



13 July 2010

By email: AERInquiry@aer.gov.au

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

Dear Mr Leuner

Submission to the AER Approach to compliance with the National Energy Retail Law, Rules and Regulations

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to make a submission to the Australian Energy Regulator's (the **AER**) *Approach to compliance with the National Energy Retail Law, Rules and Regulations (the Issues Paper)*.

We consider the compliance and enforcement regime of the AER will be critical to its success. The design and deployment of its responsibilities are essential to ensure regulated businesses understand and operate within the law and that consumers can confidently participate in the market.

Recognising that the AER has not previously had regulatory responsibility in the retail market, nor directly for consumers within that market, we have made some general comments we believe will assist the AER in establishing an effective enforcement regime.

Our comments on the questions raised in the Issues Paper are also set out below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia.

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. Consumer Action has been actively involved in energy advocacy work in Victoria and nationally since the 1990s. Over this time we have provided key consumer input into important energy regulatory processes for consumers, including the current Victorian smart meter rollout and initiatives relating to

improved energy price and product information disclosure following the deregulation of Victorian retail energy prices.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

General comments

Principles of effective enforcement

With the growing complexity and size of the retail energy market in Australia, it will become increasingly difficult and complex to effectively detect and address breaches of the law. On this basis it is crucial that the AER's compliance and enforcement regime contains a flexible range of tools and approaches to address conduct that is harmful to consumers and/or the competitive market.

We acknowledge that in both the first and second exposure drafts of the National Energy Customer Framework (**NECF**) there were significant short-comings in the compliance and enforcement mechanisms available to the AER. We have advocated strongly to have these powers increased and expanded to ensure the AER can be an effective regulatory body in the retail energy market.

We note also that following the most recent Ministerial Council on Energy (**MCE**) meeting held in June, the overarching objective of the law is now likely to be drafted so it is consistent with that of the National Electricity Law and the National Gas Law, in contrast to what was drafted in the second exposure draft of the NERL. We also note that it now appears to be the intention that the NERL will provide the AER further guidance in relation to their regulatory responsibilities, requiring the AER to carry out its function in a way that is compatible with the provision of consumer protections for small customers, including customers experiencing hardship¹. On this basis, as we understand, the AER will be expected to include this principle as a priority in its approach to compliance and enforcement, arguably widening the scope for that compliance and enforcement activity.

As such, we support the AER's desire to clearly define its role as a regulator in a market providing essential services to consumers, including by developing clear principles that will underpin a 'compliance and enforcement policy'.

Specifically, high level principles that form the basis of its policy should include:

- a commitment to utilising a range of tools and approaches, including, where appropriate, the courts;
- a commitment to advocating for additional tools, powers or resources where those available are ineffective or insufficient to address a problem;

¹ Ministerial Council on Energy Communiqué 11 June 2010, Pg 6

- a flexible approach to applying the regulatory tools, specifically one that is not linear but includes a focus on choosing the right tools for the job, (rather than preferring certain tools over others or a linear approach to regulation);
- as assessment of consumer detriment that considers the level and nature of impact on consumers or a group of consumers as well as the amount of detriment overall²;
- a commitment to establishing useful legal precedents and testing the scope of relevant laws.

In its role, particularly in the early period, the AER needs to be proactive, establishing the boundaries of the law. As such, the AER needs to be prepared to lose cases. While winning all the time may feel good, it may also be an indication that the AER is only taking 'safe cases'.

To effectively fulfil its role as a regulator under the NERL, it is essential that the AER considers these guiding principles and specifically that it develop clear objectives that prioritise the interests and protection of consumers in its enforcement and compliance policy that ensures the AER's role is clearly understood, both internally and by market participants.

AER compliance and enforcement culture

Essential to its success will be a culture of compliance and enforcement within the AER, that applies the principles above, and proactively pursues the protection of consumer interests in the retail energy market.

