12 June 2016

By email: energycouncil@industry.gov.au

COAG Energy Council Secretariat
GPO Box 9839
Canberra ACT 2601

Dear Sir/Madam

Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the consultation paper, *Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation*, released in March 2016.

The Council of Australian Governments' (**COAG**) Energy Council (the **Energy Council**) first proposed a review of enforcement regimes across all national energy laws in 2010.[i] There has been many consultations since that time, however reform has not yet been legislated in mid-2016. Consumer Action appreciates the efforts the Energy Council has undertaken to research enforcement regimes and consult with stakeholders, however this sort of review should not take more than 6 years to complete. We encourage the Energy Council to finalise the reform processes to ensure that energy market enforcement regimes are modern and fit-for-purpose.

This submission responds to each of the questions in the consultation paper.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Question 1: Do stakeholders agree that the recommended definitions are appropriate for the national energy laws? If not, how should they be amended?

Consumer Action welcomes the adoption of community service orders in the enforcement regime. However, the definition of 'community service order' is too narrow. Rather than the order only directing the person who has engaged in contravening conduct to perform the community

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service, the definition should allow for such a person to facilitate (that is, pay for) the community service.

Depending on the type of community service, there are some instances where it would be inappropriate for the wrongdoer to be the person delivering the community service. For example, where the contravention related to breaches of the retail law's consumer protections for low-income and vulnerable groups, it may be appropriate that the community service be financial counselling delivered for the benefit of those groups. However, it would be inappropriate for the wrongdoer (in this instance, a retailer) to perform the financial counselling. Instead, the community service order should allow for the wrongdoer to pay a community agency to deliver the financial counselling.

We suggest that the wording could be amended as follows:

Community service order, in relation to a person who has engaged in contravening conduct, means an order directing the person to perform or procure a service, that:

(a) is specified in the order; and

(b) relates to the conduct;

for the benefit of the community or a section of the community.

Question 2: Changes to penalty levels under comparable legislative regimes have been introduced through a single increase, however, stakeholder views are sought on what, if any, issues a single increase may present.

Recommendation 7 (civil penalties)

Consumer Action generally supports an increase to the maximum civil penalty rates so that they reflect the value the penalties held when the regime was introduced in 1996.

We note that the consultation paper does not propose to consider the maximum penalty levels and whether policy decisions need to be made regarding adjusting these levels (recommendation 5). However, we consider it important that the maximum levels be increased substantially in line with modern regulatory regimes and urge the Energy Council to respond to this recommendation to increase maximum civil penalties beyond their real value.

Recent reforms in other sectors suggest that there is a need to increase the value of civil penalties. We refer to the Financial System Inquiry (recommendation 29) and the Issues Paper for the Review of the Australian Consumer Law.

In Consumer Action's submission to the Issues Paper for the Review of the Australian Consumer Law, we proposed further increases to the maximum civil penalties, noting that low penalties can have limited deterrence impact for very large corporations. Our submission states:

> "In *ACCC v Coles*[ii], the ACCC alleged that Coles had demanded payments from suppliers that it was not entitled to; threatened harm to the suppliers that did not comply with the demand; and withheld money from suppliers it had no right to withhold. In December 2014, the Federal Court by consent made declarations that Coles had engaged in unconscionable conduct in breach of the ACL and ordered Coles to pay $10 million in financial penalties. Coles also entered Court enforceable undertakings to provide

redress to over 200 affected suppliers. In her judgment, Justice Gordon stated that:

"*while it is a matter for the Parliament to review whether the maximum available penalty of $1.1 million for each contravention by a body corporate is sufficient when a corporation with annual revenue in excess of $22 billion acts unconscionably... the current maximums are arguably inadequate for a corporation the size of Coles*."

In Reckitt-Benckiser, the Federal Court found misleading representations in relation to Nurofen Specific Pain products. The representations were that each product was formulated to specifically treat a particular type of pain when, in fact, each product contained the same active ingredient[iii]. The court ordered a penalty of $1.7 million, which appeared to be out of proportion to the financial loss suffered by consumers due to the price premium attached to the products. Reckitt-Benckiser is also a multi-national corporation, with annual revenue of over $AUD15 billion. The penalty provided is manifestly inadequate given these circumstances, and that the ACL should be amended to increase the maximum penalties. We note that the ACCC has recently appealed this penalty decision to the Full Federal Court[iv]. "

We note that the maximum penalty for breach of the competition provisions of the *Competition and Consumer Act 2010* (Cth) are much higher than the equivalent maximum penalties of the ACL. For these provisions, the maximum penalty is $10 million, three times the gain obtained from the conduct, or 10 per cent of the annual turnover of the business.

Consumer Action sees no policy basis for different penalties for breaches of energy law provisions compared to consumer, competition and corporations law more broadly. In fact, there may be policy basis for greater penalties with respect to energy laws, given they relate to the provision of an essential service. Contravention of energy laws impacts both on the wellbeing of households across Australia, and on the broader economy.

Recommendation 8 (infringement notices)

Our position is similar in relation to infringement notices. While we support the proposed increase to account for CPI since the introduction of the regime, we do not consider that the level of infringement notices is sufficient. We support the position articulated in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers developed by the Australian Government Attorney-General's Department, which notes that the amount payable under an infringement notice should be set at one fifth of the maximum civil penalty rate.

Question 3: Officials are considering the frequency of future increases in penalty levels and would like stakeholders' feedback on whether a yearly or three-yearly process would be appropriate. What are the risks or benefits of each approach?

Future increases to penalty levels should be linked to CPI, with annual reviews to ensure currency with the rapidly changing nature of energy markets. Annual changes do not appear to invoke further cost not risks on the energy sector.

Question 4: Do stakeholders agree with the coverage and form of the Ministerial Principles? If not, how should they be amended?

The proposed policy principles for determining whether a breach of a provision should be subject to a civil penalty are supported. To ensure the markets are operating to achieve their objective in the long-term interests of consumers, the consumer protection principle should be given primacy.

We also support the proposed form of these principles, and encourage the Energy Council to set a regular review period for the principles to ensure they remain current and reflect changes in the market.

Please contact us on 03 9670 5088 or at gerard@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
CONSUMER ACTION LAW CENTRE

Gerard Brody
Chief Executive Officer

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[i] Ministerial Council on Energy Communique, 17 June 2016.
[ii] *Australian Competition and Consumer Commission v Coles* [2014] FCA 1405,
[iii] *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424
[iv] Australian Competition & Consumer Commission, *Media release—ACCC appeals $1.7m penalty against Reckitt Benckiser for misleading Nurofen representations,* 23 May 2016, available at <http://www.accc.gov.au/media-release/accc-appeals-17m-penalty-against-reckitt-benckiser-for-misleading-nurofen-representations>.