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Review of the ASX Corporate Governance Council's Principles and Recommendations

Energy Consumers Australia is the national voice for residential and small business energy consumers. Established by the Council of Australian Governments Energy Council in 2015, our objective is to promote the long-term interests of energy consumers with respect to price, quality, reliability, safety and security of supply.

We appreciate the opportunity to comment on the Review of the ASX Corporate Governance Council's Principles and Recommendations (the Review).¹

Introduction

At the outset, Energy Consumers Australia supports the need for the regular assessment and evolution of the ASX Corporate Governance Council's Principles and Recommendations to ensure that they continue to align with companies' corporate social licence to operate, community expectations and emerging issues in corporate governance, values and culture.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Royal Commission) and the Australian Prudential Regulator Authority's (APRA) recent report into the Commonwealth Bank of Australia (the CBA Report)² reinforce the importance of these issues, not only in respect of the financial services industry but across other sectors including, in our view, the energy sector.

On almost any metric, the energy sector is not serving Australian consumers and small businesses well – whether that be in relation to price (in a 10-year period electricity prices have doubled), ease of choice of retail energy offers (myriad of complex offers) or integration of new technologies (optimising solar and batteries for individual consumers and across the entire system). Our Energy Consumer Sentiment Survey confirms that consumers do not believe they are getting value for money, do not have confidence that the energy market is working for them, or will do so in the future.³ This reflects that community expectations of the energy sector are not being met, and that the sector's social licence to operate is under threat.

This has been reinforced by recent calls for a Royal Commission into the energy sector.⁴

¹ <https://www.asx.com.au/regulation/corporate-governance-council/review-and-submissions.htm>.

² http://www.apra.gov.au/AboutAPRA/Documents/CBA-Prudential-Inquiry_Final-Report_30042018.pdf.

³ <http://energyconsumersaustralia.com.au/publication/energy-consumer-sentiment-survey-findings-december-2017/>.

⁴ "PM dodges calls for power price inquiry", Channel 9 News, 9 July 2018 at

<https://www.9news.com.au/national/2018/07/09/09/35/coalition-under-pressure-on-energy-prices>.

Recent reviews of the energy sector, including the Independent Review into the Future Security of the National Electricity Market,⁵ the Victorian Government's Independent Review of the Electricity and Gas Retail Markets in Victoria⁶ and most recently the Australian Competition and Consumer Commission's Retail Electricity Pricing Inquiry⁷ (the ACCC Review) – have identified systemic problems of structure and performance throughout the supply energy chain. While fixing many of the problems that have been identified in the energy sector are likely to require legislative and regulatory reform, there is also a need to pursue a parallel 'cultural' agenda to help re-write the DNA of the sector and create the space for a debate about a positive vision for the energy sector and the enabling role that it plays.

More holistically, there is a need for the culture of the energy sector to be "re-wired" to align with community expectations and focus on better consumer outcomes. Indeed, the national energy objective (NEO) as stated in the National Electricity Law is as follows:⁸

To promote efficient investment in, and efficient operation and use of, electricity services for the long-term interests of consumers of electricity with respect to:

- price, quality, safety and reliability and security of supply of electricity
- the reliability, safety and security of the national electricity system.

A further discussion of relevant frameworks to determine the LTIC is provided in our paper entitled *Interpreting the long-term interests of consumers*.⁹ In short, this policy objective of achieving the long-term interests of consumers, as stated in the NEO, needs to be reflected in individual energy company's statement of intent and approved at a Board level.

In our view, the essence of the CBA Report applies equally in the energy sector:¹⁰

CBA's focus on financial risks was not matched by a strong 'risk champion' for operational, compliance and conduct risks. Risk management in these areas was dominated by a 'tick the box', process-driven mentality, which meant that potentially serious non-financial risk issues were not identified early and addressed. CBA's compliance function was under-developed, as was its framework to manage conduct risk.

The treatment of customers is critical for CBA's reputation and public standing. CBA's focus on aggregate customer satisfaction survey results reinforced a 'good news' story that the Board and management were predisposed to hear. Alarm bells from the treatment of aggrieved customers, which should have alerted CBA to serious shortcomings in customer outcomes, did not sound loudly.

These various failings have culminated in a dilution of the 'voice of risk' and the 'customer voice', which did not provide a sufficient counterweight to a strong and mature 'voice of finance' in ensuring sound risk and compliance outcomes.

⁵ Independent Review into the Future Security of the National Electricity Market at <https://www.energy.gov.au/government-priorities/energy-markets/independent-review-future-security-national-electricity-market>.

⁶ Independent Review of the Electricity and Gas Retail Markets in Victoria at https://www.energy.vic.gov.au/_data/assets/pdf_file/0030/79266/Retail-Energy-Review-Final-Report.pdf.

⁷ <https://www.accc.gov.au/regulated-infrastructure/energy/electricity-supply-prices-inquiry>.

⁸ <https://www.aemc.gov.au/regulation/national-energy-objectives>.

⁹ <http://energyconsumersaustralia.com.au/wp-content/uploads/Interpreting-the-Long-Term-Interests-of-Consumers.pdf>.

¹⁰ http://www.apra.gov.au/AboutAPRA/Documents/CBA-Prudential-Inquiry_Final-Report_30042018.pdf.

While the ASX Corporate Governance Council's Principles and Recommendations do not apply to all companies across the energy sector as many of them are not ASX listed entities, in our view they provide useful guiderails for corporate governance practices across the sector.

