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General Manager
Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne Victoria 3001

By email: AERInquiry@aer.gov.au

Approach to Compliance with the National Energy Retail Law, Rules and Regulations Issues Paper

Australian Power & Gas (APG) welcomes the opportunity to provide comments on the Australian Energy Regulator (AER) issues paper on the *Approach to Compliance with the National Energy Retail Law, Rules and Regulations*.

In setting the approach to compliance the AER must ensure that it minimises the compliance cost and burden faced by energy retailers. APG would suggest that minimising of compliance costs can be achieved, without imposing any unnecessary risk on the market or consumers. One way this can be achieved is through not requiring all obligations under the retail framework to be reported on and only require reporting on obligations where information on compliance cannot be obtained through other means.

In addition, key to reducing the cost of compliance is a review of the frequency of reporting. APG does not support the requirement for quarterly reporting. We hold the view that the additional burden and cost associated with quarterly reporting far exceeds any potential benefits that may be derived from reporting to the AER on a quarterly basis. We hold the view that annual compliance reporting with a requirement on retailers to report breaches on a periodic basis depending on the severity of the breach is more than adequate for monitoring and assessing a retailer's compliance. This is similar to the current regime.

To avoid any unnecessary administrative burden and cost the AER must also ensure that where it relies on information from market sources in assessing potential non-compliances that the information being relied on is based on qualitative data and not anecdotal evidence and commentary. The AER should not expose retailers to administrative and compliance reporting or action on the basis of unsubstantiated data. We discuss this issue in more detail in our submission.

APG supports the primary objective of the AER in fostering a positive culture of compliance and one that works cooperatively with market participants. We are however concerned with what we see as a “heavy handed” approach to retail compliance. The tone of the issues paper presupposes failings with existing compliance regimes, and is drafted from a position of presumption that retailers routinely fail to comply with their obligations. It would appear this may be driven by a perception that the retail energy market is not as transparent as the wholesale energy market, a point we would refute.

There are a number of market based indicators that when used correctly will provide clear information to the AER on the state of the retail energy market. If the AER is to look at past performance and past compliance reporting in assessing the likelihood of future breaches then the AER must also look at the actions implemented by retailers in improving performance and addressing any past issues.

Our detailed comments on key issues raised in the paper are contained in the attached. APG would welcome the opportunity for further discussion on the issues raised in our submission. Should you have any questions relating to our submission I may be contacted on (02) 8908 2714 or via email at sruddy@auspg.com.au

Yours Sincerely,

Shaun Ruddy
Manager Regulatory & Compliance
Australian Power & Gas

Openness and Transparency

APG holds the view that a combination of communication strategies will be required to ensure that all stakeholders (Retailers, Distributors and Customers) understand the AER's approach to compliance. It is imperative that at the outset of the AER taking on responsibility for compliance with the National Energy Retail Law, Rules and Regulation that it sets the appropriate level of stakeholder expectation of how the AER will approach compliance and issues of non-compliance.

This baseline understanding will set expectation levels with stakeholders.

A reliance on one form of communication will have a limited effectiveness. For example if the AER were to rely on publications only there is the potential for divergent views on how to achieve compliance (or what constitutes non-compliance) this is because of the potential for differing interpretations of what has been written. However to use a publication in conjunction with targeted presentation, one on one & public forums would reduce if not eliminate any ambiguity around the AER's approach to compliance.

Monitoring Compliance

In determining the indicators to be used in monitoring compliance the AER needs to ensure the indicators can be used in a consistent fashion across varying compliance obligations. Consistency in assessment is a key issue as a lack of consistency drives compliance uncertainty and administrative burden.

How does the breach affect achievement of the national energy retail objective?

At a high level having an indicator or factor in assessing whether a breach has an affect on achieving the national energy retail objective would seam an appropriate measure. The issue comes when assessing the level of impact a breach may have on achieving the national energy retail objective and to what likely extent has it been impacted.

As such this type of indicator may only be used as a lead indicator with further investigation required in determining any level of potential impact from the non-compliance and any required rectification action. For example, once it has been determined that there has been a compliance breach which has impacted the national energy retail objective a second step assessment would need to occur where an assessment is made on,

- How the national energy retail objective has been impacted (material or non-material),
- The likely outcome from the impact,
- The rectification action required,
- The level of the market impacted (customers, market participants etc),

- Commercial impact,
- Special considerations etc.

This secondary level of investigation / assessment is crucial to the compliance process and in determining what level of remedial action (if any) is required.

What mechanisms or safeguards are in place to rectify a breach?

