regulated and would be subject to the application of the proposed national consumer law. An example of a standard form contract to which the proposed national consumer law would apply is where an electricity distribution business is required under the National Electricity Rules to provide Responsible Person services, such as metering services, on the request of another market participant. Usually requests are made where the market participant has not been able to reach agreement with another provider for the provision of services; although a market participant may at any time request a distribution business to carry out Responsible Person functions whether or not it has been able to reach agreement with other providers. In these circumstances the distribution business is effectively a default provider of services; nevertheless, in the event of such a request it must have terms available and as a matter of efficiency, providers use terms in a standard form contract to reflect the risk allocation between the parties commensurate with the modest fees charged for such services.

- *Issues in identifying 'unfair' terms*

While we are generally in favour of increased consumer protection where new protections are beneficial, we consider that the current formulation of the prohibition on 'unfair' terms that seeks to address the unjustified imposition of terms on consumers, may not achieve the desired outcome and instead may inhibit efficient business practices.

Generally in a competitive market we would expect contractual terms to be drafted to encourage consumer uptake rather than cause detriment to consumers. In our view where a customer enters into a standard form contract it simply reflects their willingness to accept the risk profile contained in that contract given the price compared to similar packages offered by competing service providers.

However, even if we assumed that this is not the case, the test as to what constitutes an 'unfair' term at page 30 of the Consultation Paper, would give rise to considerable uncertainty because it would be difficult to apply in practice and the cost of getting it wrong could be significant.

We consider that it may be difficult for a regulator or a court to judge whether or not a term is 'unfair.' We would expect that in applying the test, the term in question would not be considered in isolation but rather as part of the contract as a whole. When viewed as part of a complete package, the term in question may be counterbalanced by other benefits to the consumer such as a lower price. In other words the 'unfair' term is simply part of a package that has an overall risk profile that is acceptable to the consumer at a given price. The regulator or a court would need to examine and account for the price and other implications of removing the term. That is that the whole contract would need to be reviewed and recast, which the regulator or judge would not be in a position to do.

A prescriptive approach to assessing 'unfair' terms, such as the banning of certain contract terms on the basis that they are considered, in all circumstances, to be unfair, would be even more likely to discourage efficient business practices because it fails to consider the overall context in which the term is used. Careful consideration needs to be given to each term deemed to be unfair to ensure that the ban does not inadvertently change incentives on both businesses and consumers and increase costs for both.

For example, the Consultation Paper identifies a number of terms that should be banned including terms that limit suppliers' liability in negligence. Limiting suppliers' liability in negligence has a sound business rationale. In the absence of a cap, a business may not be able to obtain indemnity insurance, this may in turn threaten the financial viability of a business should a claim in negligence succeed. Insuring against the risk of such an event would need to be managed by other means and this may result in higher costs being passed through to the consumer.

- *Application to business consumers*

At page 32 the Consultation Paper states that the scope of the unfair terms provision will extend to standard form contracts entered into by businesses, including small businesses, and would not be confined to individual consumers.

We do not consider that the policy justification for extending the prohibition to business consumers, particularly large business consumers, has been made out. The Productivity Commission's report considered protections for small business and found that small businesses would benefit from enhanced effectiveness of a generic law. The Commission's analysis did not extend to large businesses. Further consideration should be given to whether this is in the public interest especially given the uncertainty over how the test will be applied.

- *Continuity of contractual arrangements*

Any uncertainty as to whether a term is 'unfair' gives rise to a risk that terms inserted into contracts in good faith may later be deemed to be unfair. It is foreseeable that this could result in a whole class of standard term contracts automatically becoming null and void. Any uncertainty this may create would partly be mitigated by ensuring that the prohibition on unfair terms is designed so that if a term is later found to be unfair, only that term is not enforceable and that the rest of the contractual arrangements remain in place.

Enhanced enforcement mechanisms

The Consultation Paper raises the possibility of significant new enforcement powers including:

- Civil pecuniary penalties and disqualification orders;
- Substantiation notices;
- Availability of redress for non-parties to proceedings;

- Public warning powers; and
- Infringement notices to the extent permitted by relevant Commonwealth and state and territory laws and policies.

However, the Consultation Paper does not provide sufficient detail as to how these mechanisms will operate in the consumer law context. ENA notes that such mechanisms need to be carefully designed to provide the appropriate balance between enabling effective investigation and deterrence of prohibited conduct and safeguarding the rights of the service provider to a proper process and hearing.

We appreciate the opportunity to contribute to these important changes to the consumer law framework. Should you require further information please contact Abbe Hutchins on 02 6272 1519.

Yours sincerely



Andrew Blyth
Chief Executive