11 February 2011

By email: AERInquiry@aer.gov.au

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Mr Tom Leuner
General Manager, Markets Branch
Australian Energy Regulator
PO Box 520
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AER draft decision — Approach to compliance with the National Energy Retail Law, Rules and Regulations

Dear Mr Leuner

Jemena appreciates the opportunity to comment on the draft decision, draft statement of approach and draft procedures and guidelines dealing with the AER's proposed approach to compliance and enforcement under National Energy Customer Framework (**NECF**). These documents were issued in December 2010.

Jemena's response to the AER's request for comments is set out in **Attachment 1**.

Jemena directly owns Jemena Gas Networks in NSW (**JGN**), the largest individual gas distribution network in Australia, and Jemena Electricity Networks in Victoria (**JEN**). Jemena partially owns the United Energy Distribution electricity distribution business in Victoria (34%) and the ActewAGL gas and electricity distribution business in the ACT (50%). These businesses will be individually affected by the proposals being put forward by the AER.

Jemena looks forward to a satisfactory resolution of the compliance and enforcement issues raised by the NECF. If you wish to discuss the submission please contact Paul Johnston on (02) 9455 1560 or at paul.johnston@jemena.com.au.

Yours sincerely

Sandra Gamble

Sandra Gamble
General Manager Regulation and Strategy
Jemena Limited

Attachment:
1. Jemena, *Response to AER draft decision — Approach to compliance with the National Energy Retail Law, Rules and Regulations*, 11 February 2011

ATTACHMENT 1

AER draft decision — Approach to compliance with the National Energy Retail Law, Rules and Regulations

11 February 2011

1. Introduction and key messages

The documents issued by the AER deal individually with the aspects of compliance and enforcement for which the AER will be responsible whenever the National Energy Customer Framework (**NECF**) is implemented in each jurisdiction.

Our submission addresses the AER proposals broadly across the draft decision, draft statement of approach and draft procedures and guidelines. However, given that the draft guidelines appear to settle on the AER's proposed final position, we have focused on the draft guidelines.

Given that Jemena's distribution assets straddle three jurisdictions and two energy types—gas in NSW and the ACT and electricity in the ACT and Victoria—we have suggested where different arrangements for gas and electricity would be appropriate.

Jemena's key messages are:

Implementation and transition

Jemena submits that the AER guidelines need to provide for a number of complexities in introducing the NECF, such that:

- NECF obligations may not be uniform among jurisdictions, at least for an initial period
- gas distribution businesses may have greater issues in preparing for the NECF than electricity distribution businesses
- all distribution businesses will need time to introduce compliance and other business systems to prepare for the NECF as it will apply in their jurisdictions.

As a result, Jemena submits that the AER guidelines could usefully recognise a transitional period for individual businesses until these complexities are resolved.

AER classification of regulatory obligations and reporting

Jemena has substantial concerns with the guidelines' classification of Type 1 obligations and submits that a more discerning basis should be used to target only those obligations that have major implications.

Pro-formas – Type 1, 2 and 3 obligations

Jemena considers that the calling up of the Criminal Code Act in the proposed compliance statement to be signed by the Chief Executive Officer is unnecessary and is inconsistent with compliance statement wording currently used in other industry compliance statements. We consider that more suitable wording should be used.

2. Targeting monitoring activities

Jemena notes that distribution business submissions to the AER's 31 May 2010 Issues Paper:

- queried how the period of transition to the NECF could be recognised in the targeting process

- observed that there would likely be a higher instance of breaches of the NECF as companies came to understand new obligations imposed.

- noted that it would be inappropriate for the AER to undertake a heavy handed approach to enforcement during the implementation of the NECF.

Jemena is pleased to note that the AER has recognised that, in the short term, while regulated entities become familiar with such obligations, breaches may be more likely to occur.

Jemena welcomes the draft decision's statement that the AER will work cooperatively with regulated entities during transitional periods to ensure that appropriate systems and processes are developed to reduce the likelihood of breaches occurring[1].

However, despite these assurances, Jemena submits that the AER guidelines should recognise that there is a range of NECF implementation complexities (currently being considered by jurisdictions and businesses) which need resolution before the AER's monitoring activities can achieve their full value. In particular, individual jurisdictions may only implement some parts of the NECF before other parts – or not implement them at all. This will complicate the monitoring activity which the AER intends to rely upon to determine business compliance. In particular, comparative performance analysis between and within jurisdictions (of the type currently used by jurisdictional regulators) may be problematic when obligations are not uniform.

Further, Jemena has discerned potentially major differences in NECF preparedness between gas and electricity distribution which are likely to require separate approaches to monitoring and enforcement by the AER in the introductory years of the NECF.

The NECF represents a major shift in the way gas distributors will be required to interact with retailers and end users on issues such as providing customer connection services, service delivery standards, complaints handling and providing information. These are likely to require very significant modifications to business processes and IT systems.

In NSW for example, JGN has never had a direct contractual relationship with most end users, and has relied on energy retailers to provide this interface. The introduction of direct customer relationships will requires a major refocus by distributors like JGN, and jurisdictions must allow adequate time for gas businesses to prepare. Adequate preparation time will be required for electricity distributors as well, even though some distributors currently do have standard energy agreements with small users. During these adjustment periods, Jemena submits that the full range of monitoring and compliance activities proposed in the statement of approach, draft decision and draft guidelines would not be meaningful.

While it is still unclear how jurisdictions will handle the implementation complexities described above, Jemena submits that the AER's monitoring and compliance frameworks must take them into account.