The proposal to include an indicator where an assessment is made on the mechanisms or safeguards that are in place to rectify the breach is a positive step. As stated in many cases mechanisms and safeguards will be in place to limit any potential damage from a non-compliance. Where such mechanisms are in place it should allow for a more light-handed approach to compliance.

How many people are likely to be affected by a breach of the obligation?

The indicator whereby an assessment is made on the number of people likely to be affected by a breach of an obligation is both an important and practical measure. Where a breach has occurred that has a limited consumer impact the potential level of compliance / rectification action would be different to where a large or substantial level of a retailer's customer base has been impacted. This would include notification, reporting and monitoring requirements etc.

However it should be remembered that where a breach has occurred across multiple retailers affecting larger customer volumes it may be an indicator of an issue with the functional operation of the market or compliance regime itself rather than a more simplistic issue of retailers failing to meet their obligations.

How are people likely to be affected by a breach of the obligation?

In assessing the level of a breach and any subsequent rectification / compliance action assessing the likely impact to the people affected by the breach is a key determinant for any required actions. The questions as set out in the issues paper are fair and reasonable questions to be used in assessing how people may be affected.

We would however caution the use of the "unjustified administrative cost for others" in assessing the impact of a potential breach. If this is to be used it should be limited to those entities which are not able to recover the unjustified administrative cost. For example all Ombudsman costs would be recoverable from market participants. In particular the participant that caused the issue, therefore we do not believe the Ombudsman classification should be included in this type of assessment.

Factors to be considered in assessing the likelihood of a breach

In defining factors that may indicate the likelihood of a breach the AER needs to ensure the factors are true and robust indications of a potential breach. We do not support the use of past indicators (in isolation) as an acceptable method of determining the likelihood of future breaches.

Retailers will and do address issues where non-compliances have occurred. In assessing the likelihood of a breach, where the AER is looking at past compliance information it must also take into account the actions taken by the retailer to address any past issues.

Mechanisms for monitoring compliance

Use of Ombudsman information

We note the intention of the AER to use information from the Jurisdictional Ombudsman as a lead indicator for potential compliance breaches, We support the statement in the issues paper stating that *“Not all complaints made by a customer to an energy Ombudsman scheme will point to a breach of the Retail Law or Rules”* Given the recognition that not all complaints point to a breach, when relying on information from the Ombudsman it will be important for the AER to segregate out those complaints that do not indicate a breach. Further the AER must segregate out those complaints where no investigation has occurred and the alleged complaint has not been substantiated.

Ombudsman schemes have a number of case (complaint) categories where issues are taken “on face value” and no investigation is carried out to determine whether the alleged issue actually occurred.

For example The Energy and Water Ombudsman for Victoria (EWOV) reported for the month of June 2010 it had received 3,892 cases, of these 3,347 were received in categories where no investigation is carried out by EWOV to substantiate the issues raised. That is the cases were taken on at face value. In using information provided by the Ombudsman the AER must remember that Ombudsman schemes take on cases based on jurisdiction and not on merit, therefore the use of raw complaint data will be misleading in determining a potential compliance breach. Further Ombudsman schemes have a tendency to double count issues. Where a customer raises an issue and they happen to have both a gas and electricity account with the retailer the Ombudsman will often raise 2 cases (one for the electricity and one for the gas). Each of these cases is counted individually and in our view provides for a disproportionate view of the state of the market.

For the Ombudsman information to add value to the compliance monitoring process only cases where the issue surrounding the complaint has been substantiated through investigation should be

included in any report made to the AER. To do otherwise would misrepresent the state of the market.

Retailers cannot be expected to incur the administrative costs of compliance investigations where they are requested on the basis of information that does not reflect the true state of the market.

AER Customer Consultative Group

As with reliance on information from the Ombudsman scheme if the AER is to use information from the Customer Consultative Group it must ensure the information that is being relied on is factual and not anecdotal information. Historically we have seen instances where anecdotal commentary has overtaken the size and scope of a real issue. Where members of the Customer Consultative Group raise issues with the AER with the intent that compliance follow up will occur, the issues raised must be backed with factual evidence based information. The AER must also ensure that the expectations of the AER Customer Consultative Group are managed when it comes to the potential action the AER may or may not take.

ACCC / AER Infocentre

As with the previous mentioned information sources, the information gathered through the ACCC / AER Infocentre needs to be reviewed and quantified to ensure it is accurate and that the issues being raised are substantiated. Again it would not be acceptable for the AER to commence investigation proceedings including the request for information from a retailer on the basis of anecdotal information that has been gathered through unsubstantiated complaints.