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Consumer Utilities
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6 May 2011

Mr Tom Leuner
General Manager, Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

By email: AERInquiry@aer.gov.au

Dear Mr Leuner,

Draft AER Compliance Procedures and Guidelines (23 March 2011)

The Consumer Utilities Advocacy Centre Ltd ("CUAC") is an independent consumer advocacy organisation. It was established to ensure the representation of Victorian consumers in policy and regulatory debates on electricity, gas and water. In informing these debates, CUAC monitors grass roots consumer utilities issues with particular regard to low income, disadvantaged and rural consumers.

We welcome the opportunity to comment on the AER's 23 March 2011 papers, that is, the Notice of draft instrument Compliance Procedures and Guidelines ("Notice of draft instrument") and the draft Compliance Procedures and Guidelines. We have been involved in the AER's consultations on compliance and responded to the AER's Issues Paper Approach to Compliance (31 May 2010) on 9 July 2011, and AER's draft decision on Approach to Compliance, Compliance Procedures and Guidelines and Statement of Approach (December 2010) on 11 February 2011.

Classification of regulatory breaches

We remain concerned that the manner in which regulatory breaches are classified and the omission of certain regulatory breaches from the compliance reporting framework would result in a lowering of customer protections in Victoria and would fail to deliver

best practice protections in other jurisdictions. In our 11 February 2011 submission, we highlighted these concerns. In particular, we explained in detail why it was important that breaches relating to the following matters should be re-classified as Type 1 regulatory breaches requiring immediate reporting:

- Disconnection and reconnection provisions;
- Explicit informed consent and energy marketing;
- Hardship and payment plans;
- Customer retail contracts – billing;
- Tariff changes;
- Designated retailer's obligation to provide a standing offer.[1]

We note that our arguments as to why these regulatory breaches should be re-classified as Type 1 are also outlined in the AER's Notice of instrument.[2]

In the Notice of instrument, the AER has acknowledged that explicit informed consent and energy marketing, hardship and payment plans, customer retail contracts – billing and tariff changes "will take priority in the AER's compliance monitoring activities in recognition of the significant impact that non compliance can have on customers, and continued reports of complaints and concerns in these areas to energy ombudsman schemes in all participating jurisdictions."[3] This is positive.

However, we disagree with the AER that immediate reporting of these breaches is not warranted. According to the AER, as "sufficient information in relation to compliance with these obligations will be available to the AER through other sources (including energy ombudsman schemes and the AER's performance reporting regime)," this will capture any escalation that may warrant investigation within a six-monthly reporting period.[4] On this basis, the AER has stated that immediate reporting is unnecessary.

Non-compliance could be isolated, or systemic, for example, because of failures of retailers' IT processes and systems or problems with training and supervision of sales or call centre staff. The type of breaches which we would like to see re-classified as Type 1 are critical and demand an immediate response rather than a response within a six month time frame. Through compliance reporting of these obligations, the AER can respond more promptly where there are systemic breaches of regulatory obligations requiring attention. The consequences of delaying any remedial action to a six month

[1] http://www.cuac.org.au/database-files/view-file/5282/ at 5-13.

[2] AER, Notice of draft instrument, Compliance Procedures and Guidelines (23 March 2011), at 15-18.

[3] AER, Notice of draft instrument, Compliance Procedures and Guidelines (23 March 2011), at 15.

[4] AER, Notice of draft instrument, Compliance Procedures and Guidelines (23 March 2011), at 15-16.

time frame might be that a larger number of customers potentially could be impacted negatively by the regulatory breach.

Information obtained through the AER's performance reporting regime may indicate potential non–compliance with regulatory obligations, based on trends identified through the performance indicators. However, performance reports are not compliance documents. The main purpose of performance reporting is to encourage competition by comparing the performance of energy businesses[5] and providing information to the public. Further, the reliability of reports submitted by energy businesses is dependent on their capacity to report accurately. The reliability and quality of information reported can only be confirmed by an independent compliance audit on the systems and process of the energy business. We discuss this further below.

Complaint data from energy ombudsman schemes is a useful indicator, but may not identify the scale of non-compliance that might be prevalent in the energy market. In CUAC's experience, some consumers do not know what their rights are; others are averse to complaining.

Compliance audits

We note that the AER has, in its draft Compliance Procedures and Guidelines, provided further guidance and clarity with regard to the factors they would consider when making a decision to audit and the choice of the audit mechanism. However, we are concerned that there is still no commitment to undertake an annual compliance audit program. We agree that the scope, coverage and timing of a compliance audit needs to be determined on a case by case basis depending on the energy business' previous level of compliance, and in response to issues identified through other compliance monitoring activities. However, it is important that compliance audits be undertaken annually so that the reliability of energy businesses' processes to collect data and its accuracy, are assessed regularly.

We want to ensure that as Victoria transitions to the national framework, Victorian consumers do not lose the current level of protections that are particularly important in a market characterised by retail price deregulation. Currently, the matters which we have identified on page 2 of this submission are generally classified as Type 1 obligations under the compliance reporting framework of the Essential Services Commission of Victoria (ESCV) requiring immediate reporting whenever there is a breach. Rather than classifying these obligations as Type 2 (requiring six monthly reporting) and raising the reporting frequency when non-compliance becomes an issue, we believe that there should be more frequent compliance reporting of these obligations in the AER's compliance framework. The AER could incentivise the development of good industry practice by reducing the required frequency of reporting these (re-classified)

[5] AER, Notice of draft instrument, Performance Reporting Procedure & Guidelines (April 2011), at 5.

Type 1 obligations, if the energy business demonstrates consistently that it has a good compliance record with regard to these obligations.

We thank you for the opportunity to participate in the AER's consultation. If you have any queries, please do not hesitate to contact the undersigned.

Yours sincerely,

Jo Benvenuti
Executive Officer

Deanna Foong
Senior Policy Officer