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### **Australian Consumer Law (“ACL”) consultation paper**

Energy Retailers Association of Australia (ERAA) welcomes the opportunity to respond to the Standing Committee of Officials of Consumer Affairs (“SCOCA”) paper: *An Australian Consumer Law: Fair Markets - Confident Consumers* (February 2009).

#### **Summary of key issues**

- One of the goals of the ACL is to reduce regulatory complexity for businesses and harmonise consumer laws across jurisdictions. As part of achieving this goal, it is proposed that unnecessary or divergent sector-specific laws should be identified with a view to repealing or harmonising them.
- However, there will shortly be a comprehensive regime in place for the regulation of the customer contract processes and general customer interface applicable to the electricity and gas retail markets (the National Energy Customer Framework or “NECF”).
- The policy approach underlying the NECF includes:
  - reducing the overlap between energy specific and generic regulation;<sup>1</sup>
  - rely on general consumer laws but have energy specific regulation where general consumer laws do not provide a consistent national approach or are silent and the characteristics of energy markets justify additional regulation.
- In short, the NECF is intended to fill in the perceived “gaps” in generic consumer law. However, it is unlikely that the ACL and the NECF will be implemented at the same time.<sup>2</sup> The ERAA is very concerned that the likelihood of these two parallel but related reform streams being implemented at different times will:
  - lead to inconsistencies between the two regimes thereby failing to meet one of the key objectives for both;

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<sup>1</sup> Australian Energy Market Agreement, section 14.5.

<sup>2</sup> The ACL will be implemented late 2010.



- involve the need for subsequent reviews of the two regimes and possibly further changes. It would be unacceptable for business to be required to make further changes shortly after they have just implemented a new regime.
- At a broader level, the introduction of the ACL further confirms ERAA and its members view that the need for energy specific regulation is overstated. However, this is a matter for the NECF process rather than the ACL.
- The ERAA is supportive of a national approach to consumer laws. However, it is critical that policy makers give very careful consideration to the interaction between the ACL and the NECF. Policy makers should ensure that there is no scope for duplication or conflicting requirements on businesses operating in the energy markets.
- In particular, policy makers should consider how the unfair contract terms provisions would apply to regulated contracts and how any proposed marketing provisions will interact with industry specific regulation governing these issues. In this respect, the ERAA believes there should be:
  - an exception from the unfair contract terms provisions for those contractual terms (including the model terms and minimum terms) that are required or expressly permitted under the NECF (in this respect both the Victorian and UK regimes exempt terms which reflect terms required under law); and
  - to the extent there are marketing obligations and restrictions in the ACL (e.g. on telemarketing or door-to-door sales), appropriate exemptions for those energy market participants who will be subject to the highly prescriptive NECF regime.

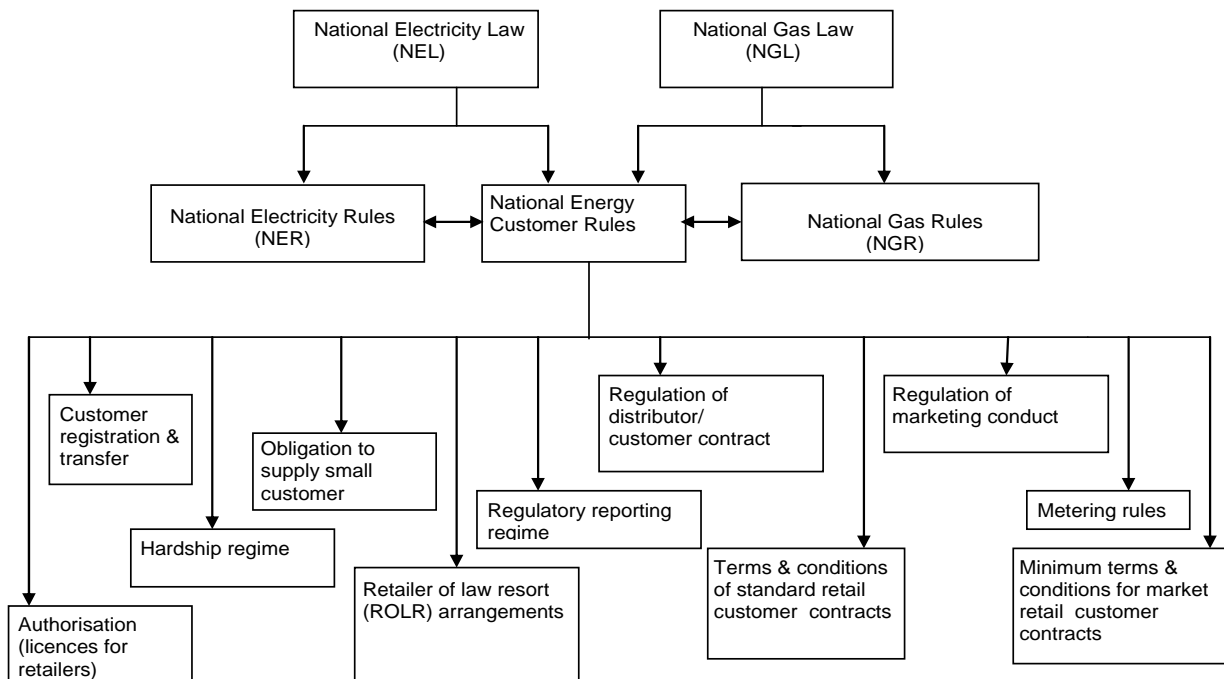
### **The National Energy Customer Framework**

