



30 August 2013

By email: AERInquiry@aer.gov.au

Mr Andrew Reeves
Chair
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

Dear Mr Reeves

Submission to the AER DRAFT AER Stakeholder Engagement Framework

Consumer Action is pleased to provide comment on the AER's Draft Stakeholder Engagement Framework (the **Draft**).

We believe the Draft provides a strong foundation for the AER to engage with its stakeholders, particularly its compliance and enforcement role in the Retail Energy Market. We have provided some comments aimed at encouraging the AER to develop strong relationships with consumer organisations and provide feedback on issues raised. As outlined further below, we also believe that the framework could be improved by specifically referring to balance between supply-side and demand-side engagement.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation, offering free legal advice, pursuing consumer litigation and providing financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly. We have a significant and detailed history in providing consumer advocacy across energy issues in both Victoria and nationally.

We have a particular focus on energy consumer policy, and believe that effective competition and robust consumer protections are mutually reinforcing. We regularly work on areas of concern for consumers in the national energy market in relation to current regulatory reform in the energy sector and perceived market failure.

AER Engagement Principles

Does the Framework cover the appropriate range of AER activities and stakeholders affected by the AER's activities and decisions?

We support the inclusion of the activities and stakeholders identified by the AER. We suggest however that under strategic issues, that the reference to "our compliance and enforcement priorities" be made clearer so that stakeholders are also appropriately engaged in relation to the AER's compliance and enforcement activities, particularly those that result from a complaint from a consumer organisation.

Consumer organisations play an important role in early identification of consumer issues in the marketplace, through complaints services, legal advice and assistance services, financial counselling, and market monitoring. The information provided by consumer organisations to regulators can help identify emerging issues and trends of consumer concern. However, consumer organisations often receive limited feedback about complaints, and regulatory action (if undertaken) can occur many years after a complaint is made.

The danger in this approach is that consumers and consumer organisations may have a reduced motivation to engage in the effort involved in making complaints. Further, in matters that proceed to investigation and may ultimately seek to require evidence from complaining consumers, consumer organisations can help support a consumer through the process and increase the likelihood they will 'stick' with the process. These efforts can be seriously undermined by an inability to obtain some feedback as to progress of the matter.

We have detailed further below some mechanisms that the AER could consider adopting to improve communication loops with consumer organisations.

Are the proposed principles relevant and appropriate to the AER's activities, in particular given the considerable complexity of many of the regulatory and economic issues that make up the AER's work? Are there additional or alternative principles that should be included?

We appreciate that the AER is seeking to continue to develop its stakeholder engagement approach. We suggest that this should be with the objective of being a flexible and dynamic regulator that is able to respond to the needs of the market and energy consumers. To this end, we believe the Framework could be improved by either an additional principle and/or further emphasis on being timely and responsive. We note that timely communication is currently within principle 1.

Our recent Regulator Watch report discussed the importance of regulator's being responsive through taking a "campaign approach" to particular market issues.¹ This involves a regulator responding proactively to a market concern from a number of perspectives—for example, through business and consumer education activities as well as targeted enforcement action—rather than merely respond to matters as they brought up.

An approach of this sort is particularly important in emerging or rapidly changing markets. In such markets businesses will be experimenting with new business models and marketing strategies in an uncertain regulatory environment. The regulator could sit on its hands and see what happens or it could play a role in shaping the market by sending early messages that particular types of conduct will not be tolerated.

In our view, it is important to intervene early to ‘set the tone’ as problems emerge. One can contrast this success with regulators’ failure to respond to early problems in the post deregulation telecommunications market. The result is a culture of non-compliance with which we are still dealing. Where a regulator fails to set the tone for a market, industry players are able to make arguments based on sunk costs, consumer familiarity with harmful practices and/or ‘they got away with it, so how can you challenge me’.

In addition, we encourage the AER to ensure its commitment to the diversity of consumers and the demand-side of the market. Under Principle 2 there is acknowledgement in relation to respecting the diversity of communities and stakeholders, we believe this should be emphasised as the energy market objective, and increasingly expectations from government, is that the energy market should focus on the “average consumer” rather than particular interests. The long term interests of consumers should refer to all consumers, and the AER’s stakeholder engagement strategy could benefit from explicitly stating it will engage with particular groups on the demand side (i.e. seniors, NESB consumers, low income groups, disabled etc).

Are the commitments included under each principle relevant and appropriate? Are there additional actions we could undertake that would assist us to embody the principles in our engagement activities?

We believe the commitments included under each principle are relevant and appropriate. We do, however, strongly encourage the AER to consider further aspects of engagement around its enforcement activities. Specifically:

- *Super complaints* - In its report on consumer policy, the Productivity Commission canvassed the establishment of a 'super complaints' mechanism, which has been used in the UK since 2002.ⁱⁱ Under the UK provision, a designated consumer body notifies the UK Office of Fair Trading and other relevant regulators about a consumer problem. The super complainant is required to set out its reasons why the problem is significantly harming consumers' interests. The regulator must then publish a reasoned response within 90 days. Super-complaints include details of market features harming consumer interests and documented facts and evidence, and are designed to provide consumer bodies with authority in ensuring consumer detriment is appropriately investigated. The process offers complaints to be “fast-tracked” so that issues raised by consumer bodies are given due consideration within a fixed time.
- *The role of the AER CCG* - The expertise provided in the membership of the AER's Customer Consultative Group is an opportunity for the AER to understand consumer experiences or market failure M. We think this could be extended through improved transparency and communication in relation to matters raised by CCG members. The ACCC has established a protocol within its Consumer Consultative Committee to report back to the committee on every complaint made by a member of the committee. The complaint remains open on the committee's register of complaints until it has been dealt with appropriately. The mechanism ensures members of the committee are kept informed about the progress and outcomes of complaints. This

mechanism has proved extremely useful in practice and we recommend it be emulated by the AER.

Are there additional engagement 'tools' we could include in the engagement spectrum?

As outlined above, we believe that AER could further engage with stakeholders through a *Super Complaints* function.

We propose to review the Framework after three years' Is this an appropriate timeframe?

This appears to be an appropriate timeframe.

What measures could the AER use to evaluate our engagement?

An independent assessment throughout the three year period as well as at the end of the three year period would enable the AER to make iterative changes to its engagement framework, based upon 'live' feedback and the experience of stakeholders.

Are there any other issues we should consider?

We believe that the Framework has not specifically considered the issue of maintaining AER's independence and being balanced in engagement among stakeholders. Our concern is, as an industry-specific regulator, the AER has regular, ongoing and intensive engagement with the supply-side of the market. While this is necessary and appropriate, and we are in no way casting aspersions on AER's independence (indeed, we believe it to be very independent in the conduct of its duties), there remains a risk that an industry-specific regulator becomes "captured" by the industry it regulates. We think the Framework could be improved to address this risk by specifically referring to the importance of balancing engagement with the supply-side and demand-side interests. While we welcome the principle around transparency, we think that balance could be a useful addition.

Finally, we have attached a link to our recent report '[Regulator Watch](#)' which provides a strong focus on what additional activities the AER could undertake to meet stakeholder needs.

We would welcome an opportunity to further discuss this submission and our 'Regulator Watch' report with you. Please contact Janine Rayner on 03 8554 6907 or janine@consumeraction.org.au.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

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ⁱ Gordon Renouf, Teena Balgi and Consumer Action, *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, March 2013, available at: <http://consumeraction.org.au/new-report-regulator-watch/>

ⁱⁱ Productivity Commission, *Review of Australia's Consumer Policy Framework*, available at: <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>, page 218.