

30 April 2010

Mr Tom Leuner  
General Manager  
Markets Branch  
Australian Energy Regulator  
GPO Box 520  
Melbourne VIC 3000

By email: [AERInquiry@acr.gov.au](mailto:AERInquiry@acr.gov.au)

Dear Mr Leuner,

**Issues Paper: AER Retailer Authorisation Guideline (March 2010)**  
**Draft for Preliminary Consultation: Retailer Authorisation Guideline (March 2010)**

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 Australian Energy Regulator's (AER)'s Issues Paper on Retailer Authorisation Guideline (March 2010) (Issues Paper) and the AER's Retailer Authorisation Guideline (March 2010) (Guideline). Retailer authorisation is a prerequisite to ensuring that the energy market operates and functions without disruption and that security and reliability of energy, an essential service, is ensured. With increasing competition in the National Energy Market (NEM), it is expected that there will be new entrants in each jurisdiction. Therefore, it is important for the AER to scrutinise each application for retailer authorisation closely so that the risk of market failure is minimised and that consumers are protected from unscrupulous operators. We have in our submission addressed issues which are relevant to CUAC's concerns.

We draw the AER's attention to CUAC's submission to the second exposure draft of the National Energy Customer Framework (NECF 2), where we recommended amendments to Part 5 of the National Energy Retail Law (NERL) - Authorisation of Retailers and Exempt Seller Regime.<sup>1</sup> In relation to the AER process on page 5 of the Guideline, we reiterate the comments we made in our NECF submission:

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<sup>1</sup> 26 February 2010, CUAC's submission on the National Energy Customer Framework (NECF)

- In addition to publishing an application for retailer authorisation on the AER website, we believe that there should be more direct notification to stakeholders via email alerts to stakeholders on the AER's subscription list – comments made in relation to section 504, NERL. In Victoria, the Essential Services Commission (ESC), for example, publishes licence applications in a daily newspaper circulating in Victoria and may also publish a notice in a local paper. Further, the ESC publishes a notice on its website and informs registered industry stakeholders about the licence application via email.<sup>2</sup>
- The consultation period regarding the application should be six weeks rather than 20 business days, as six weeks is in line with other areas of the NERL relating to public consultation – comments made in relation to section 504, NERL.

### Issues Paper - Questions for consideration

- 3.1 Would prospective applicants benefit from briefings prior to the submission of an application? If so, please provide details of the form (for example, group or individual sessions) and content of briefings that would be most beneficial for prospective applicants.

Industry stakeholders would probably be a better position to provide detailed answers to the form of briefings they prefer. However, as the application form requires detailed information and disclosures, we believe that applicants should be briefed prior to the submission of an application to ensure a full understanding of the applicant's obligations.

- 4.1 Is it appropriate for the AER to require only a compliance strategy rather than a compliance plan or systems at the time of the application? Please provide any reasons for your view.

A compliance strategy, rather than a compliance plan or systems at the time of the application, is inadequate for this industry. Retailers should demonstrate their readiness to enter a complex industry. We believe that at the time of the application all risks, governance, compliance management plans and systems must be in place.

- 4.2 What guidance, if any, should the guideline provide on the types of risks that the AER would expect to be covered by a risk management strategy?

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<http://www.ret.gov.au/Documents/mce/documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/CUAC.pdf> at 33-37.

<sup>2</sup> Essential Services Commission (ESC), Procedures for Applications for Electricity Licences and Electricity Licence Transfers (November 2006), at 3 -

<http://www.esc.vic.gov.au/NR/rdonlyres/DD249ED9-63D5-441A-B3A0-D3EDC7455C88/0/FinalElectricityLicensingProceduresLicensingandTransfers200611.pdf>

Essential Services Commission (ESC), Procedures for Applications for Gas Licences and Gas Licence Transfers (October 2006), at 3 -

<http://www.esc.vic.gov.au/NR/rdonlyres/15ABD68E-098D-4318-8A9D-4EBF4CC8357F/0/ProceduresPRCGasGuidelinesandProceduresGasProceduresversionRMD26Jul06.pdf>

The risk management strategy must cover retailer of last resort (RoLR) incidents. To prevent RoLR, it is crucial that risks are highlighted early in any risk management plan so that transfers of customers can be initiated prior to licence revocation.