There are inherent obstacles that the AER needs to overcome to achieve this. Primarily, the fact that the AER has been an industry specific wholesale and network regulator which has not had responsibility for consumer protection issues at a retail level. The nature of the work and the approach required is different in significant respects. For example:

- It is primarily legal not economic in nature;
- It will require capturing and understanding the experience of individual consumers;
- There will be a significantly greater need to interact with individuals with limited knowledge of their rights and the regulatory framework.

The need to further consider and develop expertise relating to this shift is demonstrated by the Issues Paper references to the AER's experiences in the wholesale energy market, using that as the basis for much of the outlined approach to compliance and enforcement.

We highlight that operating a compliance and enforcement framework under the National Electricity Law and the National Gas Law for the wholesale energy market is significantly different to operating a compliance and enforcement framework for a retail energy market. In particular in a retail energy market, regulated businesses interface directly with consumers who are therefore directly impacted by any breach of the law.

² There is a serious risk that conduct that has significant impact on particular groups of consumers, including disadvantaged and vulnerable groups if the AER looks for cases of wide-spread and national detriment before acting.

The relationships established with the wholesale energy market participants also pose some risk that the AER will be, or will be perceived to be, "captured" by industry if the AER is not also seen to understand and protect consumer interests.

The AER is in the fortunate position of being embedded in the Australian Consumer and Competition Commission (**ACCC**). We strongly support the AER's plans to draw from the ACCC's experience, not only its experience with enforceable undertakings, but in all aspects of its role working with consumers. We also encourage the AER to look to other regulatory bodies, including the incumbent state energy and consumer protection regulators, who have demonstrated and extensive experience in retail energy markets and with consumers. For example, Consumer Affairs Victoria's recent enforceable undertaking with Neighbourhood Energy³.

As an example, we refer the AER to the United Kingdom's Office of Fair Trading (OFT) which has developed a proactive approach to enforcing consumer protections. We note that its website states:

Working directly with consumers can be a flexible and cost-effective alternative to enforcement action. The OFT is committed to using consumer initiatives to support the supply side of the market as part of its new, whole-market approach to working. The OFT regularly runs campaigns in partnership with other organisations such as local authority Trading Standards Services and Consumer Direct to raise business and consumer awareness on a variety of different issues.⁴

We encourage the AER to investigate the OFT's approach and determine ways in which it can proactively investigate how consumers are experiencing the retail energy market. Specifically, we refer the AER to the market studies the OFT undertakes⁵.

We acknowledge that the AER has already come some way in these regards, but highlight that it has a significant amount of work to do to be market ready for regulating under a retail energy law and interfacing directly with consumers. The development of principles and the culture to achieve this are imperative to its success in its new role.

Proposed compliance and enforcement regime under the National Energy Retail Law (NERL)

The AER regulatory tool kit

The Issues Paper lists a range of tools in the AER's regulatory tool kit including administration, enforceable undertakings, infringement notices, civil proceedings and revocation of licence.

It is fundamental that these are used with flexibility with the overall goal for the AER to be to find the "right tools for the job". The aim of any action taken, should be to target a problem

³ <http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-EnforceableUndertakings-2010-05-10+-+Neighbourhood+Energy+-+Enforceable+undertaking?OpenDocument&1=~&2=~&3=~&REFUNID=~>

⁴ <http://www.offt.gov.uk/OFTwork/consumer-protection/>

⁵ <http://www.offt.gov.uk/OFTwork/markets-work/>

and deal with it. Consumer Action believes that this can best be done with a flexible policy tool kit and a commitment to using the most effective tools in any given situation.

Effective use of the tool kit of responses will ensure a flexible framework that can use various approaches to maximise outcomes for Australian consumers with a focus on protecting vulnerable and disadvantaged consumers.

Fostering cooperation and voluntary compliance

Openness and transparency

Q.1 What strategies for communication with retailers, distributors and consumers on compliance practice, and the AER's approach to compliance, are likely to be most effective? (e.g. publications, targeted presentations, one-on-one discussions, public forums).

Please provide reasons for your response.