For example, we are aware that they have encouraged the development of a world-first, energy sector charter that has the support of 15 CEOs from across the gas and electricity supply chains to deliver energy in line with community expectations.¹¹ In our view, cultural change is a critical element of The Energy Charter initiative.

Therefore, this Review is an important mechanism to deliver a benchmark in corporate governance practices that can apply across Australian organisations in a number of sectors. We have set out below our response to the Review which concentrates largely on the proposed changes to Recommendation 1.1 and Principle 3.

Proposed changes in the Review

The Review proposes amendments to Recommendation 1.1 through commentary that relevantly adds:

1. To the usual responsibilities of the Board the following:
 - Defining the entity's purpose
 - Approving the entity's statement of core values and code of conduct to underpin the desired culture within the entity
 - Overseeing management in its implementation of the entity's business model, achievement of the entity's strategic objectives, instilling of the entity's values and performance generally
 - Ensuring that the entity's remuneration framework is aligned with the entity's purpose, values, strategic objectives and risk appetite
2. To clarify that the information provided to the Board by the senior executive team should not be limited to information about the financial performance of the entity, but also its compliance with material legal and regulatory requirements and any material misconduct that is inconsistent with the values or code of conduct of the entity
3. To provide additional guidance on the role and responsibilities of the Chair of the Board.

Additionally, the Review proposes that Principle 3, currently worded "act ethically and responsibly", be expanded to:

A listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner.

It is also proposed that the commentary of Principle 3 acknowledge the organisation's "social licence to operate" as one of its most valuable assets and that this can be seriously impacted where the culture articulated above is not adhered to.

The Review suggests three additional Recommendations that relate to:

- core values – the listed entity should articulate and disclose its core values (Recommendation 3.1);
- whistleblowing policies (Recommendation 3.3); and
- anti-bribery and corruption policies (Recommendation 3.4).

¹¹ www.theenergycharter.com.au.

In addition, Recommendation 3.1 (to become 3.2) makes it mandatory that the Board be informed of any material breaches to the organisation's code of conduct by a director or senior management or any other breaches that call into question the culture of the organisation.

The reporting approach to the principles is intended to continue to be on an "if not, why not" basis framework.

Our response to the Review

We agree that Recommendation 1.1 and Principle 3 should be expanded in the ways proposed in the Review. In our view, and as has been shown in recent events in financial services through the Hayne Royal Commission, the obligation to simply act "ethically and responsibly" does not appear to be nearly specific enough to guarantee the right culture across an organisation to achieve the desired consumer outcomes and alignment with the social licence to operate. It is critical that the tone for purpose, and core values that underpin culture, be set right from the top of an organisation, namely at the Board level.

Taken together and in conjunction with the Australian Government's proposals for new laws to protect whistle blowers, the proposals for Principle 3 and its recommendations provide a strong foundation upon which the Board is not only able to set the tone from the top, but also ensure that the tone is being instilled operationally across the organisation. This approach is backed up by the requirement for the Board to define the organisation's purpose, core values and code of conduct to underpin that culture.

In the regulated energy sector, as part of social responsibility and their social licence to operate, we would expect that the amendments proposed in the Review may encourage Boards across the sector take the initiative to:

1. clearly articulate the organisation's purpose and approve a statement of core values and a code of conduct that recognises "customers at the centre";
2. own culture and have appropriate oversight to ensure organisational alignment with the Statement of Intent" commitment to "customers at the centre" in line with policy objectives of the NEO (long term interests of consumers);
3. ensure management are operationally responsible for embedding a "customer at the centre" culture, including by linking key performance indicators and remuneration, together with corporate strategies and performance metrics; and
4. review information that spans financial performance, together with compliance with material legal and regulatory requirements and any material misconduct that is inconsistent with a culture of having "customers at the centre".

As APRA pointed out in the CBA Report, the traditional focus of companies simply on "financial risk" with a compliance approach needs to be augmented with a clear understanding of operational, compliance and conduct risks. Furthermore, the reputation of an organisation needs to be the focus of the Board. At a time when consumer confidence in energy companies is at an all-time low, this is critical.¹²

¹² This is reflected in the Prime Minister calling the CEOs of energy companies into two roundtables in August 2017: see transcript of the second meeting on 30 August 2017 at <https://www.pm.gov.au/media/remarks-energy-retailers-meeting>.

Energy Consumers Australia also agrees that to ensure ongoing flexibility and effectiveness, the existing “if not, why not” framework of the Principles and Recommendations allows the principles to remain contemporary and continue to deliver good corporate governance outcomes for ASX listed entities, investors and other stakeholders. Prescriptive legislative or rules-based responses to these dynamic issues in the market are unlikely to achieve the desired outcomes of cultural change.

Conclusion

In conclusion, Energy Consumers Australia welcomes the Review and its recommendations, both in its application broadly to ASX-listed Australian companies but also due to its impact in providing guiderails for best practice corporate governance practices across all companies including in the energy sector. We also look forward to working with energy companies to better align with community expectations and focus on better consumer outcomes through such mechanisms, in line with the policy objectives of the NEO.

If you have any questions regarding our submission, please contact Sabiene Heindl, Director Strategic Engagement of Energy Consumers Australia on 02 9220 5500 or sabiene.heindl@energyconsumersaustralia.com.au.

Yours sincerely,



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