4.4 The AER acknowledges the limitations of financial statements and declarations in establishing an applicant's financial health. What alternative methods of assessment may be appropriate?

While there are limitations, an applicant must provide documentary evidence and support as evidence that it has sufficient financial resources or access to such resources to sustain a viable energy business. This includes: current balance sheet and financial data; significant contracts; annual report(s); Standard & Poor's or other acceptable rating; statements from internal/external auditors; statements from consultants including accountants and legal advisors; statement of assets and liabilities; shareholder register; certificate of registration/partnership agreement/trust deed; statements from banks/financiers, shareholders, the board or the parent company; guarantees in place; assurance by the applicant that it has sufficient financial resources to sustain its operations including all prudential requirements set by Australian Energy Market Operator (AEMO) and/or licensed distribution businesses; preliminary discussions and/or negotiations with licensed distribution businesses concerning the credit support arrangements.

4.5 Does the limitation on information that need to be provided on compliance breaches—being those that have occurred in the past 10 years and that have led to enforcement action or an enforceable undertaking—strike an appropriate balance between ensuring a rigorous assessment and the information burden on applicants? Please provide any reasons for your view.

We are doubtful whether the limitation on information would result in an appropriate balance between ensuring a rigorous assessment and the information burden on applicants. We mentioned in our submission on NECF 2 that Part 13 of the NERL (enforcement) is in urgent need of amendment. We submitted that the enforcement provisions as currently drafted would leave a legislative regime that would be very difficult for the AER to enforce and, literally, impossible for consumers to seek remedies from. We are unaware of a single reported legal action brought under the National Gas Law (or National Electricity Law) for a breach of a provision of those laws. Even the use of non-court-based enforcement measures has been limited – we note that the AER reported that it has used undertakings and/or infringement notices on only six occasions in total since it assumed regulatory responsibilities from the NECA in mid-2005, and not at all in relation to gas since the NGL was enacted.<sup>3</sup>

The fact that there were no legal actions taken and so few non-court based enforcement measures suggest that the answer to question 4.5 is no.

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<sup>3</sup> AER, 'Investigations', *AER website*, <http://www.aer.gov.au/content/index.phtml/itemId/656186> This page also indicates that even before the AER assumed regulatory responsibility from the NECA, the NECA pursued enforcement action against businesses for code breaches on only four occasions.

4.6 What issues or concerns may arise from a requirement for applicants to provide certified criminal history checks?

Criminal history checks are routine for employment at senior level or for responsible positions. CUAC believes these checks should be mandatory.

4.7 What other information requirements not provided for in the draft guideline would be appropriate for the AER to impose? Please provide details of these requirements and the rationale for inclusion.

We believe that it must be a requirement for applicants to negotiate Use of System Agreements with all licensed distribution businesses whose geographic areas include any of the applicant's customers or intended customers. This also includes the negotiation of credit support arrangements with the licensed distribution business. Credit support arrangements protect consumers by ensuring that distribution businesses have some degree of financial security against non-payment of distribution service charges that are set out in default Use of System Agreements. This may include network charges, excluded service charges and additional charges. Credit support arrangements contribute to the ongoing financial viability of the distribution business. It ensures that customers continue to receive network services of a certain quality.

We submit that an applicant must be required to contact the relevant licensed distributor prior to submitting an application to the AER and to provide evidence of negotiations involving credit support arrangements. We recommend that the Guideline be amended to include this requirement in the Information requirements –organisational and technical capacity, section.

We note that page 5 of the Issues Paper stated that; “the AER will not consider an applicant's readiness to meet jurisdictional obligations such as community service obligations and gas safety cases.” Retailers must demonstrate ability to comply with both the national legislation as well as the jurisdictional obligations before commencing operations as well as on an ongoing basis. It is unclear from the Issues Paper what regulatory oversight would apply to retailers in terms of their meeting local jurisdictional obligations.