We support the AER's establishment of the Customer Consultative Group (**CCG**) to ensure it is engaging and consulting with the consumer sector. Public forums, one-on-one discussions and targeted presentations all contribute to a wider understanding and engagement with the AER over its regulatory role and are also extremely important in ensuring transparency. These should be continued and should evolve as the AER's role develops.

However, we highlight to the AER that there is a significant difference to regulating wholesale market compliance in comparison to compliance with retail functions as consumers can not be singularly represented by industry groups. While consumer representatives can provide high level engagement on issues of a more technical and regulatory nature, the general consumer base can largely not interact on that level and it is therefore essential to the success of the AER that it has a strong and direct engagement with the broader consumer base.

We understand the AER is currently redeveloping its website and support this initiative. This is an important step that recognises the website will be a gateway for at least some consumers accessing information about energy services and that it may also serve to provide the AER with invaluable feedback about what is occurring in the retail energy market. We note also the AER view that at least some consumers may raise concerns through the ACCC Infocentre.

There are two key points to make regarding the website and Infocentre:

- These channels will need significant promotion and support if they are to work in the way the AER appears to envisage; and
- Even if effective, these two sources will not provide sufficient data alone.

Infocentre and Website portal

It is important to understand that whilst the ACCC website and Infocentre are valuable resources, they receive significantly less traffic than the equivalent portals provided by State and territory counterparts. By way of example, in the 08/09 year Consumer Affairs Victoria received in excess of 500,000 calls from consumers. The ACCC received 112 561 during the same period.

It will therefore be crucial that the AER raise its profile so that consumers know where to take their grievances that relate specifically to energy services under the NERL, and as importantly, feel comfortable to do so. Other key factors will be that the approach encourages local as well as national issues, and minor as well as major alleged breaches. There is a need to publicise these access points to consumers in each jurisdiction so they know they can raise all energy concerns through this mechanism and it needs to be done in a manner that ensures consumers clearly understand the AER's role.

There are a number of ways the AER can achieve this, for example:

- One of the most cost effective and effective means of raising the profile of the organisation in the minds of consumers is use of the media in tandem with enforcement action. This method has been used to great effect by the ACCC and other regulators. There is no substitute for being seen to act to protect consumers.
- Recently through the Your Choice campaign in Victoria, the Essential Services Commission (**ESC**) distributed information flyers through the retailer's bills, which were branded the ESC and were received by all Victorians. This approach is a good example of a direct approach to contacting consumers and may assist the AER in developing its approach to engaging directly with its, soon to be acquired, consumer base.
- The ACCC regularly distributes fact sheets and newsletters informing industry participants of their regulatory responsibilities, and consumers of their responsibilities and rights. The AER should adopt the practices of the ACCC and modify them to relate to energy services.

We also refer the AER to Australian Security Investments Commission's (**ASIC**) education and information approach.

Finally, we strongly urge the AER to develop a strategy, for example broader advertising campaigns, in local newspapers and on radios which will combine to reinforce the AER's new role as it replaces jurisdictional regulators. In a market place such as Victoria that has 14 retailers, is deregulated, is on the cusp of receiving complex retail tariffs and where marketing issues are already systemic creating perverse outcomes for a number of consumers, there is an urgency for the AER to provide consumers with the assurance their interests are being protected.

Other data sources

Other data sources to supplement information gained through the website portal and Infocentre are discussed in response to question 6 below.

Monitoring compliance

Targeting monitoring activities

Q.2 Are these appropriate indicators of the impact of a breach of provisions?

Q.3 What other factors might be relevant?

Please provide reasons for your response.

The approach that the AER takes to addressing breaches will essentially define the effectiveness of the enforcement regime under the NERL in an increasingly complex energy market.

While the greater the expected impact and probability of a breach, the more vigorous and intensive the monitoring activity will need to be, the AER will need to effectively deal with misconduct at all levels and pull the right regulatory tool from the tool box. It is important to note that while seemingly insignificant breaches may have only small impacts, even a small dollar impact on a disadvantaged group can affect the capacity of consumers to weather the detriment.

