origin

22 December 2010

Mr Tom Leuner
General Manager
Markets Branch
Australian Energy Regulator
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By email: AERInquiry@aer.gov.au

Dear Tom,

ORIGIN SUBMISSION TO AER PERFORMANCE INDICATORS POSITION PAPER

Origin welcomes the opportunity to provide a response to the AER's *Position Paper: Retail Market Performance Reporting*.

We support the ERAA's submission to the AER and would like the Origin view recorded as per each point raised in that submission. This submission addresses several of the concerns raised in the ERAA submission in a little more detail.

Overall, Origin is disappointed to see that the AER's proposed NECF interpretation and performance reporting approach remain largely unchanged from the Issues Paper and consultation forums, and that the list of indicators has continued to grow despite the concerns raised by stakeholders about the value of the data collected. The main point is still that the AER still does not know what an effective hardship program (or more broadly, an effective collection approach) should, or would, look like in any practical sense. It has not addressed the practical trade-offs between the various performance elements that stakeholders want to see at low levels (e.g. disconnections, payment plan amounts and debts), and it has not discussed the reasonable limitations of performance as a regulatory concept.

Instead, the industry is expected to accept being publicly held to account on ambiguous datasets that are not substantiated in any measureable sense as providing meaningful information about business processes. We are being asked to provide significant detail just in case it's useful. In Origin's view this is not appropriate. There are now 54 indicators, which seems excessive.

We are not arguing against performance reporting, or even against many of the indicators currently suggested, as long as these are factually reported and do not mislead third parties about retailers' influence over long term customer behaviour or how retailers might be compared. In October retailers provided a comprehensive list of indicators to the AER that reflected much of what is there now, but we asked that several should not be called 'performance indicators' or show retailer effectiveness or otherwise unless this was unambiguous and/or genuinely measureable. The AER has not taken on this suggestion or apparently addressed the underlying concerns we have raised.

We have some further points to make about process before continuing to the indicators themselves. We seek the AER's explicit responses to these issues.

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The process so far

First, we would like to note that while the AER as regulator is an enforcer and not technically a developer of policy or regulation, this is an artificial distinction. The relatively broad provisions in the NECF, and the way that the AER is currently interpreting its requirements across a range of areas, place the AER squarely in the realm of regulatory policy development. This is because the AER is putting forward a view of retailer performance that goes beyond policy debates to date about what good or effective performance might look like, and also goes beyond what basic compliance with the NECF might entail. This needs to be recognised, regardless of any view of the validity of the AER's final conclusions.

Second, and leading from this point, in our view the AER is not developing its policy with sufficient rigour or appropriate attention to the issues that need to be taken into account. For example, it is accepted regulatory best practice to assess market conditions, including the state of competition and the presence of any market failure, before drafting new regulation. It is expected that regulators proceed with new regulation on the basis of evidence, and with a view to regulate only where there are net benefits. Global views on what constitutes good regulation, and particularly through regulatory governance initiatives in Australia, the UK, USA and Canada, and through entities such as the OECD, can be characterised as the pursuit of the following:

> ...the adoption of lowest cost, least intrusive, methods of achieving mandated aims; the application of informed (evidence-based) expertise to regulatory issues; the operation of processes that are transparent, accessible, fair, and consistent; the application of accountability systems that are appropriate; and the use of regulatory regimes that encourage responsive and healthy markets where possible.[1]

This has not been the approach taken by the AER on retail issues to date. Further, the only data we have seen are the statements made by stakeholders in submissions, and while the views have been briefly outlined in the Position Paper we have seen no particular analysis of the validity of statements made from an evidence-based or consumer benefit perspective.

Submissions as evidence

While consultation is a useful tool we are concerned that submissions have been used to the exclusion of other information, and particularly any information which may shed light on the costs and customer benefits of the various proposals. Using stakeholders' assertions as sole data sources and then trading off these stakeholder views would not seem to be a reasonable or robust means of regulation. As such we would suggest that it does not meet stakeholder expectations of the AER and does not facilitate the national energy market objective.

Further, we are concerned that there are a number of parties who have relevant views but because they have not provided written submissions these views will not be taken into account. This group includes consumer advocacy organisations and smaller retailers who find it hard to resource the many responses to issues required.

On this topic, responding to submissions is difficult for even the larger organisations - we note that at this time we are approaching the Christmas holidays and there are currently six open AER consultations on retail issues and several other consultations occurring in jurisdictions on various issues. All of these require written submissions. It does not seem appropriate for the AER to have so many processes at once with submission due dates like

[1] See Baldwin, R. (2010) 'Better regulation: the search and the struggle', *Oxford Handbook of Regulation*, ed.s R. Baldwin, M. Cave, and M. Lodge, OUP: Oxford.

this process (24 December 2010) when the reality is that the NECF, and AER's role in enforcing it, is not likely to be adopted by any jurisdiction before mid-2012. This was known some weeks ago and was made official at the recent MCE meeting of 10 December. There is no need to rush these tasks - surely there is time to spend on robust analysis of the issues, which includes a more in-depth consultation with stakeholders which provides for genuine participation.

Establishing realistic expectations

What we have seen so far through this process is a reliance on existing jurisdictional performance reporting frameworks, supplemented by the AER's own interest in further detail in case this illuminates potential compliance problems, public policy matters, or perhaps tells an interesting story. Any and all the reasons for potentially collecting information have been merged into what seems to be an overall exercise in data collection just in case it's useful. The likely form of public reporting of this data seems similarly vague.