Other information requirements to support an application include the following<sup>4</sup>:

Capacity to operate a business -

- Managing supplier contracts

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<sup>4</sup> Essential Services Commission (ESC), Procedures for Applications for Electricity Licences and Electricity Licence Transfers (November 2006), at 17- 21 -

<http://www.esc.vic.gov.au/NR/rdonlyres/DD249ED9-63D5-441A-B3A0-D3EDC7455C88/0/FinalElectricityLicensingProceduresLicensingandTransfers200611.pdf>

Essential Services Commission (ESC), Procedures for Applications for Gas Licences and Gas Licence Transfers (October 2006), at 16-20 -

<http://www.esc.vic.gov.au/NR/rdonlyres/15ABD68E-098D-4318-8A9D-4EBF4CC8357F/0/ProceduresPRCGasGuidelinesandProceduresGasProceduresversionRMD26Jul06.pdf>

- Managing customer contracts
- Customer account establishment and management
- Customer service provision
- Billing and collection
- Appropriate management systems

Capacity to comply with regulatory requirements -

- Provision of information to distributor
- Meter reading
- Provision of information to customers
- Privacy and confidentiality management
- Customer information management system

We ask the AER to refer to the information requirements set out in detail in the ESC documents referred to in footnote 4.

4.8 Which, if any, of the information requirements contained in the draft guideline seem unnecessary or unduly burdensome? Please provide details and the reasoning behind your comments.

We believe that all the information requirements are necessary.

5.1 Is it appropriate to target retailers who wish to begin or resume retailing after a period of dormancy for compliance audits or monitoring? Please provide any reasons for your view.

Yes. The circumstances of the retailer might have changed during the dormancy period. If the period of dormancy is long for example, and there are no sound reasons explaining this delay in operations, the AER should consider asking the retailer to lodge a fresh application.

5.2 What matters should the AER have regard to, other than the rights of customers, when imposing conditions on the transfer, surrender or revocation of a retailer authorisation?

The rights of customers should be paramount in considering the transfer, surrender or revocation of a retailer authorisation. We agree that holders of retailer authorisation must demonstrate that customers will remain on the same or better terms following a transfer, surrender or revocation.

Regarding paragraph 3.1 on revocation at page 22 of the Issues Paper, we reiterate our comments in our submission on NECF 2, in particular, sections 520 and 522 of the NERL:<sup>5</sup>

- “Material failure” must be defined;

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<sup>5</sup> 26 February 2010, CUAC’s submission on the National Energy Customer Framework (NECF) <http://www.ret.gov.au/Documents/mce/documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/CUAC.pdf> at 36.

- There should be a time frame to indicate how long a retailer has before an authorisation is revoked. We nominate three months to facilitate a fair transition and to minimise consumer detriment from ongoing poor performance of the retailer.

5.4 Is it appropriate for the AER to require applicants to develop procedures for customers to take action against them following the revocation or surrender of the retailer authorisation? If not, what other protections for customers are / could be provided?

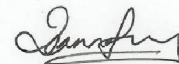
We believe that customers should have access to internal and external dispute resolution processes such as ombudsman schemes. This is a basic consumer right. Most consumers do not have the resources to institute legal action against industry players. Access to free external dispute resolution processes is essential to ensure that consumers are able to seek redress.

With regard to other protections for consumers, we believe that the AER should also be able to, as the regulator, seek redress for consumers who have suffered loss or damage as a result of contravening conduct, when it is pursuing general enforcement action. We previously raised this in our submission on NECF 2.<sup>6</sup>

If you have any queries on the above, please do not hesitate to contact the undersigned.



Jo Benvenuti  
Executive Officer



Deanna Foong  
Senior Policy Officer

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<sup>6</sup> 26 February 2010, CUAC's submission on the National Energy Customer Framework (NECF) <http://www.ret.gov.au/Documents/mce/documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/CUAC.pdf> at 69-70.