Identifying how many people are likely to be affected by a breach, and the manner in which they may be affected, will inform how the AER communicates to a business its obligations against a specific clause and how they inform consumers of their rights under that obligation thereby preventing the likelihood of a breach occurring in the first place. We are concerned however that the indicators presented in the Issues Paper to identify the impact of a breach of provisions are far too narrow to successfully capture the level of detriment consumers may experience in the national energy market.

We refer the AER to research undertaken by Consumer Affairs Victoria (CAV) which assessed the various costs that can be borne by consumers in the marketplace. CAV's report, *Consumer detriment in Victoria: A survey of its nature, costs and implications*, sets out some approaches to measuring consumer detriment that are useful for developing a broader methodology for assessing the impact of breaches and that we believe will assist the AER. Specifically, CAV defines "consumer detriment" with reference to the range of effects on consumers when goods and services do not meet their expectations. A broad range of effects, both financial and emotional, tangible and less tangible are considered.⁶

⁶ Consumer Affairs Victoria. 2006. *Consumer detriment in Victoria: A survey of its nature, costs and implications*. Research paper no. 10, p.iii.

CAV's report assessed how problems in markets can affect consumers emotionally by causing annoyance, frustration, stress and disappointment.⁷ The research found that these kinds of costs contribute to consumer detriment. As these are more difficult to measure using traditional empirical models than costs which can be measured in terms of financial indicators, they have traditionally been excluded from analyses of market intervention. However, their potential magnitude means that they must not be excluded from analyses that assess the effects of market changes.

We also refer the AER to a report recently completed by Public Interest Advocacy Centre, *Cut Off II: the experiences of utility disconnections*⁸, which looks at the impacts of disconnections on consumers.

We encourage the AER to draw upon the expertise of these organisations to inform the AER's approach to working with consumer impacts and detriment.

Q.4 Are these factors appropriate indicators of the likelihood of a breach of provisions?

Q.5 What other factors might be relevant?

Please provide reasons for your response.

We consider that the factors identified in the Issues Paper are practically likely to impact on the likelihood of a breach occurring. However it is not clear from the Paper how the AER intends to use such indicators. For example, we would strongly support the use of such indicators to prioritise education and compliance activities and to allocate resources to those activities, particularly in early stages of the AER's operation where there will be less market intelligence to hand. In contrast however we strongly suggest that enforcement resources should be focussed on where breaches in fact occur and an assessment of the actual detriment that flows from a breach.

To use another example, we agree that costs to comply and impact on profitability (actual or perceived) is likely to impact on business compliance. The existence of these costs or impacts therefore should weigh in favour of a strong compliance and enforcement approach such that the cost or impact of not complying is equal or greater. Non-compliance can provide, at least in the short term, direct financial gain and falsely gained competitive advantage to the non-complying business, as well as pushing the burden of non-compliance onto consumer. A key role for the AER must be to ensure that these benefits to business are offset by the real and present threat of enforcement action.

We note that the civil penalty provisions in the NERL are far too low to provide sufficient deterrence as yet and are continuing to advocate for consistency with other consumer laws.

⁷ As above, p.1.

⁸ Public Interest Advocacy Centre, *Cut off II: the experiences of utility disconnections*. January 2009.

Mechanisms for monitoring compliance

Market intelligence and information

Q.6 What are the strengths and weaknesses of these information sources as an input to the AER's compliance monitoring?

The AER will need to dedicate significant resources to monitoring compliance in the retail energy market. The size and complexity of the market, the differences between jurisdictions and the large consumer base (20 million consumers) will require the AER to be vigilant and to constantly assess market operations against the NERL and to minimise the risk of non-compliance from the outset.

As noted above, whilst properly supported and promoted, the ACCC Infocentre and the AER Inquiry email may provide important sources of information for the AER, alone they will not be sufficient. For example, even with significant efforts directed at ensuring consumers are aware of and comfortable with the Infocentre and web portal options, it remains unlikely that disadvantaged and vulnerable will use these contact points and therefore alternate strategies will be needed. This is discussed further in our response to question 7.

