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Ms Michelle Croker
Gas Market Development Section
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Dear Ms Croker

Consultation on First Exposure Draft of National Gas (South Australia) (Short Term Trading Market) Amendment Bill 2009

The Energy Networks Association (ENA) welcomes the opportunity to respond to the first exposure draft of the *National Gas (South Australia) (Short Term Trading Market) Amendment Bill 2009*.

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.

The new arrangements increase distributors' exposure to claims

Gas distribution companies are concerned that the information and calculations they are compelled to provide to the Australian Energy Market Operator (AEMO), as part of the STTM arrangements, will give rise to additional legal exposure for distribution network operators. This information is currently provided for retail market rules purposes, but it is proposed that it be used for wholesale market trading. This increases the exposure of distributors because:

1. Through the STTM they will be providing information that will be relied on by many market participants for gas trading purposes, which inherently poses new and increased financial risks on participants.
2. Distributors have no other avenue to limit their liability, since their distribution haulage contracts are not concerned with STTM issues, and furthermore those contracts are not with all of the parties involved in the STTM.

As networks are largely facilitators of the trading market and do not directly gain from the operation of this market, there is no reward commensurate with the additional exposure, only additional risks borne by the distributor.

The risks to distributors arise as a result of potential inaccuracies in the data provided by network operators to AEMO. There are several factors that impinge on data accuracy, including:

- The use of network meter data for high value wholesale trades when data and communications systems have not been designed for this purpose.

Much of the data provided by the distributor will likely be collected through network meters. These meters have not been designed for, and may not be fit for, the purpose of collecting detailed information to be relied upon in large-scale transactions. Due to established network processes the accuracy and timeliness of the data cannot be guaranteed and this can give rise to significant financial ramifications for any parties relying on this data.

- Immediate end of gas day requirements for daily data limits the extent to which network operators can verify measurements and estimates applied through automated processes.

Under the STTM arrangements as currently drafted, it appears that distributors have insufficient time to verify daily measurements and estimates before releasing this information to AEMO. The STTM arrangements require timeframes which ENA considers inappropriate for network operators to review error reports before STTM Users provisional settlement positions are employed in bidding decisions for the following day.

- Large number of meters on networks creates practical operational limitations on availability and reliability of data when required within tight timeframes.

There are hundreds of telemetered sites, which have daily metering data, which may impact a distributor's ability to collect and collate accurate information with short turnaround times while still providing a high degree of reliability/accuracy.

Given the various factors that act to reduce the accuracy and reliability of data collected from distributors, measures should be taken to help mitigate the increased exposure to liability that distributors face as a direct result of providing this information.

Why this is a problem

In normal commercial operations it is commonplace for businesses to limit their liability for bad faith and negligence. If a distributor is unable to limit their liability there are implications for their business. These implications include:

- it is difficult to insure the business where liability is uncapped – insurers and reinsurers are unable to price risk;
- if adequate insurance cannot be obtained, a major claim could jeopardise the financial viability of the business; and
- just as an insurer would be unable to price risk, likewise the businesses would be unable to price risk and therefore could not adequately self insure.

In addition, the current drafting of the immunity is ambiguous. This is because although there is immunity provided for the provision of information under the proposed section 91FED, the definition of STTM information seems to be ambiguous and may not pertain to information used in calculations performed by the network operators. These calculations are not expressly covered under the definition of "STTM information" and immunity may potentially not apply to the provision of these calculations. As a result, the immunity under section 91FED may not apply to network operators when providing calculations and allocations. ENA considers it appropriate to clearly include this type of information disclosure within the immunity provisions.

For the most part, gas is a discretionary fuel and is therefore subject to competitive pressures. Industry notes that any increase in insurance costs to gas distribution businesses would need to be passed through to customers; and this would not facilitate Australian Government policy to increase the uptake and usage of natural gas.

Suggested remedies

While section 91FED(3) allows the use of a liability cap for negligence, it does not mandate it, nor does it extend to information provided in bad faith. ENA considers that exposure to unlimited liability for these instances is unreasonable.

ENA notes that some alternatives being considered are:

- Limiting distributors' obligations so that a distributor is only required to provide the best information it has at the time.
- Extending the immunity so that it covers calculations as opposed to only information and does not exclude negligence and bad faith. Bad faith is ambiguous in its meaning and ENA is concerned that Market Participants might take the view that meter information should be accurate. Therefore, to the extent that information is inaccurate, and distributors know this to be the case, they might be accused of acting in bad faith.

Similarly, given that distributors are required to provide calculations to AEMO, depending on the complexity of the calculation and assumptions used, Market Participants could claim that the distribution business has acted negligently in using a particular model for the calculation or making a particular assumption.

- Capping the amount that distribution businesses are liable for, which would better allow distribution businesses to seek insurance. However, the cost of insurance will also be commensurate with the size of the cap. Industry is concerned that the cost of insurance, which would have to be passed on to customers, is an impost which would wrongfully fall upon parties that do not benefit from the introduction of the STTM, but merely provide services to facilitate a market for others.

ENA's preferred solution is:

- to include all information *used* by AEMO for STTM purposes in immunity provisions;
- to include calculations and allocations directly in the immunity provisions; and
- not to exclude negligence and bad faith from immunity.

If you have any questions or would like to discuss any of the points further, please contact Tim Kane on (02) 6272 1520 or tkane@ena.asn.au.

Yours sincerely



Andrew Blyth
Chief Executive