The Ministerial Council on Energy (“MCE”), through its Standing Committee Officials, is currently developing national frameworks for the regulation of the retail energy sector and the connection and capital contribution process. These frameworks will comprehensively address all aspects of the provision of energy supply and connection to end-use customers.

The NECF which is to apply to electricity and gas supply, has been under development since mid-2006 and has been the subject of five working group papers, a consolidated work group paper and a policy response document issued in August 2008. Public information sessions and workshops have also been held providing industry participants and consumer groups with the opportunity to make submissions on the proposed framework. Industry participants are currently waiting for the Initial Exposure Draft of the Laws and Rules (this was expected in December 2008).

At the end of these processes (and a series of related reviews currently being conducted through MCE or the Australian Energy Market Commission), there will be a comprehensive, sector specific regime in place for electricity and gas customer contracts and the interface with customers.

The scope of the NECF proposals can be seen in the following diagram. In short, it is a very comprehensive and prescriptive regime regulating almost all facets of the relationships between energy businesses and small customers.



## NECF model and minimum terms vs ACL unfair terms

A key element of the NECF is the introduction of:

- model terms and conditions which retailers must adopt for their standard retail contracts - these are contracts with small customers to whom the retailer has a statutory obligation to supply or where the law deems a contract to exist (eg customer taking supply without first entering into a contract);
- minimum terms and conditions for market (ie negotiated) retail contracts with small customers.

The ERAA assumes that neither the model nor minimum terms will include provisions which could be considered unfair terms. This assumption is reflected in section 32 of the Victoria Fair Trading Act which provides that Part 2B of the Fair Trading Act (Vic) does not apply to contractual terms required or expressly permitted by law (to the extent they are required or permitted by law). An equivalent provision is contained in section 4(2) of the Unfair Terms in Consumer Contracts Regulations 1999 (UK).

It is critical that the ACL should contain a provision which would have the effect of exempting the terms required in the standard retail contracts or in the market retail contracts proposed under the NECF. There should be no question of terms prescribed by regulation being considered unfair.

## Deemed unfair terms

The SCOCA has proposed banning specific types of standard terms upfront. Such an approach is blunt and unwarranted - particularly in respect of business to business transactions.



Neither the UK nor the Victorian regimes ban specific terms. Schedule 2 of the Unfair Terms on Consumer Contracts Regulations 1999 (UK) contains a lists of terms that may be regarded as unfair, but as the Office of Fair Trading makes clear in its guidelines on this topic, this is a “grey” - rather than a “black” list.

Further, the Productivity Commission did not analyse whether particular types of terms were inherently unfair and should be banned. On the contrary, the Productivity Commission put forward a number of arguments as to why some contract terms which appear unfair were beneficial to consumers.

By way of example, provisions which limit liability in negligence may be justified in consumer contracts particularly if the provisions seek to cap rather than exclude liability. Caps seek to protect businesses who provide services to a mass market from the effects of low probability but high impact events which may result in a large number of claims that would exceed available insurance and threaten the viability of the business. Caps will also have the benefit of keeping prices down by not requiring suppliers to obtain excessive insurance for low probability, high impact events.

Further, in the case of energy market participants, their customer contracts will be heavily regulated under the NECF and provisions required or permitted by energy specific regulation should not be subject to being set aside. Rather, they should be presumed fair in the context of the provision of those services.

## **D2D and telemarketing**

SCOCA has asked whether ACL should include provisions regulating door-to-door sales and telemarketing.

The marketing of energy and gas contracts involving small customers will be subject to highly prescriptive regulation under the NECF. The SCO for the MCE has recommended marketing requirements to be included in the National Energy Consumer Rules. The requirements recommended are extensive and include, for example:

- mandated pre-contractual disclosures in relation to:
  - price, charges, penalties, billing and payment arrangements;
  - contract duration;
  - cooling off period;
  - electronic transactions;
  - standard retail contracts
- mandated timing and form (ie disclosure statements) for the required pre-contract disclosures;
- mandated conduct standards for marketers, record keeping, compliance audit etc;

- obligations to provide customers with documentation setting out their right to rescind the market retail contract;
- a mandated 10 business day cooling-off period.