Ombudsman schemes provide a key source of information for the AER to draw upon for its compliance monitoring. Issues identified by the schemes flag pending issues to the AER. Regular formal and transparent reports outlining issues that consumers are experiencing in the energy market, combined with briefings by the ombudsman schemes directly, will be essential to the AER in identifying industry trends and potential breaches by regulated businesses. We urge the AER to develop memoranda of understanding with the relevant schemes regarding complaints data as well as serious and systemic issues reporting.

The AER CCG provides an effective forum for consumer representatives to raise issues affecting energy consumers and emerging issues with the AER directly. Additional workgroups and broader groups convened for consultation on individual regulatory issues or processes, as occurs with the distribution price reviews are also effective means of consultation. However as the CCG meets only three times a year and the other forums can often be quite technical, it generally limits consumer input into the AER and automatically precludes general consumers from engaging with the AER directly. We highlight, as previously, that a significant risk facing the AER is over reliance on peak consumer bodies as the only interaction with consumers. The AER must prioritise a more direct approach.

Q.7 What other sources of information and market intelligence should the AER consider?

Please provide reasons for your response.

As noted above, Consumer Action considers that it is crucial that the AER adopt additional information gathering strategies to those outlined in the Issues paper, and specifically that it not over rely on data gained through the ACCC Infocentre and the AER web portal. in

addition to developing close relationships with Ombudsman schemes (discussed above) we consider there are at least two key additional elements:

- Cooperation and information exchange with other relevant agencies including state and federal consumer protection regulators, incumbent energy regulators and government departments.

Importantly the AER must have an uninhibited relationship with the ACCC in particular to to apply the ACCC's compliance and enforcement experience to the energy market. Further, sharing of enforcement responsibilities over areas where the line between the Australian Consumer Law and the NERL are blurry will require a collaborative approach to capturing the appropriate data, tracking systemic issues and drawing upon its enforcement powers to address issues that are relevant.

The role of complaints handling with CAV and other jurisdictional consumer regulators will require clear lines of communication and a heads of understanding breach - making sure that nothing falls between the cracks.

- A complaints escalation process for complaints received via community organisations including consumer advocates and representatives. We note that the ACCC has recently introduced a process that automatically escalates consumer complaints received via a consumer or community agency for at least preliminary investigation on the basis that those organisations tend to be more expert regarding the role of the regulator than the general community and have therefore effectively already applied a filter in determining which matters to refer to the regulator for attention. We strongly urge the AER to initiate a similar process.

Developing relationships with these organisations more generally will assist with keeping the AER informed of market developments and issues, for example consumer issues with debt levels experienced by consumers, and subsequently, how retailers are managing their billing and collection cycle, payment plans, and hardship arrangements in response to these.

Targeted compliance reviews

Q.8 Is the AER's approach to targeted provision reviews appropriate for energy retail markets? If not, what changes to this approach could be made?

Please provide reasons for your response.

Consumer Action supports the AER's approach to targeted compliance reviews in the retail energy market. This will enable the AER to drill down on specific market issues.

Retailer and distributor reporting

- Q.9 What policies, systems and procedures should regulated entities put in place to ensure the reliability, accuracy and timeliness of reports on compliance to the AER?
- Q.10 Is the three-tiered structure of reporting proposed appropriate? If not, what alternative structure should the AER adopt?
- Q.11 What frequency of reporting (e.g. immediate, quarterly, six monthly, annual) is appropriate? If not, what frequency should be required?
- Q.12 What factors should the AER consider in deciding whether or not to impose a reporting obligation in relation to a particular obligation?

Please provide reasons for your response

The self-identification of breaches by regulated businesses should simply be viewed by the AER as another source of information on their performance, with the AER still needing to conduct regulator audits, including targeted compliance reviews to complement them.

