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Manager MCE Secretariat,
Department of, Energy and Tourism,
GPO Box 9839
Canberra ACT 2601

By email MCEMarketReform@ret.gov.au

Dear Sir/Madam,

National Framework for Regulating Electricity and Gas Distribution and retail Services to Customers.

Thank you for the opportunity to respond to the policy paper for the National Energy Customer Framework. Powercor Australia Limited and CitiPower Pty (together 'the businesses') are Victorian electricity distributors and offer the following comments for your consideration.

Governance Model

The Businesses support the proposal that the national customer framework be based upon a contract model. We however have concerns with:

- The proposed approach to liability, and
- The inconsistency between adoption of this governance model and aspects of the proposed enforcement regime which presupposes a direct regulation approach.

Liability and warranties

The Businesses agrees with the SCO statement that ‘a robust and reasonable liability regime’ is an important aspect of the proposed contractual model. However in addition to being ‘robust and reasonable’ any such scheme should also provide a high degree of certainty for both businesses and customers. This is presently the case under the National Electricity Law (NEL) and jurisdictional arrangements. We are therefore strongly of the view that the proposed national framework should at a minimum retain:

- the existing legislative immunities under sections 119 & 120 of the NEL, and
- the contractual right to limit liability to the extent permitted by law.

Therefore, unless it is found to be acting negligently or in bad faith, a distributor should remain exempt from liability for acts or omissions that relate to performance of its obligations under the NEL and Rules, as well as for any acts or omissions that result in the partial or total failure to supply electricity. In addition any such liability that may be incurred due to negligence or bad faith actions should be capped, as is currently provided for under the NEL.

A failure to provide this level of certainty and protection would significantly expose distribution businesses and, in extreme circumstances, would threaten the viability and ongoing operation of such businesses. For this reason any right for a customer to claim for no fault loss or damage, particularly for economic loss, should continue to be excluded.

We also note that it is intended that jurisdictions maintain their existing GSL/Service Standard regimes. We consider that these types of arrangements are the most appropriate basis under which to provide consumer protection and compensation for small customers for any service failures. In relation to large customers the awareness that they do not have a right of action against a distribution business is an effective motivator for them to put in place appropriate redundancy systems, protective devices and insurance protection. In the absence of such an exposure they will not be similarly motivated and, as such systems are solely within the control of the customer, they may well decide not implement these systems and instead to rely on rights of recovery against their supplier/distributor.

Inconsistency between Aspects of the Governance Model and Enforcement Regime

The Businesses support the proposal to adopt a contract based governance model for the regulation of energy services to customers. However this governance model should be applied consistently by the MCE-SCO, including in relation to enforcement. We understand that the SCO’s proposed contractual model will require a contract between a distributor and each customer (customer distribution contract) and between the distributor and each retailer (Retail Support Contract). The terms of these contracts will be set out as model terms in the Rules and will be deemed to apply in the absence of an allowed negotiated agreement. In addition customers will have rights of recovery from distributors who fail to meet any jurisdictionally mandated Guaranteed Service Level.

However the MCE-SCO is additionally proposing that there be a ‘narrow list’ of provisions in the NEL that are designated as ‘conduct provisions’ and will be actionable by large customers/retailers/distributors, with jurisdiction to hear such matters being conferred on lower courts, including the Federal Magistrates Court.

It seems bizarre that on the one hand a contract based regulatory model is being proposed, while at the same time it is proposed that disputes between the parties to those contracts should be based upon a direct legislative right of action, that may override or ignore the contractual basis of the legal relationship between the parties.

If a contractual governance model is to be adopted then this should be consistently applied as both the central basis both for defining the rights and obligations of the parties and for the resolution of any disputes between those parties. We do not see it as useful for both business and the AER to devote the time and effort to applying the contract model, only to put in place an enforcement regime that enables parties to utilise a direct legislative remedy, rather than relying on the agreed terms of a regulator approved form of contract.