Under the NECF, energy retailers will be responsible for the conduct of their marketers.

The SCOCA should carefully consider the implications of introducing parallel and potentially inconsistent marketing obligations on participants in the energy retail markets via the ACL. If the SCOCA does go ahead and introduce national provisions regulating door to door sales and telemarketing in the ACL, the ERAA would strongly argue that appropriate exemptions be given for the energy market.

As an example, some State Fair Trading Acts mandate certain forms be provided in relation to cooling off. Some of these forms are simply non-sensical in an energy context and in some instances are likely to be misleading and deceptive under the Trade Practices Act. For example, Schedule 2 of the Victorian Fair Trading Act requires the inclusion of a specific notice on the front page of contact sales agreements and telephone marketing agreements which provides for cancellation of the contract and return of the goods: given the inability of a customer to return electricity, such a provision is clearly unhelpful.

Careful consideration will therefore need to be given to the practical and legal implications of mandating uniform requirements for cooling off periods and the dangers inherent in introducing standard forms.

### **Itemised billing**

The SCOCA has also asked whether the ACL should include a provision relation to the provision of an itemised bill on request.

Again, any such obligation on an energy market participant to provide an itemised bill will need to be carefully considered in light of the provisions of the NECF Rules. It is currently proposed that the standard customer contract to be included in the Rules will prescribe the content of a small customer bill and require, among other things:

- customer's name, account number and address;
- meter identifier;
- bill period;
- due date;
- amount of arrears or credits;
- relevant tariff;
- whether it is issued on the basis of an estimate or a meter read;
- meter reading values;

- details of consumption;
- pro rata billing information;
- Government rebates;
- amount of security deposit;
- the basis on which charges are calculated, including fixed and variable charges and other miscellaneous fees or charges applicable to a small customer;
- details of available payment methods;
- contact details and availability of interpreter services.

While it is hard to conceive that the ACL could require anything more, there have been experiences of duplicatory regulation which in substance cover the same matters but lead to difficulties because of minor differences in requirements. This is a critical concern as any requirement for changes to retailers' billing systems are time consuming and expensive.

Should SCOCA proceed to introduce national provisions regarding itemised billing in the Australian Consumer Law, an exemption should be given to energy participants subject to the detailed obligations under the NECF.

### **Unfair contract terms: application to B2B transactions**

ERAA note that, as the unfair contract terms are intended to apply to all non-negotiated contracts, businesses purchasing electricity or gas will obtain the benefit of the protection against unfair terms under the ACL when standard form contracts for business customers are used by electricity and gas retailers.

This proposal is not consistent with the recommendations of the Productivity Commission which expressly proposed that the scope of the protection should be limited to consumers: "*A law focused on unfair terms causing material consumer detriment would target the most significant problems, reducing regulatory risks.*" No basis or rationale has been put forward to justify the application of the unfair contract term provisions to business to business dealings. The fact that standard contracts are used in business does not of itself justify the extension of the provisions to business dealings.

The proposal to afford consumers and businesses the same protection is inconsistent with the approach taken in the NECF which has gone to some length to provide appropriate protections which distinguish between residential customers, small business users and large customers. For example, there is no requirement for large business customer contracts to comply with the minimum term provisions under the NECF.

The ERAA submits that the unfair terms protections under the ACL should not apply to businesses.

### **Enforcement powers - substantiation notices**

Section 7 of the SCOCA paper on ACL proposes the introduction of a power on consumer regulators to issue "substantiation notices". The proposed powers of the consumer regulators to



issue such notices are vaguely defined but appear wide ranging and have the potential to operate unfairly.

SCOCA should consider putting in place appropriate procedural protections around the exercise of such a power. For example: prescribing the type of information that can reasonably be required, the minimum time period in which a response can be required and whether a minimum a threshold (of suspicion) needs to be reached before the power can be exercised.

### **Existing Definition of Consumer**

The SCOCA has also asked whether the scopes of the definition of “consumer” in the Trade Practices Act should be extended to cover a wider range of circumstances, such as goods used in business contexts and whether the exclusion in relation to resupply should be retained.

As noted above, the proposal to afford consumers and businesses the same protection is inconsistent with the approach taken in the NECF which has gone to some length to provide appropriate protections which distinguish between residential customers, small business users and large customers. In respect of energy consumers, if the definition of “consumer” in the Trade Practices Act is to be altered, it should be done so as to make the definition consistent with the distinction between small and large energy customers under the NECF.

If you have any queries in relation to this submission, please contact me on (02) 9437 6180

Yours sincerely,

[\[Transmitted electronically\]](#)

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**Energy Retailers Association of Australia**