We believe this approach is inappropriate. As we have stated in previous submissions and various forums, retailers bear significant reputational risk, and this is particularly the case in the current climate of price rises. While the reasons for retail price rises mainly relate to wholesale and network cost increases and government mandated energy efficiency and renewable schemes outside retailers' control, retailers are the ones targeted in the media. Performance reporting that makes statements about the effectiveness of retailers' processes and hardship schemes will always get media and political attention. As such, it is vital that performance reporting is clear in how it explains retailers' compliance obligations and any policy expectations, and also is clear in how comparisons between retailers should be made. As we have stated several times in the past, the current performance reporting framework put forward by the AER does not support this kind of clarity and, in fact, compromises retailers by potentially setting expectations that are not based in reality and have not been established in the NECF.

This is particularly problematic as the sense of energy hardship as a shared responsibility between retailers, the government and the community is being eroded in favour of this politically expedient focus on retailers and their processes. This is happening nationally, and the work that retailers do in the provision of hardship programs (which goes well beyond what was provided in the pre-competitive environment - an environment which we note had higher disconnection rates) tends to be ignored or overlooked in much of the social commentary. This is not helped by the focus of the AER and others on customer debt and the implicit assumptions around retailers' capacity to reduce customer energy debt (ideally to zero), while keeping repayments low and not disconnecting. In these assumptions we have lost any sense of there being consumers who have a chronic inability to pay, for whom retailers cannot be (entirely) responsible. There is also no acknowledgement of the view that has been put by some welfare organisations in the past that disconnection is sometimes the best outcome for people who have let their debt spiral out of control and who are not engaging.

Overall, viewing financial hardship solely through the lens of retail energy continues to skew the picture. We need to have a more balanced approach to the provision of social support if consumers are to have access to the social services and community support that they need. We ask that this is given due consideration by the AER in its future reports, including the affordability report.

Specific indicators

We do not support four of the 54 indicators in any way. These are:

- Hardship program customer payments and effects on debt: increasing, stable, decreasing (A. 9.1.7)
- Debt level performance indicators (A. 2.1.3),
- Disconnections/reconnections within a year of leaving hardship program (A.9.1.11 and A.9.1.12); and
- Multiple disconnections within 24 months (A.3.2.2).

Reporting on the first two of these indicators will be onerous, and the first will also include retailer subsidies, which will muddy any interpretation of a customer's capacity to pay. The concerning drift in focus toward debt as a key factor also shifts us further into developing conflicting aims for hardship programs, as noted above. These indicators are unnecessary and seem to be evidence of the AER continuing to ask for more in the hope that the information might be useful. It is not clear how either of these will demonstrate anything about retailer performance in a clear and measureable sense - they are far more about examining retailer data for social policy purposes. This is also clear in the Position Paper.

The requirements to report on disconnections of a former hardship program participant within 12 months and multiple disconnections within 24 months represent unreasonable reputational risk to retailers due to the inherent and unfounded assumptions underpinning them. Publicly reporting on these as relating to the effectiveness of retailers' businesses/hardship programs misrepresents to stakeholders what retailers' hardship programs are expected to achieve and the influence a retailer may have on a customer's behaviour. We have discussed this at length in our previous submissions.

To explain further, and as noted by the ERAA, when considering different indicators of the effectiveness of a hardship program, it might be useful to conceive of a spectrum of influence: in some cases the retailer has significant influence over the customer behaviour that drives the indicator in question, whereas for other indicators the retailer has virtually no influence. Indicators such as the number of people on a hardship program are toward one end of the spectrum, where even though the fundamental driver of a customer's need for support is outside a retailer's control, the retailer has some ability to influence a customer (assuming engagement is possible) to move on to the program and the retailer is also the one who decides who is eligible. For this reason, it seems reasonable to infer something about the performance of the retailer and its hardship program from this indicator. Further, the reputational implications of numbers shifting in this indicator are not as great - it is hard to argue that customer numbers should be high or low, as the issue will be how and when the customers' needs were understood and provided for.

At the other end of the spectrum are the indicators such as disconnections within 12 months of leaving a hardship program. While it might be argued that a retailer has some influence, the other sources of influence are likely to be particularly salient. What happens to a customer in a 12 month period is highly complex and unpredictable, and linking their subsequent payment behaviour to the retailer's program is a stretch. Further, it is unclear what this indicator is designed to measure: the AER initially stated that this was about assessing how retailers assisted customers in an ongoing way and the debate on this issue was about retailers affecting long term behavioural change (assuming this means budgeting and/or energy efficiency). As it became clear that this was hard to support, the argument changed so that the indicator is now more to show that if a customer's experience with the retailer was positive that they should feel comfortable to contact the retailer again when needed and avoid disconnection.

Once again, if there is no clear sense of the retailer performance or degree of program/process effectiveness being measured, then the data are not performance indicators. The indicators above have been based on untested assumptions about what hardship programs might achieve and this is not appropriate for public reporting of retailer performance in light of associated reputational risk. If, in fact, this is not about retailer processes but about collecting data for social policy reasons, then this needs to be made clear.

I would be happy to discuss any aspect of this submission further with the AER, and at your convenience. If you have any queries about this submission please contact me on the number below.

Yours sincerely

[signed]

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