We see this as a significant inconsistency within the proposed regime and, in effect, believe the retention of this ‘conduct provision’ approach significantly undermines the integrity of the proposed contract based governance model.

Potential for duplication between Jurisdictional and National Regulation

The businesses agree with the SCO’s recommendations about business authorisations for distributors. We understand that jurisdictional technical and safety requirement and GSL schemes will continue to apply under existing licensing arrangements. In addition ‘off grid’ networks, Community Service Obligations, tariff equalisation schemes, land use and planning and environmental policies will all remain with the jurisdictions.

The MCE-SCO states it recognises the requirements for significant consequent amendments of legislation, regulations, rules, codes licences and other regulatory instruments in each of the participating jurisdictions to remove any inconsistencies between the national and jurisdictional regimes. However conspicuously absent is any firm commitment by the jurisdictions to make any such changes simultaneously with the national regime coming into force.

This exposes regulated businesses to the potential significant cost and uncertainty of being subject to two regulatory regimes during the proposed transition process. The Businesses therefore seek that the participating jurisdictions commit to implementing the necessary amendments to their regulatory regimes, so that these are implemented at the same time as the national regime coming into effect and without risking duplicate or conflicting regulatory requirements.

Enforcement Mechanisms

As noted above, the businesses do not agree with the proposal to allow retailers and customers to take private action to enforce ‘conduct provisions’ in the NEL and Rules. The only reason for introducing this additional private right of action appears to be

that such a regime existed in the National Gas Code and has been carried across by default to the National Gas Law and therefore should be adopted in the NEL in the interests of convergence.

In our view this new cause of action would only be justifiable where there is a regulatory enforcement gap or deficiency, but this is clearly not the case in relation to the NEL and Rules, where it could instead be argued that the enforcement armoury is overflowing.

By way of illustration, we understand that the current NEL enforcement provisions will be retained and extended by inclusion of enforceable undertakings and compliance monitoring and reporting systems. The NEL enforcement provisions already include scope for:

- Offense Provisions under Schedule 2, Part 8 of the NEL, creating offences that are punishable on conviction by penalty;
- Civil penalty provisions under Part 6 of the NEL;
- Hearings before a commercial dispute resolution panel in relation to Rule disputes under Part 6, division 2A of the NEL;
- Enforcement of Access determinations under Part 6. Division 3B;
- Infringement notices under Part 6, division 5; and
- Infringement penalties under Part 6, Division 5;

While it is true that most of these rights of action are vested only in the AER, we consider that that is fully justified as it allows development of a clear enforcement policy by the AER and gives a high degree of certainty to business. Further this limitation prevents private sector gaming and unnecessary litigation based upon a desire to seek commercial advantage, rather than a desire to advance the public interest.

Further, given that the MCE-SCO proposes to adopt contract as the basis for the governance model, these required contracts will provide the parties to those contracts with a right to take civil action to enforce those contracts and or seek damages in relation to any breach, without the need to resort to an overriding legislative right of action.

We are therefore of the view that the introduction of ‘conduct provisions’ to the NEL would be both unnecessary and potentially destabilising to the contract based regulatory model.

Compliance Reporting

The businesses note the proposal that the AER be empowered to develop in consultation with stakeholders reporting requirements on the basis of graduated risks reflecting the importance of the reporting obligation, similar to the current Victorian guidelines.

The Businesses are generally supportive of this approach; however we note that these reporting obligations should not remove discretion as to how the regulated entity will most efficiently manage their own compliance processes and risk. In this regard we note that these reporting obligations are proposed in the context of a regulatory regime which already imposes significant pecuniary penalties for breach. Any such scheme must therefore place a degree of reliance on the efficacy of the existing penalties and not introduce a compliance reporting regime that is unduly onerous and costly for businesses.

Should you have any questions in relation to this submission, please do not hesitate to contact me on (03) 9683 4282 or by email at rherrmann@powercor.com.au.

Yours sincerely

Rolf Herrmann
(Acting) General Manager Regulation