We note that at times regulated businesses aren't always accurate in their reporting or their figures vary from those of the regulator. On this basis, where using this approach as part of its tool kit, we encourage the AER to establish a reporting protocol, including a template developed in consultation with stakeholders, which makes the information consistent and comparable. Further, timeframes would need to be introduced, with consequences for breaching timeframes. For example, using non-compliance with timeframes as one trigger for pro-active compliance reviews by the AER is highly likely to be effective.

The Issues Paper states that it will “review all breaches reported by regulated entities and may choose to take further action”⁹. This approach needs to be more fully explored and defined to outline the approach the AER may take when there was consistent evidence of a breach as reported by a business.

We largely support the three-tiered reporting structure, outlined in the Issues Paper, however believe that tier one incidents need to be reported within a set time frame, for example, within 2 hours of the retailer becoming aware of the incident. In addition, the Report should be required to include an additional head of information - namely the impact on a significant number of disadvantaged and vulnerable customers.

We agree with ongoing and regular reporting of tier two issues and support quarterly reporting. We note this is consistent with reporting requirements for serious and systemic issues in the financial services sector under ASIC's Regulatory Guide 139 (whilst it occurs via the Ombudsman schemes not directly from businesses it is important to note that businesses bear the costs of this as they pay the costs of operation of the schemes).

⁹ Page 22

Further, an additional summary report should be submitted by the retailers at the end of the financial year.

We are cognisant of, and support, the AER's intent to reduce reporting and compliance costs to regulated entities and subsequently consumers, however while starting the compliance framework with more frequent reporting may initially appear cumbersome, it will provide a clear and ongoing view of the market and will ensure costs are reduced in the long run, when compliance is firmly established.

Compliance audits

Q.13 What factors should the AER consider in determining when an audit should take place?

Q.14 What factors should the AER consider in determining the scope of a compliance audit?

Q.15 What factors should be considered in determining whether an audit is to be conducted by or on behalf of the AER, or by a regulated entity?

Please provide reasons for your response.

AER initiated audits should be regular, as per a schedule of audits and also upon indication of an issue with a particular retailer, such as a rise in complaints by consumers, various levels of potential detriment, ombudsman reports of systemic issues and, direct feedback from stakeholders. As noted above, failure to comply with timeframes for self-reporting should also trigger an audit.

The scope of the audit will depend on the issue. A system wide issue, such as the failure of AGL's billing system under the Phoenix rollout, combined with ongoing process failures resulted in prolonged periods of billing errors and general customer service issues, would require a whole of business audit. Another example, with a more refined audit scope would be in the case of marketing issues. On the basis of regular complaints about Victoria Electricity's marketing practices for example, it would be reasonable for the AER to conduct an audit that assessed just their marketing operations.

The scope of the audit should also consider whether a desktop audit is sufficient. In Victoria, the extent of marketing issues reported can not be captured by a desktop review of systems and processes in place by retailers. The "at the door" exchange of a commission-based sales person with a consumer at their own home can only truly be assessed at the time of the exchange itself. The AER would need to establish an appropriate way of addressing this.

The process of the audits should be documented, and the AER should develop a process for managing the results of an audit (compliance action) and results should be published. We refer to an example in Victoria whereby Simply Energy has undergone four audits in the past three years (2008, June 2009, November 2009 and May 2010). The results of these audits have not been widely publicised and have resulted in ongoing poor performance with little incentive for improvement.

The AER should develop an approach to determining at what point the results of an audit initiate changes to the guidelines or suggest changes to the rules should be sought. The AER needs to establish clear actions against ongoing poor performance from the outset, including publicity.

Q.16 Is it preferable to set out standard payment arrangements and default periods within which regulated entities must pay the costs of an audit to the AER in the AER Compliance Procedures and Guidelines, or to determine these matters on a case-by-case basis?

Q.17 Where the scope of a single audit covers more than one retailer or distributor, how should the costs of that audit be allocated between the entities concerned?

Please provide reasons for your response.

Consumer Action has no comments at this time.

Q.18 Is it appropriate to combine compliance and performance audits in relation to retailers' hardship policies?