Jemena submits that the AER guidelines could usefully recognise a transitional period. This can be done by providing for a deemed 'no action' period during which business process, IT and compliance systems are put in place. During the 'no action' period, businesses could be allowed to report selected obligations on an informal basis (i.e. without CEO sign-off) until they were ready to implement the NECF to the extent provided in jurisdictional legislation.

[1] AER, *Approach to compliance with the National Energy Retail Law, Rules and Regulations,* Draft Decision, p 8.

3. AER classification of regulatory obligations and reporting

The draft guidelines propose three types of regulatory obligation with attendant reporting requirements:

- Type 1 obligations – reporting actual or possible breaches within 24 hours of the event being notified to the business
- Type 2 obligations - reporting actual or possible breaches six-monthly
- Type 3 obligations - reporting actual or possible breaches annually

Jemena's key concerns with this hierarchy are as follows:

Inappropriate classifications

Appendix B1 of the draft guidelines classifies *all* obligations under a particular division of the National Energy Retail Law (**NERL**) or National Energy Retail Rules (**NERR**) as Type 1; namely:

- Prepayment meter systems – NERL Part 1, Division 2
- Retailer-initiated de-energisation of premises – NERR Part 6, Division 2
- Distributor de-energisation of premises – NERR Part 6, Division 3
- Life support equipment – NERR part 7

Jemena submits that the guidelines' classification of Type 1 must be more discerning and target only those obligations that have major implications. It is burdensome, costly and unnecessary to lump all distributor de-energisation breaches into Type 1, when clearly the most serious breach would be the wrongful de-energisation of life support equipment (NERR Part 7).

Jemena is strongly of the view that that the AER should not include all of the subdivisions under *distributor de-energisation of premises* and *prepayment meter systems* obligations as Type 1 matters.

For example, the NERL Part 2, Division 10, sets out retailer obligations on prepayment meter systems. Sections 56, 57, 58, and 59 are subdivisions within Division 10. In our opinion, only a breach of subdivision 59, which deals *with "person on life support equipment"* is worthy of the proposed reporting standard in accordance with guideline clause 3.2.1—i.e. "must be reported to the AER as soon as reasonably practicable and in any case within 24 hours of the event being identified by or reported to the regulated entity". Reporting in relation to subdivisions 56, 57 and 58 should be classified at Type 2 obligations.

The NERR Part 6, Division 3, has two subdivisions—subdivision 119: *Grounds for de-energisation* and subdivision 120: *When distributor must not de-energise premises*. Jemena contends that it is only subdivision 120 that should be classified as Type 1— and not subdivision 119 which deals with the rights of a distributor to de-energise.

Jemena notes that the Victorian Essential Services Commission (**ESC**) has never classified all de-energisation obligations as Type 1—only those that deal with persons on life support equipment.

Further consultation

Given the excessive number of reporting obligations provided for in appendix B.1of the proposed guidelines, Jemena suggests that the AER should consult with stakeholders on the

assignment of Type 1 obligations so that they become more meaningful and appropriate. Jemena considers that this would benefit the new regulatory framework and could assist in clarifying the relationship between the NECF and remaining jurisdictional regulatory obligations.

4. Pro-formas – Type 1, 2 and 3 obligations

Under clause 3.3.4 of the draft guidelines, a written report on breaches of Type 1 obligations must be prepared using the pro-forma Chief Executive Officer (CEO) signed letter in Appendix A1 and the reporting template in Appendix A3.

Under clause 3.3.5, written reports on breaches of Type 2 and 3 obligations must be prepared using the pro-forma CEO signed letter in Appendix A2 and the reporting template in Appendix A3.

In both pro-formas, the CEO of the reporting entity is required to sign a statement which concludes with the following words:

> I solemnly and sincerely declare that this report prepared by [regulated entity] to the AER is:
>
> 1. true and accurate to the best of my knowledge and belief;
> 2. in accordance with the AER's compliance Procedures and Guidelines.
>
> I acknowledge that Division 137 of the Criminal Code Act 1995 (Cth) makes it a serious offence to give false or misleading information to the AER knowing it to be false or misleading or omitting any matter or thing without which the information is misleading.

Jemena considers that the calling up of the Criminal Code Act in the proposed compliance statement is totally unnecessary and is inconsistent with compliance statement wording already used in other industry compliance statements and regulatory accounting statements; for example, those used by the ESC in Victoria. Further, the guidelines' requirement that the CEO must make such a statement within a short time after becoming aware of a Type 1 breach – five business days at a maximum – imposes an order of accuracy in reporting which may not be practicable under the circumstances.

Jemena submits that the last two paragraphs in pro-forma A1 and A2 should be replaced with the following words which are modelled on the current compliance reporting statements in Victoria.

> ------ [Business] had an effective system for monitoring compliance throughout the period covered by the report.
>
> The present report has been prepared with all due care and skill and in accordance with the AER's Compliance Procedures and Guidelines.

5. Compliance audits

Section 4 of the draft guidelines set out a range of requirements covering compliance audits of the regulated entity. However, the section is silent on the audited entity having any opportunity to review the audit report before it is submitted to the AER.

Even though the ESC auditing guideline is silent on this, as a matter of procedural fairness, the business-appointed auditors generally seek the views of distributors on the findings of the reports and are willing to correct any manifest errors. Jemena submits that the AER guidelines should provide for a similar review by businesses of the audit report and allow any dissenting views to be included.

Jemena suggests that a clause be added to section 4 signifying that the regulated entity has been provided with a copy of the final audit report and has agreed to the findings and recommendations.