Q.19 Where the scope of a single audit covers both compliance and performance issues, how should the costs of the audit be allocated?

Please provide reasons for your response.

Consumer Action strongly supports the AER's suggestion to combine compliance and performance audits in relation to retailer hardship policies and general compliance to the framework. This would ensure an holistic view of the market and would ensure a retailer's approach to all consumers was captured.

Principles for investigations and enforcement

Investigations

Q. How should the results of AER investigations be communicated to the market?

Please provide reasons for your response.

We strongly support the AER communicating investigations to the market through compliance reports and quarterly updates, compliance bulletins and, as noted above, specific media releases.

This should be done for all enforcement actions as part of AER policy. It is vital that enforcement outcomes are well publicised and they should seek to raise awareness for businesses of AER enforcement actions, but also consumers have a right to know about a retailer's breach and to have confidence that the AER is effectively acting in their interests.

The extent of the publicity necessary after a particular breach will depend on a number of factors, but would be particularly relevant following the results of an audit, or any enforceable undertaking or legal action. The publicity of a breach also contributes to a transparent marketplace, where consumers are sufficiently informed, enabling more confident participation in the competitive market.

Objectives of enforcement

Q.21 Are these appropriate objectives for enforcement under the Retail Law?

Q.22 Are there other objectives that should guide the AER in enforcement of the Retail Law, Rules and Regulations?

Please provide reasons for your response.

We support the AER's primary objective to "achieve the best possible outcome for consumers" when taking enforcement action.

Further, there is an opportunity for the AER to further embrace its potential to provide strong protection for consumers, by clearly defining the purpose of the AER in undertaking its enforcement responsibilities. While the objective of the NERL itself is likely to limit this by not necessarily prioritising consumers, despite effectively being a consumer law, the law itself will most likely provide strong guidance to the AER to carry out its function in a "way that is compatible with the provision of consumer protections for small customers, including customers experiencing hardship".¹⁰

On this basis we support the objectives drafted by the AER in the Issues Paper, which we understand were loosely based on those of the ACCC, but we also encourage the AER to expand on these and include the ACCC's aim to "undo the harm caused by the contravening conduct (for example by corrective advertising or restitution for consumers and businesses adversely affected)".¹¹

Enforcement priorities

Q.23 Are these appropriate enforcement priorities for the retail framework?

Q.24 Are there other matters that the AER should consider in determining its Retail Law enforcement priorities?

Please provide reasons for your response.

While we are largely comfortable with the enforcement priorities outlined by the AER, we are concerned that they may be setting the bar too high for initiating an enforcement response. We are also concerned that they do not reflect the important role the AER will play in

¹⁰ Ministerial Council on Energy Communiqué 11 June 2010

¹¹ ACCC Compliance and Enforcement Policy, pg 2

clarifying the operation of the relevant laws. On this basis, we make the following recommendations:

Recommendation 1 - Include the additional priority:

- that clarify the operation of the law

Recommendation 2 - Amend the following priorities:

- demonstrating blatant, **ongoing or serious** disregard for the retail framework
- that is ~~industry-wide~~ **widespread**, so that enforcement action is likely to have a widespread educative or deterrent effect

Assessment criteria for enforcement action

Q.25 Are these appropriate criteria for enforcement decisions under the Retail Law?

Q.26 Are there other criteria that should guide the AER in making enforcement decisions under the Retail Law?

Please provide reasons for your response.

While the Issues Paper states that the aim of the AER is to "pursue a proper response", taking into consideration the criteria, the criteria listed which form the basis of the AER's enforcement decisions appears heavily weighted towards how and why the breach occurred and insufficiently concerned with the impact of the breach.

The approach seriously neglects consideration of the demand side of the market generally, and the impact of a breach specifically. We urge the AER to consider the criteria used by other regulators which include:

- "the affect of the alleged conduct on the consumers;
- the number of consumers currently or foreseeably affected;
- the potential for ongoing consumer detriment; and
- the consumer's capacity to obtain relief without the AER assistance"¹²
- "whether the offending conduct is of significant public interest or concern;
- whether the conduct results in a significant consumer detriment;
- whether the conduct detrimentally affects disadvantaged or vulnerable consumer groups;
- the conduct involves a significant new or emerging market issue;
- whether the conduct is industry-wide or is likely to become widespread if the AER does not intervene; and
- whether AER action is likely to have a worthwhile educative or deterrent effect."¹³

¹² ACT Office of Fair Trading, *Compliance and Enforcement Policy*

¹³ Australian Consumer and Competition Commission, *Compliance and Enforcement policy*

By including an assessment of the impact of the breach on individual consumers as well as the demand side of the market, it will ensure that all aspects of a breach are accurately captured and proportionately addressed.

Enforcement options

Q.27 In what circumstances will it be appropriate for the AER to use administrative enforcement action? In what circumstances will it be inappropriate?

Please provide reasons for your response.

The AER's goal should be to achieve the best possible outcome for consumers in the retail energy market for the provision of an essential service through a number of mechanisms. The AER has commented that its enforcement actions "fall loosely into three categories", we support the division of these enforcement actions into categories, however emphasise that the choice as to which category of enforcement is used should not be linear and needs to be flexible, as outlined previously.

We also seek to make a number of clarifying points about the Issues Paper's treatment of administrative enforcement:

- Whilst there may be speed and efficiency benefits to be gained from the use of administrative enforcement, the Issues Paper fails to record one key down side of administrative enforcement - that it creates no legal precedent to be applied to other similar instances of non-compliance.
- The Issues Paper separates enforceable undertakings from other sorts of administrative remedies. We recommend that the AER makes it clear in discussing the three categories, that references to 'administrative enforcement' are reference to administrative enforcement other than enforceable undertakings.

Finally we note two significant short-comings in the proposed approach to administrative enforcement:

- Such enforcement should expressly aim to achieve redress for affected consumers.
- The administrative enforcement actions outlined should include an educational focus such as corrective advertising or correspondence with affected consumers.

This process could also communicate how businesses should interact with the NERL through guidelines, and by highlighting the risk to businesses of non-compliance, through regular public compliance reports and media releases where businesses are failing to comply.

Q.28 In what circumstances will it be appropriate for the AER to accept an enforceable undertaking? In what circumstances will it be inappropriate?

Please provide reasons for your response.

We refer to our responses to questions 23-27 above.

Q.29 In what circumstances will it be appropriate for the AER to use statutory enforcement action? In what circumstances will it be inappropriate?

Please provide reasons for your response.

We refer to our responses to questions 23-27 above.

Compliance Reporting

Q.30 How do you use compliance reports published by energy regulators? What should the objectives of the AER's compliance reports be?

Q.31 Are quarterly compliance reports likely to be useful, or would a different frequency (e.g. six-monthly, annually) be more appropriate?

Q.32 Are there other matters that the AER might usefully include in its compliance reports?

Q.33 Are combined retail compliance and performance reports preferable to separate reports on compliance and performance?

Please provide reasons for your response.

Consumer Action supports the AER decision to publish quarterly compliance reports on its monitoring and enforcement activities, as well as an annual compliance report at the end of each financial year.

In addition, an ongoing update of compliance activity outlining specific enforcement action, including details of an incident and retailer redress should be published. We strongly encourage the AER to develop a policy to issue media releases in these instances.

The combined action of compliance auditing, enforceable undertaking and media release will reduce the need for the AER to conduct costly audits on a regular basis.

Compliance policies, systems and procedures for regulated businesses

Q.34 Is AS 3806 an appropriate model for compliance policies, systems and procedures for regulated entities?

Q.35 If not, what are its limitations, and how might they be addressed?

Q.36 What other models should the AER consider?

Please provide reasons for your response.

Consumer Action strongly supports the AS 3806 model for compliance policies, systems and procedures for regulated entities.

We thank the AER for the opportunity to provide input into the approach to enforcement and compliance at this early stage. Should you have any questions about this submission, please contact Janine Rayner on 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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